Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8 | 22e étage, 20, rue Queen ouest, Toronto ON M5H 3S8

Citation: *Kraft (Re)*, 2023 ONCMT 36
Date: 2023-10-20
File No. 2021-32

IN THE MATTER OF
MICHAEL PAUL KRAFT and MICHAEL BRIAN STEIN

REASONS AND DECISION

(Subsection 127(1) of the *Securities Act*, RSO 1990, c S.5)

Adjudicators:	Andrea Burke (chair of the panel) M. Cecilia Williams Sandra Blake	
Hearing:	By videoconference, November 28 and 30, December 1, 2, 5, 6, 7, 8 and 9, 2022 and February 14, 2023	
Appearances:	Alvin Qian Scott Hutchison	For Staff of the Ontario Securities Commission
	David A. Hausman Jonathan Wansbrough Tina Cody	For Michael Paul Kraft
	Lawrence Ritchie Marleigh Dick Jayne Cooke	For Michael Brian Stein

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REASONS AND DECISION

1. OVERVIEW

[1] Michael Paul Kraft was the Chairman and a director of WeedMD Inc. (**WeedMD**), a producer and distributer of cannabis and cannabis extracts, and a reporting issuer trading on the TSX Venture Exchange (**TSX-V**). Michael Brian Stein is Kraft's long-time friend and business associate. Staff of the Ontario Securities Commission (**Staff**) alleges that Kraft gave Stein material non-public information (**MNPI**) regarding WeedMD's planned expansion at Perfect Pick Farms Ltd. (**Perfect Pick**) in Strathroy, Ontario, on two separate occasions, contravening s. 76(2) of the *Securities Act* (the **Act**).[1] Staff also alleges that Stein, after receiving the MNPI from Kraft, purchased 45,000 WeedMD shares, contravening s. 76(1) of the Act. Stein sold those shares after the announcement of the transaction with Perfect Pick, resulting in a profit of $29,345.

[2] For the reasons set out below we find that:

a. by providing Stein with draft documents for the planned transaction with Perfect Pick on October 23, 2017, Kraft provided Stein with MNPI on one occasion in breach of s. 76(2) of the Act;

b. Kraft did not tell Stein about the date of the announcement of the transaction with Perfect Pick and therefore did not provide Stein with MNPI on the second occasion that is the subject of Staff's allegations; and

c. Stein traded shares of WeedMD while in possession of MNPI, in breach of s. 76(1) of the Act.

[3] Kraft submits that his selective disclosure of the draft documents to Stein was made in the "necessary course of business" (**NCOB**), an exception to the prohibition against illegal tipping. We find that Kraft cannot rely on the NCOB exception.

[4] Kraft brought a conditional challenge to the constitutionality of s. 76(2) of the Act. Kraft's position was that if s. 76(2) of the Act prescribes an objective test for

[1] RSO 1990, c S.5

the availability of the NCOB exception, rather than a subjective/objective test, his right to freedom of expression under s. 2(b) of the *Charter of Rights and Freedoms* (***Charter***) is infringed.[2] Under an objective test, the subjective belief of the tipper that selective disclosure was necessary, even if reasonably held, is insufficient to establish the NCOB exception where the selective disclosure is found not to be objectively necessary. Under a subjective/objective test, a tipper must have a subjective belief in the necessity of the disclosure, which subjective belief is objectively reasonable.

[5] We find that s. 76(2) of the Act infringes s. 2(b) of the *Charter*, but the infringement is justified under s. 1 of the *Charter*. We therefore dismiss Kraft's challenge.

[6] Kraft sought to introduce expert evidence on a number of matters including specific corporate governance questions related to the NCOB exception and his conditional *Charter* challenge. We concluded that expert evidence was admissible only on a narrow issue related to Kraft's constitutional argument.

[7] Before turning to some relevant background and our analysis of the substantive issues, we begin by giving the reasons for our decisions on two preliminary issues: the admissibility of Kraft's expert evidence and Staff's request that we bifurcate the conditional *Charter* challenge from the merits hearing.

2. PRELIMINARY ISSUES

2.1 Admissibility of Kraft's expert evidence

2.1.1 Introduction

[8] Kraft sought to tender expert evidence through Edward Waitzer, a corporate and securities lawyer and a leading authority on corporate governance.

[9] In response, Staff filed a report from Stephen Halperin, another leading corporate and securities lawyer.

[10] Kraft's proposed opinion evidence seeks to have Waitzer respond to the following four questions:

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[2] *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11

a. **Question #1:** Is it out of the ordinary for the chair of a small-cap public issuer, acting as an executive director, to be directly involved in the negotiation of corporate transactions on behalf of the company?

b. **Question #2:** Is it inconsistent with good corporate governance practices for an officer or director of a corporation, including a public issuer, to seek advice (whether gratuitous or not) from a knowledgeable third party, where there is a reasonable expectation of confidentiality, even in the absence of a current written agreement with the third party?

c. **Question #3:** From a corporate governance perspective, and having regard for public issuer disclosure best practices, what considerations apply to a director or officer, acting in good faith, when seeking advice from a professional resource in connection with a transaction?

d. **Question #4:** What (if any) practical implications arise from a corporate governance perspective if a regulatory authority, after inquiry, were to impose its interpretation of whether such communications were "necessary" in the circumstances within the meaning of securities legislation, even though the director or officer acted in good faith and honestly believed that the advice sought would be helpful to them in the fulfillment of their duties?

[11] Staff challenged the admissibility of Waitzer's opinion evidence and took the position that Halperin's opinion evidence should only be admitted to the extent that it responds to any portions of Waitzer's opinion evidence that we might find admissible. Stein did not take a position on the issue. The parties agreed to argue the admissibility of the expert evidence at the start of the merits hearing. We therefore had the unredacted reports of Waitzer and Halperin before us for the purpose of hearing oral submissions.

[12] We provided our ruling with respect to the admissibility of the proposed expert evidence during the merits hearing. We determined that, subject to a limited exception relating to Kraft's conditional constitutional argument, we would not admit Waitzer's proposed evidence. In other words, we did not admit expert evidence responding to the first three questions posed to Waitzer, but we did allow expert evidence concerning the impacts or consequences that may flow

should we conclude that the NCOB exception is determined on an "objective" basis. The opinion evidence of Staff's responding expert, Halperin, was also deemed to be admissible only to the extent that it related to the issues for which Waitzer's evidence was admitted.

[13] We concluded that we would not admit the proposed expert evidence for various reasons, including that portions of it were not relevant or necessary and also because much of it ran afoul of the exclusionary rule against opinion evidence on matters of domestic law and an ultimate legal issue for determination by us.

[14] In connection with the exclusionary rule, we concluded that we would not admit any opinion evidence of Waitzer as to:

a. how we should apply the law to the facts of this case;

b. the purpose or policy behind the NCOB exception; and

c. how we ought to interpret and apply s. 76(2) of the Act and the NCOB exception.

[15] Following our decision Kraft and Staff filed amended reports of Waitzer and Halperin, respectively, that reflected our decision about admissibility.

[16] These are our reasons for that decision.

2.1.2 Framework for admissibility of expert evidence

[17] Staff submitted that the criteria for accepting expert testimony, which have been adopted by the Tribunal on numerous occasions, are articulated in *R v Mohan* (***Mohan***) as follows:

a. the opinion evidence is relevant to a fact in issue in the proceeding;

b. the opinion evidence is necessary to assist the Tribunal to understand the significance of evidence that would otherwise be beyond the Tribunal's understanding;

c. the evidence is not otherwise subject to another exclusionary rule; and

d. the expert is properly qualified.[3]

[3] [1994] 2 SCR 9 at p 20

[18] Staff did not dispute that Waitzer is qualified to give his expert opinion. Equally, Kraft does not dispute that Halperin is qualified to give his expert opinion in response. We agree.

[19] The applicability of the *Mohan* test as well as the first three parts of the *Mohan* test were in dispute between Staff and Kraft. We address these points of dispute below.

[20] Kraft submitted that s. 15 of the *Statutory Powers Procedure Act*[4] (***SPPA***) applies to the admissibility of evidence and allows a tribunal to admit as evidence any oral testimony or document that is relevant to the subject-matter of the proceeding. In other words, the only question is relevance.

[21] Further, Kraft submitted that *Mohan* does not apply and cites the Alberta Court of Appeal in *Alberta (Securities Commission) v Workum* (***Workum***).[5] The Court held that the *Mohan* test does not apply in administrative proceedings generally, and proceedings before the Alberta Securities Commission, specifically.

[22] We agreed with Staff that the decision in *Workum* was grounded on s. 29(f) of the *Alberta Securities Act*, which states: "the laws of evidence applicable to judicial proceedings do not apply" for the purposes of a hearing before the Alberta Securities Commission.[6] There is no similar provision under the Act and the decision in *Workum* has not been adopted in any proceedings under the Act.

[23] In contrast to s. 29(f) of the *Alberta Securities Act,* s. 15 of the SPPA does not restrict the Tribunal from applying the *Mohan* test or other laws of evidence. Further, if the only test is relevance, we could open the floodgates on opinion evidence, whether expert or not. Recently in *Paramount (Re)*[7] and *Solar Income Fund Inc (Re)*,[8] the Tribunal has made clear that opinion evidence is inadmissible in s. 127 proceedings except for expert opinions where the proponent of the evidence satisfies the panel that it meets the *Mohan* test. In this proceeding, and

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[4] RSO 1990 c S.22

[5] 2010 ABCA 405

[6] *Workum* at para 82

[7] *Paramount Equity Financial Corporation (Re)*, 2020 ONSEC 12 (***Paramount***) at para 5

[8] 2021 ONSEC 2 (***Solar Income Fund***) at para 55

for the sake of consistency, we see no reason to depart from the *Mohan* test. We now turn to consider each of the four elements of that test.

2.1.3 Relevance

[24] We begin with relevance. We concluded that the first question put to Waitzer is not relevant and that opinion evidence on this question is therefore not admissible. We also concluded that the opinion evidence of Waitzer offered in answer to the second, third and fourth questions is relevant.

[25] Kraft submitted with respect to all four questions that Waitzer's opinion evidence will be restricted to factual matters relating to corporate governance, which is to be distinguished from securities law and corporate law. While there is an overlap between securities law and corporate governance, Kraft submitted that corporate governance is outside this panel's expertise and is regularly the subject of accepted expert testimony. In support, Kraft cited *Rowan (Re),*[9] where expert evidence was admitted about industry standards for brokerage compliance practices, *Paramount,* where evidence was admitted about standard practices in the mortgage lending industry, and *Cheng (Re),*[10] where evidence was admitted about trading practices.

[26] Kraft submitted that corporate governance is relevant as it comes into play with respect to Kraft's duties as a director and officer. The reasonable practices of a director and officer are questions of fact, not law.

[27] Staff submitted that the issue for the panel to determine is the proper interpretation of the NCOB exception to the prohibition against tipping in s. 76(2) of the Act. Staff submits that nothing in the statement of allegations raises issues related to corporate governance and practices. Staff further submitted that Kraft wants to argue that he acted in accordance with his duties as a director and consistent with corporate governance standards. However, the standard of care applicable to directors, and the alleged negligence of directors, are not issues for determination by the Tribunal. Therefore, the proposed expert opinion evidence is not relevant.

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[9] 2009 ONSEC 46

[10] 2019 ONSEC 8 (***Cheng***)

[28] Question #1 relates to how common a practice it is for the chair of a small-cap public company to be involved in the negotiation of transactions on behalf of the company. Although Kraft characterized Question #1 as relating to corporate governance, we do not agree with that characterization. Regardless of its characterization, having regard to Staff's allegations as well as the parties' opening submissions at the merits hearing, we concluded that Question #1 relates solely to a matter not in dispute and does not need to be resolved in this proceeding. We therefore find that this question is not relevant.

[29] Although Questions #2 and #3 are framed as corporate governance questions that are arguably not relevant to the allegations and the issues for determination by us, the approach taken by Waitzer in answering them focusses on the interpretation of s. 76(2) of the Act and the operation and application of the NCOB exception. As such, this evidence is relevant, but as explained below is not necessary and largely runs afoul of the exclusionary rule against opinion evidence on the interpretation of domestic law.

[30] We are satisfied that the parts of Waitzer's evidence in answer to Question #4 concerning the impacts or consequences or "chilling effect" that may flow should we conclude that the NCOB exception is determined on an "objective" basis is relevant to Kraft's conditional *Charter* argument because such evidence may have a bearing on the minimal impairment test under s. 1 of the *Charter.*

[31] We will next consider whether the second criteria cited in *Mohan* is met, that is, whether the evidence is necessary to assist the Tribunal to understand the significance of evidence that would otherwise be beyond the Tribunal's understanding.

2.1.4 Necessity

[32] We concluded that the Waitzer expert evidence in answer to Questions #2 and #3 is not necessary and largely runs afoul of the exclusionary rule against opinion evidence on domestic law and the ultimate legal issue. Regarding the parts of Waitzer's evidence in answer to Question #4 concerning the impacts or consequences or "chilling effect" of an objective test for the NCOB exception, we are satisfied that such evidence is necessary and does not offend an exclusionary rule.

[33] Kraft submitted that in considering whether the expert opinion evidence is necessary, it is enough if the evidence is helpful. Kraft cited *Bison Acquisition Corp (Re)*[11] and *Deeb (Re)*[12] to support this proposition. Kraft submitted that we can accept any relevant expert evidence and then decide how much weight to ascribe to it.

[34] We concur with Staff that it is preferable to determine admissibility rather than leaving the matter to weight as not doing so would unduly expand the scope of the merits hearing.

[35] Necessity is the primary safeguard against the risk of an expert usurping the role of the trier of fact.[13] Great care must be taken not to allow the expert's opinion to take over the adjudicative role of the court or tribunal receiving such evidence.

[36] Staff submitted that the proposed expert testimony runs afoul of the exclusionary rule against opinion evidence on the interpretation of domestic law. Opinion evidence going towards understanding domestic law and/or an ultimate legal issue is clearly inadmissible.[14] Staff went on to provide numerous examples within the proposed opinion report (including in answer to Questions #2, #3 and #4) where Waitzer provides his views on the interpretation and application of the NCOB exception under s.76(2) of the Act.

[37] We found that Waitzer's opinion evidence in response to Questions #2 and #3 goes to the interpretation of domestic law and the ultimate legal issue regarding the NCOB exception and its application in this case, and as such is not necessary. Therefore the evidence is not admissible. We also found that certain portions of Waitzer's opinion evidence in response to Question #4 is not necessary or admissible for the same reason. The balance of Waitzer's evidence in response to Question #4 related to the effects of an objective test for the NCOB exception may very well be of assistance to us in considering and deciding the conditional *Charter* challenge and is therefore admissible.

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[11] 2021 ABASC at para 49

[12] 2012 IIROC 54 at para 18

[13] *R v Singh*, 2014 ONCA 791 at para 40, citing *R v Sekhon*, 2014 SCC 15 at paras 75-76

[14] *R v Comeau*, 2018 SCC 15 at para 40

2.1.5 Admissible opinion evidence relevant to the conditional *Charter* challenge

[38] We concluded that a portion of Waitzer's report (related to Question #4) is relevant to Kraft's conditional *Charter* challenge. Waitzer offers his opinion regarding the "chilling effect" that an NCOB exception based on an "objective" rather than "subjective/objective" test would have on directors and officers who would be subject to a second guessing of their motives in making selective disclosure of MNPI.

[39] Kraft submitted that such opinion evidence may be relevant to the question of whether s. 76(2) of the Act minimally impairs *Charter* rights. We accepted this submission, and it was on this basis that we decided to admit a portion of Waitzer's opinion evidence (and the corresponding portion of Halperin's responding opinion evidence).

2.2 Proposed bifurcation of the conditional *Charter* challenge

[40] We turn now to Staff's proposal that we bifurcate Kraft's conditional *Charter* challenge from the merits hearing. Staff submitted that it was procedurally preferable and more efficient that we first complete the merits hearing and issue our decision about Staff's allegations that Kraft and Stein breached s. 76 of the Act. Staff submitted that our decision on the merits might make it unnecessary for us ever to hear and decide Kraft's conditional *Charter* challenge.

[41] Staff acknowledged that the bifurcated procedure they proposed was not a requirement when dealing with a conditional *Charter* challenge and that we are entitled to hear and determine the conditional *Charter* challenge at the same time as the merits hearing, should we decide that was preferable. If we decided not to bifurcate the conditional *Charter* challenge, Staff urged us to nevertheless separate the two adjudicative exercises.

[42] Kraft submitted that in the interest of a fair and efficient adjudicative process with the minimal amount of interruption, delay and costs, including the additional costs of counsel and witnesses potentially having to prepare all over again to address the conditional *Charter* challenge, we ought not to bifurcate the hearing.

[43] We accepted Kraft's submission, particularly because Staff raised the issue of bifurcation for the first time after the merits hearing had already begun, the parties had already prepared to address the conditional *Charter* challenge within the merits hearing and hearing dates had already been reserved for the experts. In deciding not to bifurcate, we have taken heed of Staff's submission that the adjudicative exercises should be kept separate and distinct. We therefore first consider and decide the merits of Staff's allegations against Kraft and Stein. Our consideration of Kraft's conditional *Charter* challenge is dealt with separately, after our reasons for our decision on the merits.

[44] We now provide some background about WeedMD, its transaction with Perfect Pick (the **Perfect Pick Transaction**), its planned expansion of WeedMD's business at Perfect Pick's Strathroy location through the Perfect Pick Transaction, the respondents and the witnesses before turning to our analysis of the issues before us.

3. BACKGROUND

3.1 The Perfect Pick Transaction and its Announcement

[45] WeedMD, now named Entourage Health Corp., is a reporting issuer trading on the TSX-V including between October 23, 2017, and November 21, 2017 (the **Material Time**). WeedMD Rx Inc. (**WeedMD Rx**) was a wholly-owned subsidiary of WeedMD.

[46] On October 31, 2017, after going through several related phases and milestones, the board of directors of WeedMD, which included Kraft, received various documents relating to the Perfect Pick Transaction in advance of a November 2, 2017, board meeting to present and vote on WeedMD's expansion.

[47] The Perfect Pick Transaction composed of a lease of acreage in Perfect Pick's greenhouse space (the **Lease**), an option for WeedMD Rx to purchase Perfect Pick's property, greenhouse, and infrastructure (the **Option to Purchase**), and a letter agreement between Perfect Pick and WeedMD Rx whereby upon the closing of the purchase of the property if WeedMD Rx exercised the Option to Purchase, Perfect Pick agreed to leaseback the portion of the property on which WeedMD was not then licensed to grow cannabis (the **Leaseback Commitment**).

[48] The package of documents that was provided to the WeedMD board on October 31, 2017, included copies of the Lease, Option to Purchase and Leaseback Commitment. The documents were described as "Draft Final". On November 2, 2017, WeedMD's board authorized management to execute the agreements for the Perfect Pick Transaction. WeedMD initially planned to issue a news release announcing the Perfect Pick Transaction on November 16, 2017. On November 11, 2017, the planned announcement was deferred to November 22, 2017.

[49] On November 22, 2017, WeedMD issued a news release (the **Announcement**) titled "WeedMD Launches Major Production Expansion with 610,000 Square Foot State-of-the Art Greenhouse" in which it announced a "transformational expansion" because of entering into the Lease and Option to Purchase with Perfect Pick. The Announcement noted that Perfect Pick's 98-acre property located in Strathroy, Ontario included 610,000 square feet (or 14 acres) of state-of-the art greenhouse facilities that were ready for rapid retrofit for cannabis cultivation. Prior to the Perfect Pick Transaction, WeedMD's cannabis growing operations were limited to an indoor facility in Aylmer, Ontario that was under 0.6 acres.

[50] In the Announcement, WeedMD stated that it would initially lease five acres of greenhouse from Perfect Pick, with an option to expand into the additional nine acres of greenhouse space at its discretion, in addition to an option for WeedMD to purchase the Perfect Pick property, greenhouse facilities and infrastructure. The retrofit of the initial five acres of greenhouse space had already begun, and was fully funded. The per square foot retrofit costs were among the lowest in the industry.

[51] The Announcement also stated that the WeedMD expansion at Perfect Pick's location was expected to initially lead to an increase in WeedMD's annual production of cannabis from 1,200 kg to more than 21,000 kg, to eventually more than 50,000 kg through exercise of the option to expand into the additional nine acres of greenhouse space. The Announcement included transaction details about the terms of the Lease and Option to Purchase.

3.2 The respondents

[52] Kraft is an entrepreneur who has been involved in co-founding a number of businesses. Kraft was a co-founder of WeedMD as well as the Chairman and a director of WeedMD from April 13, 2017, to December 23, 2019. In addition to his role with WeedMD, Kraft has been a director of a number of public issuers.

[53] Stein is a personal friend of Kraft, the two having known each other for over 40 years. Stein also had a business relationship with Kraft over the years. The two had looked at deals together and discussed various business opportunities, and became co-investors in transactions in different sectors. Kraft described Stein as his "go-to guy" for real estate and financial matters, in particular.

[54] Stein has been a banker and consultant for over 35 years and has been the president and director of his own consulting company for over 20 years, advising on matters related to acquisitions, divestitures, corporate financings, reorganizations and restructurings for both private and public companies.

[55] Stein became familiar with the cannabis industry and market for its stocks through his involvement with several different cannabis companies going public Stein also joined the board of a cannabis company in late 2017. Stein did not have any business, contractual or employment relationship with WeedMD during the Material Time, although he had a consulting agreement with WeedMD and its subsidiary, WMD Ventures Inc., from May to October, 2015.

3.3 Communications between Kraft and Stein

[56] Kraft and Stein were in regular contact. In October and November of 2017, including during the Material Time, Kraft had frequent communications with Stein, including by telephone, email, and text.

[57] On October 23, 2017, Kraft sent Stein an email (the **October Email**) attaching draft documents relating to the Perfect Pick Transaction. This is the first instance of selective disclosure of MNPI alleged by Staff.

[58] The October Email contained the re. line "Fw: PPF Final Agreements". Attached to the October Email were six draft documents for the Perfect Pick Transaction. These were:

a. a draft of the Lease for the Perfect Pick greenhouse acreage (the **Draft Lease**);

b. a document called "Option to Purchase – WMD x PPF – (20171013 – 2).docx" which was a draft of the Option to Purchase (the **Draft Option to Purchase**);

c. a document called "Perfect Pick Farms-Agreement re Leaseback (20171013).docx" which was the draft commitment letter regarding the agreement to leaseback (the **Draft Leaseback Commitment**);

d. a document called "PPF Warrant Certificate.docx" which was a draft warrant certificate granting Perfect Pick warrants in WeedMD exercisable only upon WeedMD exercising the Option to Purchase; and

e. two draft acknowledgments and directions ancillary to the Option to Purchase and authorizing the registration of notice of the Option to Purchase on title.

[59] The Draft Lease between Perfect Pick, as landlord, and WeedMD Rx, as tenant, described the leased premises as approximately one acre in the five-acre greenhouse on a specified parcel of land in Mount Brydges, Strathroy, Ontario, including all equipment supporting cultivation. The permitted use of the leased property was for the cultivation of medical cannabis and ancillary uses. The term of the Draft Lease was two years from commencement and WeedMD Rx had the right to extend the term of the lease for ten further periods of one year each. The annual rent for the first two years was $1.00, increasing to $500,000 in subsequent years.

[60] The Draft Lease also included an option to lease additional space in the greenhouse (the **Lease Expansion Option**) and provided that if WeedMD Rx exercised the option to lease the "initial five acre range" before the end of February 2018 there would be no option fee charged, whereas if WeedMD Rx did not exercise the option by the end of February 2018, WeedMD Rx would pay Perfect Pick $180,000 and any later exercise of the option also entailed an associated prescribed option fee. The annual rent for each additional acre leased was $180,000.

[61] The Draft Option to Purchase gave WeedMD Rx the option to purchase Perfect Pick's building, lands and property on a specified parcel of land in Mount Brydges, Strathroy, Ontario. The term of the option was 5 years, which term was extendable for a further 5 years at WeedMD Rx's option. The purchase price was $25.6 million, comprising a non-refundable $3 million deposit in the form of 3,000,000 common shares, and $7 million in milestone payments accruing to Perfect Pick over 36 months from the effective date of the agreement conditioned upon Perfect Pick meeting certain milestones including the provision of labour and consulting services and assistance with retrofit work, with the balance of the purchase price due upon closing of the purchase. The Draft Option to Purchase provided that upon closing of the purchase, Perfect Pick would enter into a leaseback agreement in accordance with the terms set out in the Leaseback Commitment.

[62] On October 25, 2017, Stein provided comments by email to Kraft and others at WeedMD (Keith Merker, Chief Financial Officer and Bruce Dawson-Scully, Chief Executive Officer) on the Draft Lease. Some of Stein's comments were incorporated into the final version of the Lease.

[63] Stein was not retained by WeedMD or Kraft to formally review the Draft Lease, nor was he compensated for conducting the review.

3.4 Stein's trading in WeedMD

[64] Prior to receiving the October Email from Kraft, Stein held 25,000 WeedMD shares. He sold 10,000 of those shares on November 13, 2017, and sold the remaining 15,000 shares on November 15, 2017.

[65] On November 21, 2017, the day before the Announcement, Stein purchased a total of 45,000 WeedMD shares for $68,525.

[66] Stein sold his WeedMD shares on November 22 and 23, 2017, after the Announcement for total proceeds of $97,870. Stein made a profit of $29,345, representing a return of approximately 43% on his investment.

3.5 Witnesses

[67] Staff called two witnesses at the merits hearing: Stuart Mills, a senior investigator in the Enforcement Branch of the Commission and Merker, who was the Chief Financial Officer of WeedMD during the Material Time.

[68] Mills conducted the investigation of Kraft and Stein and provided an affidavit which was marked as an exhibit at the merits hearing. Mills was cross-examined on the content of his affidavit and associated documents by the respondents.

[69] Merker testified about his roles at WeedMD, the management of WeedMD and its predecessor companies and subsidiaries, and the Perfect Pick Transaction.

[70] The respondents testified on their own behalf. We have addressed their testimony and our reliance upon it in the analysis of the issues before us.

[71] Stein also called Derek Pedro, a cannabis advocate and pioneer in the medical cannabis field. Beginning in January 2017, Pedro was a consultant at WeedMD and was responsible for cannabis operations. Pedro eventually became WeedMD's Chief Cannabis Officer in March 2019. Pedro testified about his experience in the medical cannabis field, how he came to work at WeedMD, and his involvement with the Perfect Pick Transaction and related expansion.

4. ISSUES AND ANALYSIS REGARDING ALLEGATIONS OF ILLEGAL TIPPING AND INSIDER TRADING

4.1 Introduction

[72] The issues before us with respect to the substance of Staff's allegations are as follows:

a. Did Kraft provide Stein with MNPI about the Perfect Pick Transaction and related expansion in breach of s. 76(2) of the Act?

b. Did Kraft provide MNPI to Stein by advising him about the date of the Announcement? and

c. Did Stein trade in WeedMD shares while in possession of MNPI in breach of s. 76(1) of the Act?

[73] Within each of these issues are multiple sub-issues, which we address in turn below.

[74] We start with a consideration of the applicable law about illegal tipping and insider trading. We then analyze whether Staff has made out its allegations that Kraft illegally tipped Stein, and that Stein in turn traded with the benefit of MNPI. In the course of our analysis we consider the availability of the NCOB exception.

4.2 Law on illegal tipping and insider trading

4.2.1 Illegal tipping

[75] The prohibition against tipping is set out in s. 76(2) of the Act. To prove that a respondent contravened s. 76(2) of the Act, Staff must establish the following on a balance of probabilities:

a. the tipper informed the other party of a material fact or material change about an issuer;

b. at the time the material information was communicated, the material fact or material change had not been generally disclosed; and

c. the tipper was in a special relationship with the issuer.

[76] Subsection 76(2) also requires that for there to be a contravention, the impugned communication must have been "other than in the necessary course of business". As we explain below, we conclude that if Staff proves the three elements listed above, the onus shifts to the respondent to show that the communication was in the necessary course of business. If the respondent does not succeed in proving that, the contravention is established.

4.2.2 Insider trading

[77] The prohibition against insider trading is set out in s. 76(1) of the Act which states "no person or company in a special relationship with an issuer shall purchase or sell securities of the issuer with the knowledge of a material fact or material change with respect to the issuer that has not been generally disclosed."

[78] To prove that a respondent contravened s. 76(1) of the Act, Staff must establish the following on a balance of probabilities:

a. the respondent purchased or sold securities of an issuer;

b. at the time of the purchase or sale, the respondent had knowledge of a material fact or material change regarding the issuer;

c. the material fact or material change was not generally disclosed; and

d. at the time of the purchase or sale, the respondent was in a special relationship with the issuer.

[79] It is undisputed that WeedMD was an "issuer" in Ontario during the Material Time.[15] It is also undisputed that Kraft was in a special relationship with WeedMD during the Material Time. Below we address the following contentious issues:

a. did Kraft selectively disclose material information to Stein that had not been generally disclosed (and the related question of whether Stein had knowledge of material information that had not been generally disclosed at the time he traded in WeedMD shares)?

b. did Kraft communicate with Stein in the necessary course of business? and

c. was Stein in a special relationship with WeedMD?

4.3 Did Kraft selectively disclose material information to Stein?

[80] We now turn to Staff's allegations that Kraft informed Stein of a material fact or material change relating to the expansion on two occasions:

a. on October 23, 2017, by providing the draft agreements for the Perfect Pick Transaction to Stein; and

b. sometime between November 11 and 21, 2017, by informing Stein that WeedMD would make the Announcement on November 22, 2017 (the **Announcement Date**).

[81] Because the allegation that Stein had knowledge of a material fact or material change that was not generally disclosed is inter-related with the question of whether Kraft selectively disclosed material information to Stein, our considerations below also address that allegation.

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[15] Act, s. 76(5)

4.3.1 Tip concerning the Perfect Pick Transaction and related expansion

4.3.1.a Introduction

[82] Staff submits that Kraft's selective disclosure to Stein about the expansion, by providing him with draft agreements in the October Email, constitutes a "material fact" under the Act. Neither Kraft nor Stein contests that Kraft sent Stein the October Email. Of the six documents attached to the October Email, Stein only admits to reading the Draft Lease. He provided comments on the Draft Lease in his e-mail to Kraft, Merker and Scully dated October 25, 2017.

[83] Staff urges us to reject Stein's evidence that he only reviewed the Draft Lease and did not review the Draft Option to Purchase or the other documents attached to the October Email. Staff submits that even if Stein reviewed only the Draft Lease, Staff has proved the communication of material information, because the Draft Lease itself was material.

[84] The Lease and the Option to Purchase were the principal documents for the Perfect Pick Transaction and the final executed Lease and Option to Purchase were not materially different than the drafts that Kraft provided to Stein. We conclude, for the reasons below, that the planned Perfect Pick Transaction, including the terms of the Draft Lease and Draft Option to Purchase, constituted a material fact that Kraft selectively disclosed to Stein and that had not been generally disclosed. We address whether Kraft's selective disclosure was made in the necessary course of business in section 4.4 below.

[85] We also conclude that even if Stein read only the Draft Lease and did not read the other documents (including the Draft Option to Purchase) attached to the October Email, he more likely than not was generally aware that the planned Perfect Pick Transaction included an Option to Purchase and he more likely than not had a general understanding of the planned expansion beyond the terms of the Draft Lease. In any event, we conclude, for the reasons below, that the fact of and terms of the Draft Lease, considered alone, constitute a material fact that Stein had knowledge of and that had not been generally disclosed at the time he traded.

4.3.1.b The parties' positions and principal submissions

[86] Staff submits that the October Email to Stein contained material facts because:

a. the Draft Lease was in all material respects identical to the final Lease that was the subject of the Announcement;

b. the Draft Option to Purchase was in all material respects identical to the final Option to Purchase that was the subject of the Announcement; and

c. the categories of terms contained in the Draft Lease and Draft Option to Purchase are what reasonable investors would consider in making investment decisions with respect to WeedMD in the circumstances.

[87] Kraft submits that the Draft Lease and the other documents attached to the October Email contained only limited information relating to the expansion and did not disclose any non-public material fact because:

a. WeedMD's expansion ambitions were widely disclosed and the information in the Draft Lease and other documents attached to the October Email was not incrementally material to the existing public information;

b. the Draft Option to Purchase attached to the October Email was neither relevant nor material;

c. the Perfect Pick Transaction was not final because there were outstanding issues; and

d. the market impact of the Announcement was driven by factors other than the facts in the Draft Lease and other documents attached to the October Email.

[88] With respect to the October Email, Kraft submits that the only information disclosed to Stein was that WeedMD was contemplating leasing one acre in the Perfect Pick greenhouse, with an option to lease up to five acres. Kraft submits that the October Email provided no information about whether the option to lease additional greenhouse space under the Draft Lease would be exercised, whether the transaction in the already stale-dated Draft Lease would be completed, or about the costs of retrofitting the one, or optional five, acres of greenhouse space.

[89] Stein submits that through reading the October Email and reviewing the Draft Lease, he did not learn any material information related to WeedMD's expansion that was not already publicly disclosed.

[90] Further, Stein submits that a contingent transaction, such as the planned Perfect Pick Transaction, is not material where there is uncertainty and a lack of specificity. Stein also submits that he believed that the information he received from Kraft was not material.

[91] Before turning to a consideration of the question of materiality, we first set out the basis for our conclusion that in addition to the terms of the Draft Lease Stein was also aware that the planned Perfect Pick Transaction included an Option to Purchase and he had a general understanding of the expansion beyond the terms of the Draft Lease.

4.3.1.c Information known to Stein

[92] It is not disputed that Stein was aware of the contents of the Draft Lease. Stein testified that he was aware that the Draft Lease related to WeedMD's expansion plans. Stein also testified that he did not read or review the Draft Option to Purchase and did not receive any information about the Perfect Pick Transaction after he provided his comments on the Draft Lease on October 25, 2017.

[93] In embarking on our consideration and analysis, we are mindful that insider trading and tipping cases are usually established by a mosaic of circumstantial evidence which, when considered as a whole, leads to the inference that it is more likely than not that the trader or tipper possessed or communicated MNPI.[16]

[94] While we have not concluded that Stein read or reviewed the Draft Option to Purchase, we do conclude it was more likely than not that Stein was aware that the planned Perfect Pick Transaction included an Option to Purchase and also that Kraft provided Stein with additional context about the Draft Lease and the Perfect Pick Transaction in general in phone conversations the two had around the time of the October Email.

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[16] *Kitmitto (Re)*, 2022 ONCMT 12 (***Kitmitto***) at para 149

[95] Even if Stein did not read or review the Draft Option to Purchase, we note that it would have been virtually unavoidable for him to be aware that such a document was included in the attachments to the October Email. The name of the corresponding attachment was an unambiguous reference to an Option to Purchase: "Option to Purchase – WMD x PPF – (20171013 – 2).docx".

[96] Kraft called Stein at 8:00 AM on October 23, 2017. They spoke for 19 minutes. Shortly after this conversation, Kraft sent Stein the October Email with the attached Perfect Pick Transaction documents. Kraft called Stein again at 11:00 PM on October 24, 2017. The call lasted 18 minutes. Kraft called Stein again at 9:15 AM on October 25, 2017. The call lasted 28 minutes. Less than an hour after that call, Stein sent an e-mail to Kraft, copied to Merker and Scully, providing his comments on the Draft Lease.

[97] Neither Stein nor Kraft recalls what they discussed on these calls. Kraft testified that there were so many different conversation topics going on between them at the time he could not remember with any certainty what issues were discussed in any of the calls.

[98] In addition to the interactions referred to above, Kraft's chronology shows the following contacts between him and Stein from October 19 to October 25, 2017:

a. October 19 - Stein emailed Kraft a press release issued by the cannabis company where he served as a director;

b. October 20 - Kraft called Stein for 11 minutes;

c. October 22 - Kraft emailed Stein a sample term sheet for a business opportunity;

d. October 23 at 5:41PM - Kraft called Stein for 1 minute (indicated to be a voicemail/hang up);

e. October 23 at 5:45 PM - Kraft called Stein for 1 minute;

f. October 23 at 6:36 PM - Stein called Kraft for 4 minutes;

g. October 24 at 8:03 AM - Stein emailed Kraft a memorandum regarding a block chain deal, "as discussed";

h. October 24 at 5:21 PM - Stein emailed Kraft about a convertible debenture financing for the cannabis company where he served as a director;

i. October 25 at 10:37 AM - Stein emailed Kraft, Merker and Scully with his comments on the Draft Lease.

[99] After Scully's email to Perfect Pick (copied to Kraft) on October 22 stating that the parties were ready to sign, Kraft and Stein spoke for a total of 70 minutes, between October 23 and October 25. The chronology indicates that they may also have spoken about a term sheet for a business opportunity, a block chain deal, and the convertible debenture financing for another cannabis company. While they may have discussed these and other topics, there was abundant time during the 70 minutes they spoke on calls that were in close proximity to the October Email and Stein's October 25 e-mail for them to have also discussed what was a significant, imminent transaction for WeedMD. Stein's October 25 e-mail with his comments on the Draft Lease states, "as discussed late yesterday". While neither Stein nor Kraft could remember what they discussed during these calls, Stein's October 25 e-mail indicates they did discuss the Draft Lease.

[100] Kraft and Stein both stated that they spoke regularly about business and personal matters. Their emails and oral evidence support the conclusion that they regularly discussed each other's, and potential joint, business.

[101] Inferences must be reasonably and logically drawn from a fact or group of facts established by the evidence, should be drawn from the combined weight of the evidence, and cannot be drawn from speculated facts.[17] For an inference to be validly drawn, it need not be the only possible inference; nor does it even need to be the most obvious or the most easily drawn.[18]

[102] Given the foregoing group of facts, we conclude it is more likely than not that over the course of those 70 minutes, Kraft gave Stein more context about WeedMD's pending strategic, compelling expansion reflected in the Draft Lease

[17] *Kitmitto* at para 147

[18] *Hutchinson (Re)*, 2019 ONSEC 36 (***Hutchinson***) at para 62

and the Draft Option to Purchase that Kraft provided to Stein in the October Email.

[103] We now turn to our consideration of the materiality of the information that Kraft disclosed to Stein and of which Stein was aware.

4.3.1.d Materiality Analysis: The planned Perfect Pick Transaction and related draft agreements (as well as the Draft Lease, considered alone) were material

4.3.1.d.i Materiality test and evidentiary burden

[104] A "material fact" is defined in the Act as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities"[19] and its determination is well established to be a question of mixed fact and law that falls within the specialized expertise of the Tribunal.[20]

[105] The term "material change" is defined in s. 1(1) of the Act as follows:

a. "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 any of the securities of the issuer"; or

b. "a decision to implement a change referred to above made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is probable…".

[106] In determining whether the information would reasonably be expected to have a significant effect on the market price or value of a security, the Tribunal applies an objective "market impact test" and views materiality from the perspective of the trading markets, that is, the buying, selling, or holding of securities.[21]

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[19] s 1(1)

[20] *Donald (Re),* 2012 ONSEC 26 (***Donald***) at paras 28-29

[21] *Kitmitto* at para 164; *Donald* at para 201

[107] Materiality is assessed objectively from the perspective of a reasonable investor and prospectively through the lens of expected market impact.[22]

[108] Determinations of materiality must be based on evidence, except in cases where materiality can be derived from common sense inferences.[23] While shareholder evidence or expert evidence may be relevant or useful to a determination of materiality, it is not necessary.[24] A determination of materiality is not a science, but is a common-sense judgment, made based on the relevant facts in evidence and considering all the specific circumstances.[25] Materiality is highly contextual and there is no "bright line" test.[26]

[109] Generally, the concept of "materiality in the Act is considered to be a broad one that varies with the characteristics of the issuer and the particular circumstances involved.[27] National Policy 51-201 *Disclosure Standards* (**NP 51-201**)[28] identifies a number of factors that may be considered in making the common-sense judgment of materiality. Some of these factors are discussed in our consideration of materiality below.

[110] The parties agree that an assessment of materiality requires a consideration of the characteristics of the issuer and all the circumstances involved.[29] They disagree on whether Staff has provided sufficient evidence to support our determination of materiality in this instance.

[111] Kraft submits that Staff has failed to meet its evidentiary burden with respect to the materiality of the information in the Draft Lease and the other draft Perfect Pick Transaction documents attached to the October Email. He makes this submission based on the following assertions:

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[22] *Cornish v Ontario Securities Commission*, 2013 ONSC 1310 (Div Ct) (***Cornish***) at para 46, citing *Re YBM Magnex International Inc* (2003), 26 OSCB 5285 (***YBM***) at para 89

[23] *Sharbern Holding Inc. v Vancouver Airport Centre,* 2011 SCC 23 at paras 52 and 61; *Cornish* at para 99

[24] *Cornish* at para 99

[25] *Donald* at para 199; *YBM* at para 94

[26] *Cornish* at para 53

[27] *Biovail Corp (Re)*, 2010 ONSEC 21 (***Biovail***) at para 65

[28] (2002) 25 OSCB 4492

[29] *Biovail* at paras 65 and 69, National Policy 51-201, s. 4.2(1)

a. the Draft Lease, in particular, and the Draft Option to Purchase contained only limited information about the planned expansion and Staff failed entirely to offer any evidence as to why the Draft Lease was material when the market already knew that the company was looking to expand, which would require getting some additional space to expand.;

b. due to the lack of any evidence going to materiality, it would be inappropriate for us to determine materiality from common sense inferences as we would be speculating and inappropriately filling evidentiary gaps;

c. Staff's evidence was insufficient because it provided no market impact analysis to support the conclusion that the information in the Draft Lease, Draft Option to Purchase and other documents attached to the October Email was material and Staff's approach improperly conflates the significance of the Announcement itself with the significance of the information contained in the Draft Lease and other draft Perfect Pick Transaction documents; and

d. Stein's belief, as a "reasonable investor", that he was not in possession of material information is evidence that must be taken into account in assessing materiality.

[112] Kraft's first submission is that the Draft Lease (and other draft Perfect Pick Transaction documents) did not contain any information that had not already been generally disclosed by virtue of WeedMD's press releases indicating that it was pursuing an expansion. We do not accept this submission and for the reasons set out below in section 4.3.1.e, we have concluded that the planned Perfect Pick Transaction (and contents of the Draft Lease and other related documents) had not been generally disclosed.

[113] We also do not accept Kraft's second and related submission that there was no evidence before us on which to base a finding of materiality. Kraft argued that Staff should have led evidence of a witness (such as Merker, Pedro or Kraft) to identify or isolate a material fact in the Draft Lease and other draft Perfect Pick Transaction documents.

[114] There is no requirement that evidence in support of materiality be in any particular form.[30] In this case and as detailed below in section 4.3.1.d.iii there is evidence supporting a conclusion that the information contained in the Draft Lease and Draft Option to Purchase was material. The evidentiary framework on which we have based our finding of materiality is similar in nature (subject, of course, to factual and contextual differences) to the evidentiary framework that the Divisional Court determined to be appropriate and sufficient in *Cornish.*[31]

[115] Kraft third submission is that Staff's evidence is also deficient because Staff provided no market impact analysis. We disagree as explained below.

[116] According to Kraft, a market impact analysis from Staff should have taken into account prior disclosures, the liquidity of WeedMD shares at various times, the sensitivity of the trading price of the shares to other earlier announcements referencing WeedMD's intentions to expand, and the extent to which WeedMD's trading price was impacted by developments in the cannabis sector.

[117] In a related submission, Kraft also asserts that Staff has conflated the Draft Lease and Draft Option to Purchase with the Announcement and that Staff provided no detailed analysis to support a conclusion that on November 22, 2017, following the Announcement, the market was reacting to the details contained in those documents as opposed to additional details about the Expansion contained in the Announcement, such as the favourable cost to retrofit the Perfect Pick greenhouse and the ability to expand to 14 acres of greenhouse space.

[118] What is required instead, according to Kraft, is an assessment of materiality of the:

a. facts already publicly known as of October 23, 2017;

b. facts in the draft Perfect Pick Transaction documents; and

c. facts that were in the Announcement but not apparent from the draft Perfect Pick Transaction documents.

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[30] *Cornish* at para 99

[31] *Cornish* at paras 84-85

[119] Kraft submits that without a market impact analysis it is not possible to know whether the market reaction after the Announcement was driven by the terms of the Draft Lease and Draft Option to Purchase or the other details in the Announcement.

[120] In advancing these submissions, Kraft relies on *Biovail.* The issue before the panel in *Biovail* was whether statements made by the company and its officers were, in a material respect, misleading or untrue for the purposes of another section of the Act. Some of the statements in question were made simultaneously with other statements in question.

[121] Although the panel in *Biovail* did consider expert market impact analysis evidence, *Biovail* does not stand for the proposition that materiality cannot be determined without a market impact analysis or without evidence of actual market impact.

[122] The Divisional Court's decision in *Cornish* where the Court was considering the Tribunal's application of the market impact test makes it clear that evidence of actual price impact and volume fluctuations can assist the Tribunal in determining materiality, but the Tribunal does not always need evidence of the effect on market price to find materiality.[32] In this circumstance, we are satisfied that Staff's evidence was not deficient for not including a market impact analysis.

[123] We do accept Kraft's caution regarding conflating the Draft Lease and other draft Perfect Pick Transaction documents with the Announcement and the apparent market impact of the Announcement.

[124] In *Biovail*, the panel concluded that in circumstances where one press release included two negative facts and the value of Biovail's shares subsequently dropped, it was not possible to isolate the impact of each of those facts on the market price of Biovail's shares.[33] Similarly, in *Cornish*, the Tribunal concluded that where material information is disclosed by the issuer along with other information, the market reaction to the combined disclosure may not be a

[32] *Cornish* at paras 56-57

[33] *Biovail* at para 218

reliable indicator of the market impact of the disclosure of one particular piece of information in isolation.[34]

[125] In our view, these are exactly the circumstances with which we are dealing. The information about the Perfect Pick Transaction contained in the Draft Lease and Draft Option to Purchase was included in the Announcement, which also contained other information that may or may not have been material. After the Announcement, there was an increase in WeedMD's share price and the volume of shares traded.

[126] Because the Announcement contained more information than was in the Draft Lease and Draft Option to Purchase, the market reaction to the Announcement is not determinative of whether the information in the Draft Lease and Draft Option to Purchase was material. Therefore, we do not rely on the market reaction to the Announcement in concluding that the planned Perfect Pick Transaction and related documents (including the Draft Lease, considered alone) were material.

[127] We find there is ample other evidence before us to conclude that the details about the planned Perfect Pick Farm Transaction and related draft agreements (including the terms of the Draft Lease, considered alone) would reasonably be expected to have a significant effect on the price or value of WeedMD's shares.

[128] Our analysis of the evidence relevant to our conclusion of materiality follows below after we address Kraft's fourth submission that Staff has failed to meet its evidentiary burden because we must consider Stein as a proxy for a "reasonable investor" and Stein's related submission that he did not believe that the information he received from Kraft was material.

4.3.1.d.ii Stein's subjective appreciation of the materiality of the information that he received is not determinative

[129] Kraft submits that as it is settled law that the beliefs of a reasonable investor, together with other information, inform the market impact test, Stein should be considered a useful proxy for assessing materiality. Stein is a sophisticated investor with experience in the cannabis sector. Stein, Kraft submits, plainly did not believe that the information he learned from Kraft was material because,

[34] *Cornish* at para 59

rather than continuing to hold his existing position in WeedMD shares after he received the October Email, he sold his shares on November 13 and 15, 2017.

[130] Stein himself submits that he did not believe that Kraft provided material information to him.

[131] As noted above, the market impact test is assessed objectively from the perspective of a reasonable investor. It is not determined through the lens of any one investor, let alone a respondent. A respondent's subjective belief regarding materiality is not necessarily relevant to or determinative of the market impact test, nor is it relevant to a finding of a breach of the Act.

[132] Stein's own evidence suggests that he was actively following WeedMD's public announcements and investor communications about its interest in expanding. Combined with our earlier conclusion that it was more likely than not that Kraft communicated the context about the Draft Lease to Stein in their calls around the date of the October Email, this supports a conclusion that he, in fact, did appreciate that the planned Perfect Pick Transaction including the Draft Lease was material.

[133] Under cross-examination by Staff, Stein acknowledged that when he reviewed the WeedMD October 19, 2017 press release he suspected that the financing that was described as being "for working capital and production capacity expansion" related at least partly to the deal with Perfect Pick, which was the only deal he was aware of at that time.

[134] Stein further submits that he "waited a couple of weeks" after the October Email before selling his WeedMD shares on November 13 and 15 as he was not sure about the status of negotiations between WeedMD and Perfect Pick. He "just erred on the cautious side." In our view, Stein's caution in waiting to trade in WeedMD shares for a period of time after receiving the October Email is more likely than not an indication that reflects instead that he believed that the information he had received was material.

[135] We, therefore, do not consider Stein's sale of his WeedMD shares on November 13 and 15 before subsequently purchasing WeedMD shares on November 21 prior to the Announcement to be significant to our analysis of the materiality of

the planned Perfect Pick Transaction and related documents, including the Draft Lease.

[136] We now turn to the evidence and our analysis of materiality.

4.3.1.d.iii Evidence supporting materiality

[137] The evidence that establishes that the planned Perfect Pick Transaction and related draft agreements attached to the October Email, (including the Draft Lease, considered alone) were material at the time of the October Email and also when Stein traded WeedMD shares falls into the following categories:

a. developments in the cannabis industry;

b. the size and nature of WeedMD's business and operations;

c. the details in the Draft Lease and Draft Option to Purchase; and

d. the likelihood of the Perfect Pick Transaction closing.

4.3.1.d.iv Developments in the cannabis industry

[138] During 2017, many companies in the cannabis industry in Canada were closely following developments regarding the Canadian government's proposal to permit the sale of cannabis products for adult recreational use.[35] Pedro a consultant at WeedMD with responsibility for cannabis operations, testified that in 2017 many, if not most, of the companies in the cannabis industry were looking to expand their capabilities and operations in response. He stated that "expansion was the name of the game".

[139] WeedMD's public statements in the months prior to October 2017 indicate that it also wanted to expand and was working on an expansion plan. In our view, these public statements did not constitute general disclosure about the Perfect Pick Transaction, including the Lease and Option to Purchase, nor did they constitute general disclosure about the expansion through the Perfect Pick Transaction. Our analysis on this point follows in section 4.3.1.e below.

[35] Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts

4.3.1.d.v Size and nature of WeedMD's operations

[140] WeedMD was a niche player in the cannabis market in 2017, focused primarily on medical marijuana in the long-term care industry.

[141] Prior to the Perfect Pick Transaction, WeedMD operated an approximately 0.6-acre indoor facility in Aylmer, Ontario on four acres of land and had an option to acquire four acres of neighboring land. In April 2017, WeedMD disclosed that the two parcels of land, if combined, could support the construction of approximately five additional acres of production space. In his evidence, Pedro stated that WeedMD had determined that five acres were necessary for it to get its fair share of the pending, expanded cannabis market.

[142] As of May 2017, it was publicly known that WeedMD was already operating at capacity at the Aylmer, Ontario facility.

[143] As of September 30, 2017, WeedMD had assets valued at $8.6 million, liabilities of just under $700,000 and net losses for the nine months ended September 30, 2017 of $6.5 million.

[144] On October 19, 2017, WeedMD announced that it had engaged Eight Capital to raise $15 million. The net proceeds from that offering would be used for "working capital and for production capacity expansion". The offering closed on November 2, 2017. The successful financing positioned WeedMD to execute its expansion strategy.

[145] WeedMD had approximately 61.7 million issued and outstanding common shares on September 30, 2017, approximately 62.5 million issued and outstanding common shares on November 1, 2017, and approximately 64.7 million issued and outstanding common shares on November 21, 2017. WeedMD's market capitalization (on a diluted basis) on November 21, 2017, was approximately $147 million.

[146] The foregoing information about the size and nature of WeedMD's operations, financial status and market capitalization is taken into account in our considerations below.

4.3.1.d.vi Details in the Draft Lease

[147] The key terms of the Draft Lease are outlined above in paras 59-60. As noted above, the final executed Lease between Perfect Pick and WeedMD Rx dated November 21, 2017, did not differ in any material way from the Draft Lease provided to Stein in the October Email. The only notable difference between the two versions was that the final Lease provided for rent to be paid monthly in arrears, a term that reflected one of Stein's comments about the Draft Lease.

[148] The addition of one acre of greenhouse space would almost triple WeedMD's pre-Perfect Pick Transaction acreage, while the option to add at least five acres of greenhouse space represented more than nine times WeedMD's pre-Perfect Pick Transaction acreage. We find that both the one-acre increase in greenhouse space under the Draft Lease as well as the available option to expand to at least five additional acres of greenhouse space under the Draft Lease represented a significant increase in WeedMD's operational capacity and therefore potential production for WeedMD and would place it strategically to take advantage of the adult recreational use market.

[149] Considered in the context of WeedMD's financial statements as discussed above, we also find that the annual rent payable under the Draft Lease, including for the exercise of the Lease Expansion Option and rental of additional acreage, represented a significant corporate expenditure.

[150] Considered in the context of WeedMD's pre-Perfect Pick Transaction scope of operations and WeedMD's determination that five acres were necessary for it to get its fair share of the pending, expanded cannabis market, the Draft Lease and its terms represented what would be a significant new contract and material development in relation to WeedMD's resources and capacity. We have concluded that the materiality of the Draft Lease did not depend upon a decision having already been made to exercise the Lease Expansion Option. The fact of the additional one acre combined with the Lease Expansion Option made the Draft Lease material.

[151] We note that WeedMD itself identified the Lease to be a material contract or document and filed it on SEDAR on November 27, 2017, as part of its Form 51-

102F3 Material Change Report in accordance with National Instrument 51-102. WeedMD's acknowledgement of materiality is significant.

4.3.1.d.vii Details in the Draft Option to Purchase

[152] The key terms of the Draft Option to Purchase are outlined above in para 61. As noted above, the final executed Option to Purchase dated November 21, 2017, did not differ significantly from the Draft Option to Purchase that Kraft provided to Stein in the October Email. The only notable differences are that the final Option to Purchase included a larger deposit amount ($4.68 million versus $3 million, still paid through the issuance of 3 million common shares) and a corresponding slightly larger total purchase price ($27.28 million versus $25.6 million), the right for WeedMD Rx to negotiate the purchase of Perfect Pick's feed-in tariff (or **FIT**) contracts on market terms, and a right for Perfect Pick to receive up to $5 million of the $7 million in milestone payments in the form of common shares.

[153] Given the subject matter of the Draft Option to Purchase (namely the significant acquisition of property), its significance to WeedMD's previously stated intentions to expand its operations, and the amounts involved under the Draft Option to Purchase in comparison to WeedMD's assets and total market capitalization (as discussed above), including the scope of WeedMD's obligations arising under the Draft Option to Purchase regardless of the exercise of the option, we conclude that the Draft Option to Purchase and its terms also represented what would be a significant new contract and material development for WeedMD.

[154] We note that WeedMD itself identified the Option to Purchase to be a material contract or document and filed it on SEDAR on November 27, 2017, as part of its Form 51-102F3 Material Change Report in accordance with National Instrument 51-102. WeedMD's acknowledgement of materiality is significant.

4.3.1.d.viii The likelihood of the Perfect Pick Transaction closing

[155] We conclude that by the time Kraft sent the October Email to Stein and Stein reviewed the Draft Lease, there was a significant likelihood that the Perfect Pick Transaction would proceed, and this significant likelihood had not decreased by the time Stein bought WeedMD shares on November 21, 2017. We deal in turn below with the respondents' submissions that there were details outstanding

between Perfect Pick and WeedMD, the Perfect Pick Transaction was uncertain and contingent, and WeedMD was actively pursuing other expansion options, such that the information Kraft shared with Stein was not material.

a. **Alleged outstanding details**

[156] Kraft submits that certain details of the expansion remained outstanding and that, as a result, the deal was not near to being final. Those outstanding issues were:

a. whether WeedMD would lease one or five acres;

b. some potential cross-contamination issues associated with the products Perfect Pick grew at the site and related to the size of the greenhouse space WeedMD would occupy; and

c. whether the transaction would include some FIT contracts related to solar panels, which were not connected with the proposed cannabis production operation.

[157] Staff submits that any outstanding issues are irrelevant to the determination of materiality.

[158] We do not accept that there remained any real uncertainty about whether WeedMD would lease one or five acres. Pedro's evidence indicated that WeedMD had determined that five acres was necessary for it to get its fair share of the pending, expanded market. WeedMD's public statements about its expansion strategy prior to October 2017 indicate that its objective was to secure five acres for expansion. In August 2017, WeedMD advised Health Canada that its application for a license for the Perfect Pick property included the use of five acres of the property. The WeedMD board received materials for their November 2, 2017 meeting on October 31. The materials included a slide deck that stated that "WeedMD management is proposing that the company lease 5 acres from [Perfect Pick]".

[159] If there was an outstanding issue in October and November 2017 relating to the amount of space WeedMD would lease from Perfect Pick, we find it is more likely than not that it was just a matter of timing. The inclusion of the Lease Expansion Option in the Draft Lease to increase the leased premises to at least five acres,

and the timing and cost of the option, are consistent with that conclusion. We also conclude that the potential cross-contamination issue factored into the timing considerations about how much space to lease initially. In any event and given our conclusion above that the materiality of the Draft Lease did not depend upon the prior exercise of the Lease Expansion Option, we do not accept Kraft's submission.

[160] As regards the potential for acquiring certain FIT contracts related to the solar panels, Kraft's evidence was that this was not connected to the cannabis business, but that selling solar into the grid would provide a separate source of revenue for WeedMD. We conclude that this potential for additional revenue was unrelated to the essential nature of the transaction between WeedMD and Perfect Pick, was not reflected in the Draft Lease (or final Lease) and is therefore outside of the mosaic of information on which we base our determination that the Draft Lease was material.

[161] Furthermore, we conclude that the evidence indicates that the Perfect Pick Transaction was essentially a done deal by no later than November 2, 2017, notwithstanding that the draft Option to Purchase did not yet include the provision giving WeedMD the option to negotiate to purchase the Perfect Pick FIT contracts. On October 31, 2017, Merker sent J. Zacharia at Perfect Pick an email with an attached draft Option to Purchase, stating "I think we are done!!!". On November 2, 2017, WeedMD's board authorized management to proceed with the execution of the agreements for the Perfect Pick Transaction.

b. **Alleged contingent nature of the planned Perfect Pick Transaction**

[162] Stein submits that the transaction between WeedMD and Perfect Pick was far from "ripe" and was full of uncertainties and contingencies. Kraft submits that there is nothing in the Draft Lease to indicate if the underlying transaction was to be completed at all, or if so, when, as the documents were already stale-dated. We disagree.

[163] Stein refers to the majority decision in *Kitmitto* for the proposition that a "potential strategic transaction" is not considered information that would reasonably be expected to have a material effect on the market price or value of securities, because there is "still uncertainty and a lack of specificity about the

potential transaction."[36] In *Kitmitto,* the majority was referring to the fact that all that was known on a particular date was that there was a potential transaction. It wasn't until several days later that it was known that the company in question was considering a strategic transaction. It was in that context that the majority made the finding, specific to the facts in that case, that a potential strategic transaction could not be considered material.

[164] In *Kitmitto,* the majority set out a number of factors that supported their conclusion that, in that instance, the potential transaction in question was material. Stein points out that some of those factors, including a precise announcement date, are not present in this case. However, we note that "each case will undoubtedly have to depend upon its own circumstances and facts."[37]

[165] Our conclusion that the Perfect Pick Transaction was sufficiently likely or certain to occur to be material is based on our assessment of the facts when Kraft sent the October Email to Stein and when Stein bought WeedMD shares on November 21, 2017.

[166] With respect to when Kraft sent the October Email to Stein, those facts include:

a. WeedMD had been negotiating with Perfect Pick since February 2017 and the negotiations had progressed from exclusivity agreements to non-binding term sheets to draft definitive agreements, that Merker described in the email that Kraft forwarded to Stein, as "final";

b. in a June 4, 2017 e-mail to an unrelated party, Kraft had described the potential Perfect Pick Transaction as a "very compelling and massive greenhouse expansion plan which is a state of the art facility with 14 acres or 609,840 square feet under glass.", "the economics we negotiated are incredible and we will start phase I being 5 acres" and "we will be submitting to Health Canada for a satellite cultivation license in the next 30 days". Kraft instructed the third party not to trade on this information;

c. on June 17, 2017, the WeedMD board authorized J. Zakaria of Perfect Pick to sign an application to Health Canada by WeedMD as tenant, to become

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[36] *Kitmitto* at para 184

[37] *Donnini (Re)*, (2002) 25 OSCB 6225 (***Donnini****)* at para 17

a licensed producer under Health Canada regulations at the Perfect Pick Strathroy property;

d. on July 6, 2017, WeedMD applied to Health Canada for a production licence for dried cannabis for the Perfect Pick facility in Strathroy, indicating that WeedMD had entered into a lease agreement for the property from the owner;

e. on August 14, 2017, in response to a question from Health Canada about the portion of the Perfect Pick property that WeedMD would be leasing, WeedMD indicated in its cover letter that it intended to take the entire 220,000 square feet (five acres) but was starting with an initial one acre;

f. WeedMD's communication strategy, circulated among WeedMD senior management and the board on August 31, 2017, includes a proposed announcement of WeedMD's strategic partnership with Perfect Pick on September 6, later revised to September 12, 2017;

g. a draft news release about the Perfect Pick Transaction was circulated on September 14, 2017;

h. on September 15, 2017, Health Canada provided confirmation of WeedMD's readiness for a licence for the Perfect Pick facility, which Merker described in an e-mail of the same date as "(w)e received approval from HC today. This is NOT the license. The license will come after security is complete";

i. on September 18, 2017, in an internal email Merker wrote the following in response to a question about when the Health Canada approval should be announced: "We will release the approval prior to license – timing is in our hands. At the latest, PR will be concurrent with signing definitive agreements with [Perfect Pick]. We are very close to this, but again, can control timing";

j. a further revised draft news release about the Perfect Pick Transaction was circulated on September 21, 2017;

k. on October 11, 2017, Kurt Langille at WeedMD sent an e-mail within WeedMD introducing himself as the person responsible for coordinating

the new Strathroy project and advising that a coordination meeting had been set for October 17, 2017, "for our quickly upcoming" Strathroy facility;

l. on October 18, 2017, Pedro sent an e-mail to an individual at a greenhouse supply company and copied Langille stating "we are ambitious to get going on the Strathroy facility that you came to visit and quote. We now have a better understanding of the actual space we will be using. Kurt will be the site super";

m. on October 19, 2017, WeedMD announced entry into a letter of engagement with Eight Capital with respect to an equity offering to raise $15 million for "working capital and for production capacity expansion";

n. in an e-mail to a Zakaria Produce email address used by J. Zakaria on October 23, 2017, on which Kraft was copied, Scully stated that "I understand that we are ready to sign – there are a couple of small issues that have not yet been discussed but Jerry said they are small issues. I am sure we can get through it tomorrow. Mike is coming to London tomorrow – could be a good time for us all to be together to sign";

o. the subject line of the October Email was "PPF final agreements". That subject line, in our view, indicates that the negotiations were well advanced and near completion; and

p. there was no evidence before us that there were any other properties that were viable, serious alternative contenders to the Perfect Pick Transaction that had progressed to any significant extent. Our consideration of whether WeedMD was actively pursuing other expansion alternatives is below.

[167] The majority in *Kitmitto* referred to the importance of considering the "indicia of interest" when assessing the materiality of a potential transaction.[38] All the facts and factors listed above, in our view, indicate significant indicia of interest by both WeedMD and Perfect Pick, which supports a conclusion that the planned Perfect Pick Transaction was sufficiently likely or certain to occur such that it

[38] *Kitmitto* at para 187, citing *Agueci (Re),* 2015 ONSEC 2 (***Agueci***) at para 112

(including the Draft Lease considered on its own) was material at the time Kraft sent the October Email to Stein.

[168] We conclude that nothing material happened between October 23, 2017, and the date of Stein's trades on November 21, 2017, to detract from the materiality of the planned Perfect Pick Transaction. Instead, events subsequent to October 23, 2017, if anything, simply heightened the certainty of the Perfect Pick Transaction closing.

[169] On October 27, 2017, Merker emailed "Final Docs" to J. Zakaria. The attached version of the Draft Lease was amended to have the rent payable monthly in arrears and to show the Commencement Date as a blank date in October. J. Zakaria subsequently, on October 30, 2017, asked for a minor change to the Draft Option to Purchase with respect to HST.

[170] The only other developments in this period support the conclusion that the Perfect Pick Transaction (including the Lease) closing was even more certain. The $15 million bought deal financing for working capital and expansion was announced on November 2, 2017. On that same day WeedMD's board authorized management to sign the Perfect Pick Transaction agreements (including the Lease and the Option to Purchase) for the greenhouse expansion project at Perfect Pick in Strathroy. As early as November 10, 2017, WeedMD planned to issue a news release about the Perfect Pick Transaction on November 16, 2017, which date was subsequently pushed out on November 11, 2017, to November 21, 2017.

[171] Stein submits that if the panel were to find that the Draft Lease was material when provided to him on October 23, 2017, the quality of materiality was nonetheless diminished and extinguished due to the time that elapsed between October 23 and when Stein purchased WeedMD shares on November 21, 2017.

[172] In support of this submission, Stein cites *Waheed (Re)*[39] and that decision's consideration of the probability/magnitude test. In *Waheed*, the Tribunal found that the material facts that had been shared with Waheed were contingent and that over an extended negotiation period the terms that had been shared ceased

[39] 2014 ONSEC 23 (***Waheed***)

to be correct or relevant. Therefore, there was no probability that the originally contemplated transaction would occur, and the facts associated with it ceased to be material.

[173] Unlike in *Waheed*, the material terms in the Draft Lease that Kraft shared with Stein remained the same in the final Lease. The passage of time and events between the information being shared with Stein and the Announcement did not, in fact, result in the information that was shared with Stein ceasing to be material. Stein's expressed "viewpoint" that the probability of the Perfect Pick Transaction closing diminished substantially between October 25, 2017, and November 21, 2017, was not based on any particular facts or information (other than the passage of less than one month of time) and his subjective "viewpoint" in this regard is not relevant to or determinative of the question of materiality.

c. **Allegation that WeedMD was actively pursuing other alternatives to the Perfect Pick Transaction**

[174] As a further example that the planned Perfect Pick Transaction was contingent and uncertain, Kraft submits that WeedMD was simultaneously and actively considering other greenhouses and greenhouse options for its planned expansion at the same time it was negotiating with Perfect Pick.

[175] Merker testified that WeedMD was looking at several different expansion opportunities. WeedMD had, for example, purchased the property it initially rented in Aylmer and considered expanding on that property as one of its options. Merker also confirmed that he and his WeedMD colleagues toured several different properties looking for expansion opportunities, including in Ottawa. Merker did not provide a specific timeframe for when these other options were considered. His evidence was that he was not aware of any alternate expansion opportunities that WeedMD was pursuing between July 11 and November 22, 2017.

[176] Pedro testified that WeedMD had looked at properties, including greenhouses, in Ottawa, Niagara, Montreal and the Bruce peninsula. Pedro stated that WeedMD was looking at these other properties in August, 2017, to "keep our options open" and that WeedMD was "always looking". Pedro also stated that he had been to the Ottawa property in February 2017, and that it "needed substantial

work". He went on to state that Ottawa was "truly a contender but, at the same time, I think this was just a very friendly conversation that was going on. So it was just more work to get Ottawa done in comparison to Perfect Pick". Pedro also stated that WeedMD's quality assurance team would have been looking at the Ottawa facility to consider issues such as water quality and pesticide use in October 2017.

[177] While we accept Pedro's evidence that WeedMD may have been continuing to look at the Ottawa facility during October 2017, there was no evidence to suggest that WeedMD's engagement regarding the Ottawa facility had progressed beyond the "friendly conversation" or in any way paralleled the extent of the highly advanced detailed negotiations and planning in connection with the Perfect Pick Transaction.

[178] Several of WeedMD's public statements referred to having building permits in hand and $6 million available, which may have suggested that expansion at the existing Aylmer facility was also an option. WeedMD did have an option to lease an additional four acres of land neighbouring its Aylmer facility. Exercising that option would have provided WeedMD with five acres. Pedro testified that WeedMD did not proceed with that option. There were no building permits for expansion of the Aylmer facility tendered in evidence. We conclude that expanding operations at the Aylmer site was also not seriously in contention as an expansion option during the Material Time.

[179] While WeedMD may have visited other potential sites and while there may have been multiple potential alternative properties that may have been suitable for WeedMD to expand its cannabis production, there is no evidence that WeedMD was pursuing any alternative properties to the same extent as they were the Perfect Pick Strathroy property at any point, including during the Material Time. Nor was there any evidence that any discussions about alternative opportunities had progressed to the same advanced point as the planned Perfect Pick Transaction.

[180] With respect to the Perfect Pick Transaction, the evidence before us includes term sheets, exclusivity agreements, draft agreements, draft communication plans including target announcement dates, a draft press release announcing the

transaction, an application to Health Canada identifying the Perfect Pick location as the site for WeedMD's expanded cannabis production, documents identified as "final agreements", the CEO's understanding that the parties were ready to sign, the creation of a retrofit team with a project lead, and evidence that the team was meeting to discuss retrofitting the Perfect Pick facilities.

[181] Were these other potential expansion sites seriously being considered by WeedMD at any time, including during the Material Time, we would expect there to have been some evidence akin to that with respect to the planned Perfect Pick Transaction, demonstrating active negotiations or detailed assessments and evidence of more specific expansion plans for those sites. No such evidence was tendered. We therefore conclude that none of these other properties were in fact serious contenders for WeedMD's expansion during the Material Time.

[182] We now consider the respondents' submissions that the information Kraft shared with Stein and Stein learned from Kraft had been generally disclosed.

4.3.1.e The planned Perfect Pick Transaction (and terms of related draft agreements, including the Draft Lease) had not been generally disclosed

[183] In order to prove contraventions of ss. 76(1) and (2) of the Act, Staff must establish that the information Kraft provided to Stein and the information Stein learned from Kraft had not been generally disclosed or widely publicized at the time Kraft provided it to Stein as well as at the time Stein traded.[40] We find, for the reasons below, that the material facts about the Perfect Pick Transaction (including the terms contained in the Draft Lease and the Draft Option to Purchase) had not been generally disclosed either at the time Kraft sent the October Email to Stein or at any time prior to Stein's trades on November 21, 2017.

[184] Staff submits that there is no evidence that the Perfect Pick Transaction and related expansion or any related details had been generally disclosed by October 23, 2017. Neither respondent identified a single instance of general disclosure, by WeedMD or any other party, of the Perfect Pick Transaction, related expansion or any related details prior to the Announcement. Merker's evidence

[40] *Agueci* at para 113

was that the Announcement on November 22, 2017, was the first time WeedMD had announced the expansion. He also testified that he was unaware of any public announcement of the expansion prior to November 22, 2017.

[185] Staff also submits that had the Perfect Pick Transaction, related expansion and details been generally disclosed prior to the Announcement, there would not have been the significant market reaction to the Announcement on November 22, 2017.

[186] Kraft submits that WeedMD's growth strategy was widely disclosed in the market prior to the Announcement. Kraft clarified that he was not saying there was general disclosure of the Perfect Pick Transaction and related expansion. Rather, in assessing materiality, what is important is how incremental the information provided to Stein in the October Email was to what was already known in the marketplace.

[187] Kraft submits that it was generally known that WeedMD was seeking to expand to take advantage of the adult recreational use market, that it had spoken about an imminent expansion, and that it had raised $15 million to fund an expansion as well as to provide working capital.

[188] Kraft submits that the material information that moved the market after the Announcement was the cost of the expansion and the favourable costs to retrofit the Perfect Pick greenhouse, and not the details about the Perfect Pick Transaction and related expansion that can be gleaned from the Draft Lease. The materials provided to the WeedMD board at its November 2, 2017, meeting included a peer analysis of the costs of building a new greenhouse, for example at the existing Aylmer property, versus retrofitting an existing greenhouse. That analysis showed that while retrofitting was not necessarily less expensive, given the condition of the Perfect Pick greenhouse and other factors, the costs of retrofitting Perfect Pick's greenhouse were among the lowest.

[189] Stein submits that any facts conveyed to him by Kraft prior to his WeedMD trades, to the extent that they may have been material, had already been publicly disclosed. Stein submits that WeedMD had generally disclosed that it was engaged in what WeedMD described as a compelling expansion, as evidenced by the following:

a. public statements by Merker regarding WeedMD's exciting business opportunities compared to its competitors, including his statement in an interview on May 8, 2017, that WeedMD had been working on an expansion plan that included a license for a second site;

b. Merker's statements on May 24, 2017, during a Reddit "Ask Me Anything" event that WeedMD had plans to expand to 220,000 square feet (or approximately 5 acres) in its third quarter to meet the demands of the impending recreational market, and that WeedMD was exploring alternatives to accelerate growth plans as the company was expanding aggressively;

c. WeedMD's press releases in April, May, August, September and October 2017, that included the following statements:

   i. on April 27, 2017, WeedMD had the option to acquire 4 acres of land neighboring the Aylmer facility, which along with the existing 4 acres of land at that facility could support 220,000 square feet of new production space and with $6 million dollars in working capital and building permits approved, WeedMD was well positioned to deliver on its next phase of growth;

   ii. on May 1, 2017, WeedMD announced that it had secured a sales licence from Health Canada for the sale of dried cannabis products and stated that it would be expanding to 220,000 square feet, to be completed in early 2018, repeating that the company had $6 million dollars in working capital and building permits in hand;

   iii. on August 30, 2017, WeedMD announced its second quarter results and stated that it was "working on a very compelling expansion opportunity to position the company strategically ahead of the future adult-use market";

   iv. on September 26, 2017, WeedMD announced entering into exclusive cannabis supply contracts with three long-term care and retirement homes and stated that the company "is advancing a very compelling expansion plan to position itself strategically for

the future adult-use market which it expects to unveil in the coming weeks."; and

v. on October 19, 2017, WeedMD announced the completion of a $15 million convertible debenture bond deal and stated that the use of proceeds would be for working capital and production capacity expansion.

[190] The Act does not define the term "generally disclosed". Previous Tribunal decisions have determined that information was generally disclosed if:

a. the information has been disseminated in a manner calculated to effectively reach the marketplace; and

b. the public investors have been given a reasonable amount of time to analyze the information.[41]

[191] NP 51-201 provides guidance on how companies may satisfy general disclosure, namely by:

a. news releases distributed through a widely circulated news or wire service; and

b. announcements made through press releases or conference calls that interested members of the public may attend or listen to either in person, or by telephone, or by other electronic transmission (including the Internet).[42]

[192] In our view, none of these public statements or press releases amounted to public disclosure of the planned Perfect Pick Transaction or related draft agreements, including the Draft Lease. The various statements and announcements listed above were aspirational, whereas the Perfect Pick Transaction was concrete. At most, the various statements and announcements demonstrate that WeedMD management was aware that, as Pedro testified, "expansion was the name of the game" and they wanted to assure their shareholders that they were pursuing a strategy to take advantage of the

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[41] *Cheng* at para 50, *Green v Charterhouse Group Can Ltd*, (1976), 12 OR (2d) 280, *In the Matter of Harold P Connor* (1976) Volume II OSCB 149 at paras 174-177

[42] NP 51-201, s.3.5(4)

potential adult recreational use market. We consider the WeedMD prior public statements that it was "working on" and "advancing" a compelling expansion opportunity or plan to be substantively and materially different than the fact of the planned Perfect Pick Transaction and terms of the related draft agreements, including the Draft Lease.

[193] While the relative cost of retrofitting the Perfect Pick facility may have been a factor in the market impact of the Announcement, it was not part of the information provided to Stein in the October Email. Therefore, we do not include it in our analysis of whether the information Kraft provided to Stein and Stein learned from Kraft constituted material facts. We addressed the issue of whether Staff has met its evidentiary burden on the issue of market impact in section 4.3.1.d.i above.

[194] We also conclude that there is no evidence that the planned Perfect Pick Transaction and terms of the related draft agreements, including the Draft Lease, had been generally disclosed between the October Email and Stein's trades in WeedMD shares on November 21, 2017.

[195] Between the October Email and the Announcement, WeedMD made only one public statement. On November 2, 2017, WeedMD announced the closing of its bought deal financing. That press release stated the net proceeds from the financing would be used "for working capital and for production capacity expansion." No details of the planned Perfect Pick Transaction or related expansion were included in that press release.

4.3.1.f Conclusion regarding the tip about the Perfect Pick Transaction and related expansion

[196] For all of the foregoing reasons we have concluded that the planned Perfect Pick Transaction, including the terms of the Draft Lease and Draft Option to Purchase, constituted a material fact that Kraft selectively disclosed to Stein and that had not been generally disclosed. We also conclude that the fact of and terms of the Draft Lease, considered alone, constituted a material fact that Stein had knowledge of and that had not been generally disclosed at the time he traded.

[197] We now turn to our analysis of whether the Announcement Date was a material fact or material change and whether Kraft tipped Stein about the Announcement Date.

4.3.2 Alleged tip concerning the Announcement Date

4.3.2.a The Announcement Date was a material fact and a material change

[198] We have found the planned Perfect Pick Transaction (and related Draft Lease and Draft Option to Purchase) to be material facts. Therefore, it naturally and logically follows that the Announcement Date of the Perfect Pick Transaction is also a material fact. In addition, the Announcement Date was a material change as evidenced by execution of the definitive agreements and WeedMD's filing of a Material Change Report. That report was filed on the basis that the Expansion and the Announcement on November 22, 2017, constituted a "material change".

4.3.2.b Did Kraft tip Stein about the Announcement Date?

[199] There is no direct evidence of a second tip about the Announcement Date. Any conclusion that such a tip occurred must be based on circumstantial evidence.

[200] We considered the following factors:

a. Stein's explanation for trading on November 21;

b. Stein's opportunities to learn of the Announcement Date; and

c. the characteristics of Stein's trading on November 21-23;

before concluding that on a balance of probabilities, a second tip from Kraft to Stein about the Announcement Date did not occur.

4.3.2.c Stein's explanation for trading on November 21

[201] Stein and Kraft both deny that Kraft tipped Stein about the Announcement Date. Stein submits that when he purchased WeedMD shares on November 21, 2017, he had no knowledge that a transaction had been agreed upon, nor that the Announcement would take place the following day.

[202] Rather, Stein testified that he purchased WeedMD shares on November 21 because of further progress on Bill C-45 which would permit adult-use recreational markets for cannabis.

[203] Stein submits that a number of events occurred on November 21. There was the passage of a motion allocating time for a third and final reading of Bill C-45 before the House of Commons and a press release by Health Canada announcing consultation on the proposed regulation for cannabis. WeedMD's Q3 interim financials were also expected to be disclosed on or before November 30.

[204] Stein also testified that he liked WeedMD as an investment because it was a niche player in the market, he was familiar with the company and he respected its leaders.

[205] Staff submits that Stein's testimony explaining the timing of his November 21 share purchases is not credible given that he did not purchase WeedMD shares as Bill C-45 progressed through each stage in the House of Commons or the Senate. For example, Stein did not purchase WeedMD shares after the first or second reading of Bill C-45 in the House of Commons. Nor did Stein purchase later in November when the Bill passed its third and final reading in the House of Commons. Similarly, Stein did not purchase any shares as the Bill progressed through the Senate and was finally passed in June 2018.

[206] We find Stein's evidence about his rationale for purchasing WeedMD shares on November 21 to be unsatisfactory. Stein only purchased WeedMD shares and no shares of other major cannabis producers that presumably would have also been impacted by the Bill C-45 news. In addition, purchasing WeedMD shares on November 21 after selling his entire WeedMD position less than a week earlier suggests that Stein's outlook on WeedMD as an investment had changed.

[207] While we question the timing and rationale for Stein's purchase of WeedMD shares, we are not convinced on a balance of probabilities that the trades resulted from Stein being tipped by Kraft about the Announcement Date.

4.3.2.d Opportunities to learn the Announcement Date

[208] It is clear that Kraft and Stein were in regular contact. They were long-time friends, discussed personal matters and discussed business matters unrelated to WeedMD. However, with respect to opportunities for Kraft to communicate the Announcement Date to Stein, we take note that they had four brief calls between November 11 when the Announcement Date was set and November 16.

[209] We accept their joint submission that they had fewer opportunities to communicate between November 16 and November 22 due to Kraft's travel schedule. The cell phone records bear this out. There were no documented phone calls between them between November 16 and November 22 other than one call from Stein to Kraft which appears to have not connected. While it is true that they may have communicated via landline or text messages, we do not find that the frequency of communication was unusually high during this period. In *Rosborough (Re),*[43] it was found that the existence of communication opportunities, by itself, was a neutral factor in determining whether or not the respondent acquired knowledge via tipping.

[210] We attach little weight to the fact that Stein had opportunities to learn of the Announcement Date from Kraft. Stein and Kraft may have communicated during the time period but we cannot conclude that any such communication was about the Announcement Date.

4.3.2.e Characteristics of Stein's trading on November 21-23

[211] The Tribunal has identified certain factors that may suggest that trading is suspicious – specifically, "well-timed, highly uncharacteristic, risky, and highly profitable purchases," that are a "fundamental shift in the nature of [the respondents'] trading."[44]

[212] Stein repeatedly stated that he reviews his portfolio on a weekly or bi-weekly basis. He further testified that he generally puts in day orders, and if a day order is not filled by the end of the day, his broker calls and they extend the order accordingly.

[213] On November 21 at 2:30 pm Stein entered a day limit order to purchase 45,000 shares of WeedMD. Stein submits that the size of the trade was not significant in the overall context of his portfolio. On November 22 Stein sold 20,000 of the shares and on November 23 he sold the remaining 25,000 shares resulting in a profit of $29,345 and a 43% return on his investment.

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[43] 2022 ONCMT 11 (***Rosborough***) at paras 45-50

[44] *Suman (Re)*, 2012 ONSEC 7 (***Suman***) at para 342

[214] Staff submits that Stein's trading was uncharacteristic. Staff submits that it was unusual that Stein entered day limit orders for WeedMD shares on November 21 compared to Stein's prior purchases of WeedMD shares in September, where the trade orders remained open for a week. Staff also submits that the November 21 share purchases reflected a shift in Stein's trading pattern from reviewing his portfolio on a weekly or bi-weekly basis and, depending on other opportunities or cash requirements, buying, selling or reinvesting shares, to a trading strategy that is more akin to that of a day trader.

[215] We conclude that entering day limit orders, and extending them if required, was likely Stein's usual method of trading. While it is true that Stein sold his WeedMD shares on November 22 and November 23, only two days after purchasing them, we attribute those sales to the opportunity to take the profit resulting from the Announcement.

[216] When asked why he sold his WeedMD shares on November 22, Stein was evasive. There had been no change in the status of Bill C-45 to prompt a sale if it was the Bill that was motivating Stein's purchase and sales of WeedMD. In our view, Stein had no reason to be evasive, yet he was so insistent in denying advance knowledge of the WeedMD press release announcing the Perfect Pick Transaction and related expansion, that he continued to deny knowing about it once it was publicly released. The WeedMD press release would have been the logical explanation for Stein selling his shares of WeedMD on November 22 and 23.

[217] While there are certainly facially suspicious circumstances surrounding Stein's trading in WeedMD shares in late November – notably the near-perfect timing of the trades and his evasive explanation for the sale of the shares immediately following the Announcement – we nevertheless cannot conclude that it was more probable than not that Stein bought WeedMD shares on November 21 with knowledge received as a result of a second tip from Kraft to Stein about the Announcement Date. The evidence about opportunity for Kraft and Stein to communicate is a neutral factor and Stein's trading pattern was not out of the ordinary.

[218] We now turn to our consideration of Kraft's submission that his selective disclosure of the Perfect Pick Transaction documents to Stein was made in the necessary course of business.

4.4 Did Kraft communicate with Stein in the necessary course of business?

4.4.1 Introduction

[219] Kraft asserts that he sought Stein's advice on the Draft Lease contained in the October Email in the "necessary course of business". Kraft further asserts that, in the event that we find that the October Email contained MNPI, the "necessary course of business" language in the prohibition against tipping in s. 76(2) of the Act operates in the circumstances to preclude any finding of a breach of this section by Kraft.

[220] The "necessary course of business" language is embedded as a part of the prohibition against tipping under the Act. Section 76(2) of the Act provides:

> **(2) Tipping** –No issuer and no person or company in a special relationship with an issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed. *[emphasis added]*

[221] We have determined that Kraft's communication of the October Email to Stein was not in the "necessary course of business" within the meaning of s. 76(2) of the Act. Our reasons are set out below.

[222] Before considering the substance of Kraft's submission, we address two preliminary issues:

a. who bears the onus of establishing whether a communication was (or was not) made in the necessary course of business?; and

b. the applicable test for establishing that a communication was made in the necessary course of business.

[223] We note that Staff and Kraft agreed that there do not appear to be any prior decisions directly considering or applying the "necessary course of business" provision in s. 76(2) of the Act. As such, much of what follows is being considered for the first time by this Tribunal.

4.4.2 Who bears the onus of establishing whether a communication was (or was not) made in the necessary course of business?

[224] Staff and Kraft fundamentally disagree about who bears the onus of establishing whether a communication was (or was not) made in the "necessary course of business".

[225] Staff submits that Kraft bears the burden of establishing that the communication between Kraft and Stein was in the "necessary course of business", citing Tribunal decisions, including *Lydia Diamond Exploration of Canada Ltd (Re)*[45], showing that respondents in enforcement proceedings bear the burden of establishing exemptions upon which they seek to rely.[46]

[226] Staff submits that this is consistent with the approach taken in the large number of past decisions of this Tribunal involving allegations of illegal tipping under s. 76(2) of the Act where specific findings regarding the necessity of the selective disclosure by respondents are notably absent.[47]

[227] Staff also submits that a conclusion that Kraft bears the burden is consistent with the requirement under s. 47(3) of the *Provincial Offences Act*[48] (**POA**) that governs any quasi-criminal proceedings brought in Provincial Court for breaches of the Act (including for breaches of s. 76(2)). Section 47(3) of the POA unambiguously confirms that in quasi-criminal proceedings brought to Provincial Court under the Act:

> "(t)he burden of proving that an authorization, exception, exemption or qualification prescribed by law operates in favour of the defendant is on the defendant, and the prosecutor is not required, except by way of rebuttal, to prove that the authorization, exception, exemption or qualification does not operate in favour of the defendant."

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[45] (2003), 26 OSCB 2511 at paras 83-84 (***Lydia Diamond***)
[46] See *Black Panther Trading Corp (Re),* 2017 ONSEC 1 (***Black Panther***) at para 95, citing *Lydia Diamond* at para 83; *Meharchand (Re),* 2018 ONSEC 51 (***Meharchand***) at para 95, citing *Lydia Diamond* at para 83
[47] *MCJC Holdings Inc (Re)*, (2003) 26 OSC 8206; *George (Re)*, 1999 CarswellOnt 236 (***George***); *Waheed; Azeff; Suman*; *Donnini*; *MI Developments Inc (Re)*, 2009 ONSEC 47; *Kitmitto*; *Rosborough*
[48] RSO 1990, c P.33

[228] Kraft submits that Staff bears the burden. He relies on two recent insider tipping and trading decisions of the Tribunal, *Rosborough* and *Kitmitto* as well as policy considerations that he says support his position. Relying upon criminal law authority,[49] he also submits that the "necessary course of business" language in s. 76(2) is to be construed as an element of the offence or charging provision that must be considered in every case, as distinct from an affirmative defence that is only available in particular circumstances, thus requiring Staff to prove that the communication was not made "in the necessary course of business" in every case.

[229] Pared down to the essence of their respective submissions, the disagreement between Staff and Kraft is that Kraft says that the "necessary course of business" language in s. 76(2) is to be construed as an element of the breach (or offence) to be proved by Staff, whereas Staff says that such language is to be construed as an exception to the prohibited act of tipping, the availability of which is for a respondent to prove.

[230] The three decisions that Staff relies upon for the principle that respondents in enforcement proceedings bear the burden of establishing exceptions upon which they seek to rely[50] deal exclusively with breaches of s. 25(1) and s. 53(1) of the Act (trading without being registered and distributing a security without a prospectus, respectively). Both of these provisions of the Act are subject to multiple exemptions that are specifically described as "exemptions" under Ontario securities laws.

[231] While Staff provided a number of other decisions of this Tribunal[51] where the burden was placed on a respondent to establish the availability of an exemption in proceedings for breach of s. 25(1) and s.53(1) of the Act, we were not provided with any other Tribunal decisions considering the applicability of the principle adopted in these decisions (*i.e.,* a respondent bears the burden of

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[49] *R. v Keegstra*, 1994 ABCA 293 at para 16, rev'd on other grounds [1996] 1 SCR 458

[50] See *Black Panther* at para 95, citing *Lydia Diamond* at para 83 and *Meharchand* at para 95, citing *Lydia Diamond* at para 83

[51] *Limelight Entertainment Inc (Re),* 2008 ONSEC 4 at paras 142 and 144; *Mega-C Power Corp (Re),* 2010 ONSEC 19 at para 248; *Paramount* at para 61; and *York Rio Resources Inc (Re),* 2013 ONSEC 10 at para 99

proving the availability of an exemption or exception) to breaches of other sections of the Act.

[232] Despite the absence of Tribunal authority, we accept that the principle adopted in the Tribunal decisions Staff cited should extend to other sections of the Act where, properly construed, a breach of the Act is made subject to an exemption or exception. Additionally, extending this principle to other sections of the Act is entirely consistent with s. 47(3) of the POA quoted above.

[233] To not find that the principle extends to breaches of other sections of the Act could result in a nonsensical difference in how exceptions or exemptions are treated depending on whether Staff elects to pursue a breach of the Act in an administrative enforcement proceeding before this Tribunal or alternatively elects to proceed by way of a quasi-criminal proceeding in Provincial Court. The former choice would require Staff to establish that an exception or exemption does not apply. The latter choice would result in the burden of establishing the availability of the same exception or exemption falling to the respondent.

[234] Kraft submits that the principle in *Lydia Diamond* and the other cases cited by Staff does not extend to the "necessary course of business" language in s. 76(2) of the Act because:

a. the registration and prospectus exemptions to the requirements in s. 25(1) and s. 53(1) of the Act are set out in separate provisions of the Act and are clearly identified as exemptions, whereas, in contrast, the "necessary course of business" language is contained in the same provision of the Act that contains the tipping prohibition and does not refer to an exception or exemption;

b. the exemptions to the requirements in ss. 25(1) and 53(1) are detailed, prescriptive and leave no, or little, room for doubt, in contrast to the "necessary course of business" language;

c. the registration and prospectus exemptions do not arise in the context of real-time decision making and therefore can be the subject of an application for exemptive relief in cases of doubt; and

d. the availability of a registration or prospectus exemption is not a question that arises in every circumstance where ss. 25(1) and 53(1) apply.

[235] In our view, s. 76(2) of the Act is properly construed as a broad prohibition against selective disclosure of MNPI by an issuer or person or company in a special relationship with an issuer, subject to the stated narrow exception, proviso or carve-out for communications "in the necessary course of business".

[236] In arriving at this conclusion, we have taken into account the purposes of the Act, the principles and rationale that apply equally to the prohibition against insider trading and tipping under the Act as well as the specific language of s. 76(2) and related provisions of the Act, including s. 76(3).

[237] The purposes of the Act that are particularly relevant to our consideration of s. 76(2) are:

a. to provide protection to investors from unfair, improper or fraudulent practices; and

b. to foster fair, efficient and competitive capital markets and confidence in capital markets.[52]

[238] The prohibition against insider trading (as well as the prohibition against tipping, given that it is an enabler of insider trading) exists for three principal reasons:

a. fairness requires that all investors have access to information about an issuer that would likely affect the market value of the issuer's securities;

b. insider trading may undermine investor confidence in the capital markets; and

c. capital markets operate efficiently on the basis of timely and full disclosure of all material information.[53]

[239] We do not accept Kraft's submission that because the "necessary course of business language" is contained in s. 76(2) itself rather than in a separate provision, it cannot properly be construed as an exception to the tipping prohibition in the Act. Kraft's submission in this regard is inconsistent with the

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[52] Act, s 1.1

[53] *Kitmitto* at para 155; *Suman* at para 22

fact that s. 25(1) itself, which is a prohibition recognized to be subject to an exception or exemption that must be established by a respondent, refers to the exemption in the very same provision that creates the prohibition. Section 25(1) provides:

> Unless a person or company is exempt under Ontario securities law from the requirement to comply with this subsection, the person or company shall not engage in of hold himself, herself or itself as engaging in the business of trading in securities […][*emphasis added*]

[240] We also do not accept Kraft's submission that because the "necessary course of business" language in s. 76(2) is not expressly identified as an "exception" in that section, it does not operate as an exception.

[241] In our view, the language "other than" that precedes "in the necessary course of business" in s. 76(2) clearly signals an exception and operates as a synonym to "except". Further, in concluding that the "in the necessary course of business" language in s. 76(2) should be construed as an exception to the prohibition against selective disclosure of MNPI, we have not construed s. 76(2) in isolation[54] but have also taken into account the language in the related s. 76(3) that prohibits selective disclosure of MNPI specifically in the context of take-over bids and significant business transactions, where communications "in the necessary course of business" are clearly stated to be an exception to the prohibition. Section 76(3) of the Act provides:

> **Same --**No person or company that is considering or evaluating whether, or that proposes,
>
> (a) to make a take-over bid, as defined in Part XX, for the securities of an issuer;
>
> (b) to become a party to a reorganization, amalgamation, merger, arrangement or similar business combination with an issuer; or
>
> (c) to acquire a substantial portion of the property of an issuer,

[54] *Pezim v British Columbia (Superintendent of Brokers)*, [1994] 2 SCR 557 at para 76

> shall inform another person or company of a material fact or material change with respect to the issuer before the material fact or material change has been generally disclosed except where the information is given in the necessary course of business relating to the take-over bid, business combination or acquisition. *[emphasis added]*

[242] We also do not accept Kraft's additional submissions. Kraft's submissions that the "in the necessary course of business" language is not sufficiently specific to be an exception to the prohibition in s. 76(2) and his other attempts to draw factual distinctions between the operation of the registration and prospectus exemptions and the "in the necessary course of business" exception are not persuasive. Furthermore, because the burden of proving whether selective disclosure of MNPI was made (or not made) "in the necessary course of business" was not in dispute in either *Rosborough* or *Kitmitto* we do not find Kraft's submissions that those decisions confirm that Staff is required to prove that a selective disclosure was made "other than in the necessary course of business" to be persuasive.

[243] Given our conclusion that the "necessary course of business" language is an exception to the tipping prohibition in s. 76(2) that Kraft bears the burden of establishing, we use the shorthand **"NCOB exception"** to refer to that language.

4.4.3 The test for establishing the NCOB exception

4.4.3.a Is the NCOB exception established on an objective or subjective/objective standard?

[244] Staff submits that the NCOB exception can be established only where the selective disclosure of MNPI is made in the "necessary course of business" on a purely objective basis. The subjective belief of the tipper that selective disclosure was necessary, even if reasonably held, is insufficient to establish the NCOB exception where the selective disclosure is found not to be objectively necessary.

[245] Kraft submits that the NCOB exception is established on a subjective standard (with an objective element), that is as a subjective/objective test. Specifically, Kraft submits that whether selective disclosure is "in the necessary course of business" must be assessed having regard to the subjective beliefs of the alleged

tipper. Under the subjective test propounded by Kraft, the Tribunal would also determine on an objective basis, applying a reasonability standard that:

a. the disclosure was made in good faith; and

b. the disclosure was made in a context that distinguishes it from "normal" or "ordinary" course of business communications.

[246] In other submissions, Kraft articulated the subjective/objective test somewhat differently – namely, as one requiring a subjective belief in the necessity of the disclosure, which subjective belief is objectively reasonable.

[247] We have considered these submissions and have concluded that the NCOB exception is to be established on an objective basis. Our reasons for so concluding are set out below.

[248] The Supreme Court of Canada's leading authority on statutory interpretation is *Rizzo v Rizzo Shoes Ltd* (***Rizzo***).[55] In interpreting s. 76(2) and the NCOB exception, we are required to apply a contextual and purposive approach and read the words of the Act in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the objectives of the Act, and the intention of the Legislature.

[249] We are also mindful of the interpretive framework in the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*[56] which is consistent with *Rizzo* and also recognizes that the specialized expertise of administrative decision makers may sometimes lead them to rely, in interpreting a statutory provision, on considerations that a court may not have thought to employ.

[250] We have concluded that reading the words of s. 76(2) in their grammatical and ordinary sense, there is nothing in the language or the articulation of the NCOB exception that suggests or indicates that the NCOB exception rests on the subjective belief of a tipper or is subject to anything other than an objective test.

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[55] [1998] 1 SCR 27 (SCC) at para 21

[56] 2019 SCC 65 at paras 117-120

[251] Kraft submits that the absence of the term "reasonably" or "reasonable" as a modifier of the NCOB exception language in s. 76(2) indicates that a subjective standard applies to establish the NCOB exception, unless an objective standard is otherwise apparent from the context. In support of this submission, Kraft cites *Connolly v Canada (National Revenue)*[57] where the Federal Court of Appeal concludes that the term "reasonable" when modifying "error" and "steps" in s. 204.1(4) of the *Income Tax Act*[58] (as in, "reasonable error" and "reasonable steps") denotes how an objective observer, with full knowledge of the pertinent facts, would view the particular action taken. Also in support of this submission, Kraft cites *Hutchinson*[59] which confirms that what is a "material fact" under the Act, defined as "a fact that significantly affects, or would reasonably be expected to have a significant effect on, the market price or value of such securities"[60] is to be determined objectively. While we do not take issue with the point that the inclusion of a "reasonableness" modifier in a statutory provision generally imports some element of objectivity, we reject Kraft's proposition that the absence of a "reasonableness" modifier means that a subjective standard necessarily applies (except perhaps where there is an absence of a reasonableness modifier for words that in and of themselves inherently import subjectivity, such as "belief"). Neither of the cases cited by Kraft stands for the proposition that he advances.

[252] Kraft also submits that the term "necessary" in the NCOB exception language means that the NCOB exception must be determined on a subjective basis because whether something is "necessary" is always assessed with reference to the state of mind of the actor involved in the activity in issue. In support of this submission, Kraft cites a single decision of the Ontario District Court in *R. v Staples*[61] that considered the circumstances in which a peace officer may require a breath test under s. 234.1 of the *Criminal Code.*[62] In the circumstances of that

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[57] 2019 FCA 161 at para 64

[58] *Income Tax Act,* RSC 1985, c 1 (5th Supp)

[59] *Hutchinson* at para 119

[60] Act, s 1(1), "material fact"

[61] 1986 Carswell Ont 37 (***Staples***)

[62] *Criminal Code*, R.S.C. 1970, c. C-34, s. 234.1(1). This provision was repealed by s. 36 of the *Criminal Law Amendment Act, 1985*, S.C. 1985, c.19. See *R v Thomsen*, [1988] 1 SCR 640 at para 7

case, the Court determined that if the words "where necessary" in s. 234.1 of the *Criminal Code* are to be given any logical meaning they "have to refer to some extent to the subjective state of mind of the officer".[63]

[253] We find this case to be of limited assistance to us and do not accept it as standing for the sweeping proposition for which it is advanced by Kraft. The Court's decision that "necessary" in the context of s. 234.1 of the *Criminal Code* invokes the subjective state of mind of the officer is readily explained by the fact that the *Criminal Code* provision (now repealed) expressly provided that necessity is to be assessed from the perspective of the peace officer. There is no similar language in s. 76(2) that invokes the subjective state of mind of the tipper. Section 234.1 of the *Criminal Code* provided:

> Where a peace officer reasonably suspects that a person who is driving a motor vehicle or who has the care or control of a motor vehicle, whether it is in motion or not, has alcohol in his body, he may, by demand made to that person, require him to provide forthwith such a sample of his breath as in the opinion of the peace officer is necessary to enable a proper analysis of his breath to be made by a means of an approved road-side screening device and, where necessary, to accompany the peace officer for the purpose of enabling such a sample of his breath to be taken. *[emphasis added]*

[254] Our conclusion that the plain meaning of the words of s. 76(2) indicates that an objective standard applies to the NCOB exception and the exception does not rest on any subjective belief of the tipper is further confirmed by other provisions of the Act that provide two defences to the tipping prohibition in s. 76(2) and that expressly refer to the tipper's belief, as well as clause 134(2)(d) in Part XXIII of the Act that provides a defence to civil liability for tipping where the person or company in question "reasonably believed that the material fact or material change had been generally disclosed" *[emphasis added]*.

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[63] *Staples* at paras 7 and 10-11

[255] These other provisions make it clear that when the Legislature intends to invoke a subjective standard or a modified subjective standard that is subject to objective reasonableness, it has done so. The two provisions of the Act that provide defences to the tipping prohibition are:

a. subsection 76(4) of the Act:

> **Defence --**No person or company shall be found to have contravened subsection (1), (2), (3) or (3.1) if the person or company proves that the person or company reasonably believed that the material fact or material change had been generally disclosed. [*emphasis added*]; and

b. subsection 175(5) of the General Regulation under the Act:[64]

> A person or company is exempt from subsection 76 (1), (2) and (3) of the Act where the person or company proves that such person or company reasonably believed that,
>
> (a) the other party to a purchase or sale of securities; or
>
> (b) the person or company informed of the material fact or material change,
>
> as the case may be, had knowledge of the material fact or material change. [*emphasis added*]

[256] Kraft made a number of additional submissions attempting to persuade us that the NCOB exception is (or, more specifically, "ought to be") based on a subjective, not objective, standard. We considered these submissions and do not find them persuasive or relevant to our statutory interpretation of the applicable standard for establishing the NCOB exception. In large part, Kraft's submissions were policy-based. Kraft's additional submissions are addressed below.

[257] Kraft submits that a subjective standard for establishing the NCOB exception is consistent with the purposes of both the Act and of s. 76(2) because corporate officials, provided that they are acting in good faith, are best placed to determine what is "necessary" in the context of the business and affairs of the issuer. Kraft submits that a subjective standard for establishing the NCOB exception will

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[64] RRO 1990, Reg 1015: General, s 175(5)

empower issuers and their representatives to achieve the best possible outcomes for their shareholders in significant transactions and that this is even more important than maintaining control over the disclosure of MNPI.

[258] Kraft also submits that an objective standard for establishing the NCOB exception will have a "chilling effect" on corporate officers and directors and would have an adverse effect on corporate governance practices, including by discouraging the seeking of advice from outside advisors.

[259] We find that with these submissions Kraft is asking us to second guess the Legislature's deliberate, clear and unambiguous choice to make the NCOB exception subject to an objective standard (which, we note, is a choice that is entirely consistent with the Legislature's related decision to also make the question of whether information is a "material fact" or "material change" subject to an objective, rather than subjective, test). These two choices to legislate an objective test reflect the importance placed by the Legislature on ensuring that any selective disclosure of MNPI occurs only in the narrowest of circumstances, consistent with the related purposes of the Act noted above.

[260] Kraft also submits[65] that if we conclude that the language of the NCOB exception is ambiguous, meaning its proper interpretation might bear two equally plausible meanings (both a subjective and an objective standard), we must apply the NCOB exception in a manner that accords with s. 2(b) (freedom of expression) and s. 2(d) (freedom of association) of the Charter and apply a subjective standard. As we have concluded that the language of s. 76(2) is not ambiguous, we reject this submission.

[261] Kraft further submits, relying upon *Taylor-Baptiste v Ontario Public Service Employees Union* (***Taylor-Baptiste***)[66] and *R v Plastic Technology Engine Corp.*[67] that even if we conclude that s. 76(2) is not ambiguous, it nevertheless remains available to us, "guided by the Charter's guarantee of free expression and free association" to find that a contravention of s. 76(2) is only established where a selective disclosure of MNPI is made in the absence of an honest and *bona fide*

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[65] 2015 ONCA 495

[66] *Taylor-Baptiste* at paras 50-51, citing *Doré v Barreau du Québec,* 2012 SCC 12 (***Doré***)

[67] (1994), 88 CCC (3d) 287 (Ont Gen Div) at paras 38, 66, 69 and 81-84

belief in the necessity of the disclosure. Kraft acknowledges that this propounded test for applying s. 76(2) is not explicit in the express words of s 76(2). He nevertheless urges us to adopt it.

[262] We reject Kraft's submission, and instead accept the position of Staff. We agree with Staff that the essence of Kraft's submission is that in the context of a decision made by an administrative tribunal, Charter values are not just relevant to resolving ambiguity in the interpretation of a statute, but they should also inform the tribunal's interpretation of the statute itself, even where the statutory provision is not ambiguous.

[263] As noted by Staff, *Taylor-Baptiste* addressed the line of cases based on *Doré* and *Loyola High School v Québec (Attorney General).*[68] We agree with Staff that *Taylor-Baptiste* did not involve an issue of statutory interpretation, but instead involved the application of a statute to a particular set of facts, and does not re-write the normal rules governing how administrative tribunals interpret statutes.[69] Where legislation or regulations are clear and unambiguous, it is not up to an administrative tribunal to rewrite them on the pretext of ensuring conformity with *Charter* values.[70]

[264] Having concluded that the NCOB exception is subject to an objective standard, we now turn to considering the factors and considerations that are relevant to establishing the NCOB exception.

4.4.3.b The factors and considerations relevant to establishing the NCOB exception

[265] The Act does not provide a definition of the phrase "in the necessary course of business". Nor does it offer any specific guidance regarding the factors that are or may be relevant to establishing the NCOB exception.

[266] As a starting premise, we reiterate our observation that s. 76(2) of the Act is properly construed as a broad prohibition against selective disclosure of MNPI by

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[68] 2015 SCC 12

[69] *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42 at para 62 makes it clear that "to the extent this Court has recognized a *Charter* values interpretive principle, such principle can *only* receive application in circumstances of genuine ambiguity".

[70] *Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 62-63

an issuer or person or company in a special relationship with an issuer, subject to the narrowly stated NCOB exception.

[267] In interpreting and applying the NCOB exception we must have regard to the reasons for the prohibition against tipping, namely, to ensure that everyone in the market has equal access to and opportunity to act upon material information. In our view, the NCOB exception to the prohibition against tipping must be interpreted and applied reasonably narrowly to ensure that the purposes of the Act and the overarching rationale for the tipping prohibition are not undermined.

[268] The phrase "in the necessary course of business" as contained in s. 76(2) of the Act clearly requires that there must be a business rationale for any selective disclosure of an issuer's MNPI and that the selective disclosure must be tied to a business and business purpose. The word "business" in the phrase "in the necessary course of business" is not qualified by the phrase "the issuer's". Staff submits that the language of the NCOB exception in s. 76(2), properly construed, requires that the selective disclosure be in the necessary course of the issuer's business. Staff submits that to conclude otherwise could lead to an ever-shifting standard.

[269] In the circumstances of this case, where the MNPI was received by Kraft in his capacity as a Chairman and director of the issuer, we accept that the NCOB exception is to be applied with reference to the "issuer's business". Kraft does not disagree. In so finding we should not be taken to conclude that in all factual situations the NCOB exception is limited to a consideration of what may be in the necessary course of the issuer's business.

[270] In our view, the inclusion of "necessary" in the language of the NCOB exception elevates the requirement beyond a mere business purpose or business rationale. As noted in commentary in *George*, what may be in the "ordinary" course of business does not necessarily equate to the "necessary" course of business.[71]

[271] Although neither Staff nor Kraft provided us with specific submissions regarding a definition or meaning of "necessary" or of the phrase "necessary course of business", we note that Staff's submissions spoke in terms of "absolute

[71] *George* at para 68

necessity". Having regard to the legislative purpose of s. 76(2) as well as our understanding of the ordinary meaning of the word, we find that the inclusion of the word "necessary" (as opposed to "ordinary") in the language of the NCOB exception imports a level of importance, including that something is "essential", "indispensable", or "requisite". We find that the purpose of the selective disclosure must be sufficiently important or necessary to the business to warrant an exception to the blanket prohibition against selective disclosure.

[272] The parties have not suggested that we should identify an exhaustive list of factors or circumstances that are or may be relevant to establishing whether selective disclosure of MNPI is in the "necessary course of business". We note that Staff did provide us with a non-exhaustive list of factors that may be relevant to a consideration of whether selective disclosure satisfies the NCOB exception, which includes:

a. the business of the issuer;

b. the relationship between the tipper and the issuer;

c. the relationship between the tipper and the tippee;

d. the nature of the MNPI that was disclosed;

e. the relevance of the MNPI to the relationship between the tippee and the issuer (that is, whether the nature of the relationship between the tippee and the issuer necessitates the disclosure of the MNPI in question);

f. the tipper's reason for making selective disclosure to the tippee; and

g. the credibility of the tipper seeking to establish the NCOB exception.

[273] We agree that in appropriate circumstances all or some of these factors may be important considerations. That said, we agree with Staff that it would not be appropriate for us to seek to identify a comprehensive set of factors relevant to establishing the NCOB exception in all cases.

[274] As the question of whether the NCOB exception has been made out in any particular case is a question of mixed fact and law, we would expect that the particular facts and circumstances of each situation will inform such a determination. Both parties pointed us to NP 51-201 which addresses the

statutory prohibitions against selective disclosure including the NCOB exception and related considerations. We accept that it is settled law that policy statements such as NP 51-201 are not legislative instruments and offer non-binding guidance.[72]

[275] However, both Staff and Kraft submit, and we agree, that NP 51-201 may provide a non-exhaustive guide to considering the *categories* or *types* of communications that may be viewed as being made in the necessary course of business and/or the types of recipients of selective disclosure who might presumptively qualify as receiving MNPI in the necessary course of business.

[276] Section 3.3(2) of NP 51-201 contains the following list of recipients of selective disclosure described in the National Policy as a list of recipients with whom the NCOB exception would generally cover communications:

a. vendors, suppliers, or strategic partners on issues such as research and development, sales and marketing, and supply contracts;

b. employees, officers, and board members;

c. lenders, legal counsel, auditors, underwriters, and financial and other professional advisors to the company;

d. parties to negotiations;

e. labour unions and industry associations;

f. governmental agencies and non-governmental regulators; and

g. credit rating agencies (provided that the information is disclosed for the purpose of assisting the agency to formulate a credit rating and the agency's ratings generally are or will be publicly available).

[277] Although we find that NP 51-201 is helpful in providing some guidance, we note that the NCOB exception must nevertheless be established on the relevant facts. Establishing that selective disclosure was made to a recipient falling within the non-exhaustive list of recipients set out in s. 3.3(2) of NP 51-201 is not the end of the relevant enquiry.

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[72] *Cornish* at para 53

[278] We turn now to consider whether Kraft's communication of the October Email to Stein was in the "necessary course of business" within the meaning of s. 76(2) of the Act.

4.4.4 Kraft's communication was not in the necessary course of business

4.4.4.a Overview of conclusions

[279] We conclude that Kraft did not provide the Draft Lease (and the other documents attached to the October Email, including the draft Option to Purchase) to Stein "in the necessary course of business" and therefore the NCOB exception to s. 76(2) of the Act is not available to him in the circumstances.

[280] We have concluded that although Kraft's decision to make selective disclosure to Stein was made for a business reason – namely, his personal desire to have the benefit of his long-time friend and business colleague providing thoughts and input as a second set of eyes – that personal business reason was not equivalent to selective disclosure made in the necessary course of WeedMD's business.

[281] Furthermore, and despite Kraft's testimony, we find that Kraft did not actually turn his mind to whether his selective disclosure to Stein was made in the necessary course of WeedMD's business prior to making the selective disclosure.

[282] We acknowledge that in a small start-up company such as WeedMD there may not be stringent processes and that individuals will wear many hats and take on responsibilities where needed. However, we do not accept that the circumstances here meet the NCOB exception. Kraft hastily forwarded an email containing MNPI, with little instruction, to a personal friend reflexively and out of habit and for his own personal reasons. He did so without any prior discussion with management or the board of WeedMD about his intention to make the disclosure or the considerations necessitating that he do so. Such action was careless.

[283] Our reasons for arriving at these conclusions are set out below.

4.4.4.b Key background, circumstances and facts relevant to the consideration of the NCOB exception

4.4.4.b.i WeedMD and Kraft's relationship and role with WeedMD

[284] At the relevant time, Kraft was the Chairman of the board and a director of WeedMD. Kraft was also a significant shareholder of WeedMD and one of its co-founders. WeedMD was a small start-up company and as a result Kraft rolled up his sleeves and took on responsibilities on an as-needed basis that were not necessarily limited to the role and responsibilities of a chairman.

[285] Despite not being a member of WeedMD's management, he had some management-like responsibilities. He also assumed responsibility for keeping the independent members of WeedMD's board abreast of important developments and securing their support for transactions. Kraft was not very involved with WeedMD's day to day business.

[286] Kraft worked part-time and on an as-needed basis, spending between 30% to 60% of his working hours on WeedMD matters.

[287] Kraft had significant experience sitting on boards of private and public companies. He was instrumental in assisting in WeedMD's transition from a start-up company to a public company. He introduced key consultants as well as some of WeedMD's directors to the company.

[288] In addition to Kraft, WeedMD's board comprised seven other persons, including Scully (Chief Executive Officer), Merker (Chief Financial Officer) and Rick Moscone, a lawyer and corporate partner with the firm Fogler Rubnioff LLP (**Fogler**), that provided legal services to WeedMD, including in connection with the Perfect Pick Transaction and the Draft Lease and other transaction documents.

[289] No member of WeedMD's core management team, and no director, had commercial real estate experience.

4.4.4.b.ii Stein's relationship with Kraft and WeedMD

[290] We discuss Kraft and Stein's relationship as friends and business collaborators in section 3.2 above.

[291] Kraft described Stein as a personal, trusted and "go-to advisor". In his testimony, Kraft described his professional relationship with Stein as follows:

> Michael had provided advice, input, feedback for me on whether it be items that were – transactions that were personal or my management company or advice, and then he also worked certain files that I mentioned, that I provided services for companies like WeedMD, companies like Lingo Media. Wherever I had a need for some expertise that was beyond me, I would usually go to Michael, and he fit the role and was able to deliver a different set of eyes and a different set of expertise, and somebody who I'd always want in my court in terms of somebody who had a financial acumen and ability to look at a balance sheet far superior to myself or even people like Khurram Qureshi, who was the accountant who I used.

[292] Stein's company, Michael Stein & Associates Inc., entered into a consulting services agreement dated May 27, 2015, to act as a non-exclusive consultant to the board of directors of WeedMD Rx and its subsidiary. The consulting services agreement contained a confidentiality provision. The consulting services agreement was not extended beyond its initial term which ended on October 31, 2015, and was not in place at the time Kraft made the selective disclosure of the Draft Lease (and other documents attached to the October Email) to Stein.

[293] Despite the fact that the consulting services agreement with Stein's company expired on October 31, 2015, Kraft testified that he continued to view Stein as a consultant and advisor generally available to him.

[294] In 2017, including during the Material Time, Stein had no business, contractual, or employment relationship with WeedMD or WeedMD Rx. Stein was not hired by WeedMD or WeedMD Rx to review the Draft Lease. Kraft did not ask Stein to act as an advisor or consultant to WeedMD or WeedMD Rx. Stein reviewed the Draft Lease as a favour to Kraft and was not compensated for his review.

[295] In the course of responding to inquiries made by Staff during Staff's investigation in connection with this matter, WeedMD's counsel did not include Stein or his company in the list of third parties whose services WeedMD used in connection with its engagement with Perfect Pick prior to the Announcement.

4.4.4.b.iii Kraft's role in the Perfect Pick Transaction

[296] Although Merker was the lead person at WeedMD with respect to the Perfect Pick Transaction, we find that both Kraft and Scully were important to bringing the Perfect Pick Transaction to fruition. Merker acknowledged that Kraft played an important role in the negotiation of the Perfect Pick Transaction. In connection with the Draft Lease, Merker oversaw outside legal counsel who were primarily responsible for preparing the Draft Lease and other documents. Merker, along with Scully and Kraft, reviewed drafts of the Lease.

[297] Merker and Kraft both testified that Kraft was an important bridge between WeedMD's senior management and its board of directors. Merker confirmed that the board counted on Kraft to make a recommendation about whether to proceed with the Perfect Pick Transaction. Kraft testified that he was not prepared to recommend the Perfect Pick Transaction to the board until he was completely satisfied with the advice WeedMD received and that he would not have been completely satisfied without having received Stein's input.

4.4.4.b.iv The circumstances in which selective disclosure was made to Stein

[298] Stein was not asked by either Merker or Scully to review any of the draft documents for the Perfect Pick Transaction, including the Draft Lease.

[299] Kraft did not tell WeedMD management, including Merker or Scully, that he wanted to get another opinion on any of the draft documents for the planned Perfect Pick Transaction, including the Draft Lease. Kraft also did not tell the WeedMD board of directors that he wanted to get another opinion.

[300] It is not controversial that the decision to make the selective disclosure to Stein was Kraft's decision alone, made without notice to, or approval by, anyone else at WeedMD.

[301] Kraft made the selective disclosure to Stein in the October Email. His email note to Stein said simply "Please review and would greatly appreciate any and all comments you could provide". Kraft's evidence at the merits hearing was that despite the lack of specificity in his email note and despite the fact that the October Email attached all of the draft Perfect Pick Transaction documents, and

not just the Draft Lease, he only wanted and was only seeking Stein's input on the Draft Lease.

[302] Kraft testified that he sent all six draft Perfect Pick Transaction documents to Stein because in sending the October Email to Stein he simply "flipped" (or forwarded) the underlying October 16, 2017 internal WeedMD e-mail from Merker to Kraft and Scully attaching the six documents and did not change the original e-mail re line of "PPF Final Agreements" that appeared on the October 16 e-mail from Merker. He conceded in cross-examination that because he was only looking for Stein's comments on the Draft Lease, in retrospect, it was not necessary for him to send all of the documents to Stein. He explained that as he was on his way to London, he sent the email to Stein "on the fly". He disputed the suggestion that he was being sloppy—asserting instead that he was being "reactive" and repeating again that he sent the email "on the fly".

[303] Kraft did not ask Stein to enter into any agreements with respect to his review and he did not ask Stein in advance of making the selective disclosure to him to keep the information provided confidential or to agree on what use Stein could make of the information. However, Kraft testified that he had every expectation that Stein would keep the information confidential.

[304] When Stein provided comments to Kraft on the Draft Lease he did so by email dated October 25, 2017, copying both Merker and Scully. Merker forwarded Stein's comments to Fogler. Some of Stein's comments were implemented by Fogler.

4.4.4.c Consideration of the parties' arguments and submissions on the availability of the NCOB exception

[305] Kraft submits that the reasons he made selective disclosure to Stein were because:

a. Stein has commercial real estate expertise that both Kraft and WeedMD's management lacked;

b. Kraft was not fully satisfied with leaving commercial real estate issues related to the Draft Lease to WeedMD's external counsel; and

c. Kraft required Stein's comments on the Draft Lease in order to satisfy himself that WeedMD was negotiating the best terms possible.

[306] Implicit in Kraft's submission that he held a subjectively reasonable belief that the selective disclosure to Stein was made in the necessary course of WeedMD's business is the related position of Kraft that he actually turned his mind to whether the selective disclosure to Stein was made in the necessary course of WeedMD's business, prior to making the selective disclosure.

[307] Having reviewed and considered the parties' submissions and the evidence, we are satisfied on a balance of probabilities that, notwithstanding the justification Kraft now offers for making selective disclosure to Stein, Kraft's reason for reaching out to Stein on October 23, 2017, and unilaterally deciding to selectively disclose the Draft Lease and other draft Perfect Pick Transaction documents to Stein was a personal decision, rather than a WeedMD decision.

[308] We also find that Kraft's selective disclosure to Stein arose out of his own self-described habit and preference of regularly personally consulting with Stein on business matters and was not made in the necessary course of WeedMD's business or to address any particular business requirement of WeedMD. This is made clear in Kraft's own words at the merits hearing:

> "Wherever I had a need for some expertise that was beyond me, I would usually go to Michael [Stein], and he fit the role and was able to deliver a different set of eyes and a different set of expertise, and somebody who I'd always want in my court…".

[309] We also find that Kraft's selective disclosure to Stein was done hastily, on the fly and was careless. We conclude that the circumstances surrounding Kraft's selective disclosure indicate that more likely than not he did not actually turn his mind to the question of whether such disclosure was in the necessary course of WeedMD's business before he made the disclosure.

[310] Staff submits that Kraft provided inconsistent evidence at the hearing regarding his reasons for making selective disclosure to Stein, not all of which aligns with the justification Kraft now offers for making the selective disclosure. In addition to testifying that he was seeking Stein's expertise specifically from a commercial

real estate perspective, in his testimony he also provided the following additional explanations for making selective disclosure to Stein:

i. he wanted Stein to look at the transaction through the lens of an investor or an external audience; and

ii. he wanted Stein to look at the draft agreements from "any perspective".

[311] Staff also submits that Kraft's prior testimony during his compelled interview with Staff in April 2021 was that he wanted Stein to look at all of the draft documents (and not just the Draft Lease) attached to the October Email. Staff submits that this prior testimony is inconsistent with Kraft's principal submission and position before us that he reached out to Stein specifically for commercial real estate expertise related to the Draft Lease that WeedMD was allegedly lacking.

[312] We give no weight to these submissions and give Kraft the benefit of the doubt regarding any imprecise language describing his reasoning for making the selective disclosure and also give Kraft the benefit of the doubt considering that he had not had an opportunity to review all relevant documents to refresh his memory at the time of his compelled interview. In our view, Kraft's testimony is revealing in that it reinforces that he personally wanted another perspective and the benefit of a review by another set of eyes.

[313] In addition to Kraft's own testimony about his self-described habit of regularly consulting with Stein, we find that the matrix of the surrounding circumstances in which the selective disclosure was made by Kraft supports a finding that the selective disclosure to Stein was made for Kraft's personal reasons, and not because the selective disclosure was in the necessary course of WeedMD's business. These circumstances are addressed below.

[314] Kraft, by virtue of his role with WeedMD, may have had the authority to retain advisors or communicate information to advisors where appropriate. Although there may not have been any requirement that Kraft do so, the fact that he did not provide notice to or obtain approval by others at WeedMD of his intention to make the selective disclosure to Stein tends to show that he reached out to Stein for personal reasons.

[315] We accept Staff's submissions that in the circumstances we should place significant weight on the nature of the relationship between Stein (the recipient of the selective disclosure) and WeedMD (the issuer) as detailed in section 4.4.4.b.ii above.

[316] In our view, the relationship of the issuer and the recipient of the selective disclosure sheds light on the nature and purpose of the selective disclosure. Although not necessarily sufficient or determinative on their own, we have taken into account the facts detailed in section 4.4.4.b.ii in reaching our conclusion that Kraft's selective disclosure was not in the necessary course of WeedMD's business.

[317] Staff submits that the fact that Kraft failed, contrary to "conventional wisdom", to ask Stein to keep the information confidential and agree on what use Stein could make of the information in the Draft Lease, prior to making selective disclosure to Stein, is a factor that weighs against a finding that Kraft's selective disclosure to Stein was in the necessary course of business. We agree with Kraft that entering into a confidentiality agreement in connection with making selective disclosure is neither necessary nor a precondition to being able to establish the NCOB exception and that NP 51-201 guidance about entering into such an agreement is non-binding. That said, entering into such an agreement is advisable as a best practice and is certainly potentially relevant to the question of whether the selective disclosure is being made in the necessary course of business.

[318] We also conclude that Kraft was not seeking any necessary or otherwise unavailable commercial real estate experience for WeedMD.

[319] The generic and barebones instructions that Kraft provided to Stein were not specific to a review of only the Draft Lease and also not specific to commercial real estate expertise. Indeed Stein's own evidence was that when he received the October Email he did not have any context beyond Kraft's cover note.

[320] Furthermore, well before Kraft's October Email to Stein, WeedMD entered into multiple term sheets with Perfect Pick setting out the material terms of the Perfect Pick Transaction, and by the time of Kraft's email to Stein agreements

described as "final" had been prepared with the assistance of WeedMD's external counsel.

[321] At no point did Kraft suggest or advise WeedMD management to retain an external consultant to provide commercial real estate advice, nor did Kraft take steps to enquire or ensure that WeedMD's external counsel team had counsel sufficiently experienced in commercial real estate matters.

[322] Given these circumstances, we find Kraft's assertion that he did not identify that WeedMD had a need to retain someone to provide commercial real estate advice until around the time he sent the draft documents to Stein to be neither convincing or compelling.

[323] We have considered Kraft's submission that Merker confirmed in cross-examination that, in his view, the selective disclosure made by Kraft to Stein was "necessary" because the Perfect Pick Transaction would not be approved unless and until Kraft was satisfied that the company was negotiating the best terms possible. In this regard, we note the following exchange between Kraft's counsel and Merker during Merker's cross-examination:

> Q. And I take it that in terms of his activities on behalf of WeedMD, you have no reason to doubt that Mr. Kraft acted in good faith in seeking Mr. Stein's comments on those documents, correct?
>
> A. That would be correct.
>
> Q. And if Mr. Kraft were to testify that he thought that that was important and necessary that he get those comments on those lease documents, that's not something you would deny, correct?
>
> A. Correct.
>
> Q. And from the perspective of the company, it was important and necessary that Mr. Kraft be comfortable with the transaction so it be approved, correct?
>
> A. Correct.

[324] While we find that Merker's evidence cited above confirms the practical importance to having Kraft supportive of the Perfect Pick Transaction, we do not

agree that this testimony amounts to Merker expressing a view that Kraft's selective disclosure to Stein was in the necessary course of WeedMD's business.

[325] The proposition agreed to by Merker—namely that "it was important and necessary that Kraft be comfortable with the transaction"—is very high level and general. It is not evidence of Merker's agreement that Kraft's selective disclosure was in the necessary course of WeedMD's business. That proposition was not put to Merker. The thrust of Kraft's submission—namely that anything Kraft might characterize after the fact as important to him to allow him to get personally comfortable with the transaction equates to something in the necessary course of WeedMD's business—is also a construct that we do not accept.

[326] In any event, although the subjective perspective of relevant persons is a matter to be taken into account in considering whether the NCOB exception has been established, given all of the evidence and considerations noted above, Merker's evidence does not displace our conclusion that the selective disclosure to Stein was not made in the necessary course of WeedMD's business.

[327] In arriving at our conclusion, there are certain arguments advanced by Staff that we have not accepted or that we consider not relevant to our analysis. These include: (i) Staff's submission that Stein did not have commercial real estate expertise; and (ii) Staff's submission that Stein's comments were not all adopted and in any event did not require particular expertise. We also do not consider Kraft's submission that that there is no evidence that Kraft acted in bad faith to have any bearing on the question of whether the NCOB exception is available to him in the circumstances.

[328] Establishing that one has turned one's mind in advance to the question of whether the purpose of making selective disclosure is in the necessary course of business is not a precondition to availing oneself of the NCOB exception. However, we note that evidence that one has considered the issues up front may certainly be helpful to establishing after the fact the purpose for which the selective disclosure was made, and also establishing that such purpose was in the necessary course of business.

[329] Without intending to provide an exhaustive list, such evidence might include evidence of discussions at the board or management level considering the

advisability or need for the selective disclosure, documents (for example retainer agreements, minutes, memos or other communications) specifying the purpose for making selective disclosure, and confidentiality agreements with or confidentiality instructions to the intended recipient of the selective disclosure or instructions to the intended recipient of the selective disclosure. No evidence of this nature was present in this case.

4.4.4.d Conclusion about the NCOB exception

[330] For the foregoing reasons, we find that the NCOB exception is not available to Kraft to excuse his selective disclosure to Stein in breach of s. 76(2) of the Act.

4.5 Was Stein in a special relationship with WeedMD?

[331] The definition of special relationship in s. 76(5) of the Act, referenced above, includes:

> "(e) a person or company that learns of a material fact or material change with respect to an issuer from any other person or company described in this subsection, including a person or company described in this clause, and knows or ought reasonably to have known that the other person or company is a person or company in such a relationship"

[332] We have concluded above that Kraft was in a special relationship with WeedMD during the Material Time by virtue of being the Chairman and a director of WeedMD.

[333] We note that Stein confirmed during cross-examination that when he received the October Email (including the Draft Lease) from Kraft, he knew that Kraft was the Chairman of WeedMD's board. Consequently, pursuant to the above definition, Stein was also a person in a special relationship with WeedMD.

[334] Accordingly, we find that Stein was also in a special relationship with WeedMD at the time he received the October Email from Kraft and also when he purchased WeedMD shares on November 22, 2017.

4.6 Conclusions regarding allegations of illegal tipping and insider trading

[335] For the foregoing reasons, we find that:

a. by providing Stein with draft documents for the Perfect Pick Transaction on October 23, 2017, Kraft provided Stein with MNPI on one occasion in breach of s. 76(2) of the Act; and

b. Stein traded shares of WeedMD while in possession of MNPI in breach of s. 76(1) of the Act.

4.7 Alleged conduct contrary to the public interest

[336] Staff alleges that, in addition to breaching Ontario securities law, Kraft's and Stein's conduct was contrary to the public interest. Staff did not provide any particulars in the Statement of Allegations or in written and oral submissions to support this allegation. The Tribunal has previously determined that where it has found a respondent's conduct to have breached Ontario securities law, it will not also conclude that the conduct was contrary to the public interest without there being additional facts and submissions to support that allegation.[73] In the absence of any evidence and submissions by Staff to support this allegation we decline to conclude that either Kraft or Stein engaged in conduct contrary to the public intertest in addition to breaching Ontario securities law.

5. KRAFT'S CONDITIONAL CONSTITUTIONAL CHALLENGE

5.1 Introduction

[337] Kraft served on the Attorney General of Canada and on the Attorney General of Ontario, and filed with the Tribunal, a Notice of Constitutional Question dated July 29, 2022, challenging the constitutionality of s.76(2) of the Act.

[338] The Notice of Constitutional Question asserts that, in the event the NCOB exception is to be established on an objective basis, rather than a subjective/objective basis, Kraft's rights to engage in free expression and free association under ss. 2(b) and 2(d) of the *Charter* are infringed. In essence, Kraft's position is that if we determine (as we have above) that s. 76(2) prescribes an objective test for the NCOB exception, then there is an infringement of Kraft's *Charter* rights.

[73] See *Solar Income Fund* at paras 70-76; *Kitmitto* at paras 174-180

[339] Although duly served, neither the Attorney General of Canada nor the Attorney General of Ontario appeared, participated in the hearing before us or took any position in connection with Kraft's conditional constitutional argument.

[340] Although Kraft's Notice of Constitutional Question was brought in reference to both ss. 2(b) and 2(d) of the *Charter*, in oral submissions Kraft's counsel advised that we need only consider s. 2(b) (freedom of expression). All of his oral submissions were framed in this context.

5.2 The conditional nature of Kraft's constitutional challenge and whether it need be decided

[341] Staff submits that the *Charter* argument raised by Kraft should be decided by us only if it has the potential to impact the case that is alleged against Kraft. Staff further submits that a consideration of Kraft's *Charter* argument should arise for determination only if we have already first decided that:

a. the NCOB exception is established on an objective standard, and not a subjective/objective standard;

b. Kraft made selective disclosure of MNPI to Stein and has failed to establish that the NCOB exception justifies the selective disclosure; and

c. Kraft subjectively believed that the selective disclosure was made in the necessary course of WeedMD's business and that subjective belief was objectively reasonable—that is, Kraft has established that he would meet the NCOB exception on the alternative "subjective/objective" standard he advocates.

[342] We understand the essence of Staff's submission to be based on the limitations of our authority and jurisdiction as an administrative tribunal to grant a remedy under the *Charter.* The Tribunal, unlike a superior court, does not have the ability to strike a statutory provision, provide an alternative interpretation of the statute that would be constitutionally acceptable, or read down, read in or read up a particular statutory provision. As such, Staff submits, we therefore should not consider the constitutionality of a particular statutory provision "in the air".

[343] Staff submits that because the Tribunal's authority is limited to examining the operation of a statute if it determines that *in a particular case* the statute would

operate to have the effect of violating a *Charter* right, we could only grant Kraft a constitutional remedy under s. 24(1) of the *Charter* (in this case, by declining to enforce s. 76(2) of the Act against him) if we are satisfied both that:

a. an objective test for the NCOB exception infringes s. 2(b) of the *Charter* and cannot be upheld under s. 1 of the *Charter*, and

b. Kraft actually meets the alternative subjective/objective test for establishing the NCOB exception that Kraft says would be upheld under s. 1 of the *Charter*.

[344] Staff further submits that if there is no potential for a constitutional remedy in the circumstances, then there is no need for us to engage in the relatively complicated process of assessing the constitutionality of s. 76(2). Staff submits that this argues in favour of us first deciding the issue of whether Kraft has established that he would meet the NCOB exception on the alternative "subjective/objective" standard that he argues for, before considering the *Charter* issues, as our determination of this issue may obviate entirely the need to consider the *Charter* issues.

[345] While Kraft agrees with Staff that the Tribunal is limited in its authority to grant a remedy under the *Charter* and that the only remedy for a finding of a *Charter* violation in this case would be for this panel to simply not enforce s. 76(2) of the Act as against Kraft, he submits that such remedy is not conditioned on a factual finding that Kraft actually meets the alternative subjective/objective test for establishing the NCOB exception that Kraft says would be upheld under s. 1 of the *Charter*.

[346] Staff cites only two cases in support of its submissions, *British Columbia (Securities Commission) v Clozza*[74] (***Clozza***) and *Zang v Alberta Securities Comm* (***Zang***).[75] Kraft cites no cases in support of his submission.

[347] While we understand that the *Clozza* decision was cited by Staff as support for the general proposition that a court (or tribunal) should not decide unnecessary constitutional questions particularly where there is an inadequate factual basis or

[74] 2017 BCSC 419 at paras 118-122

[75] 2019 CarswellAlta 2233 (QB) at paras 71-74

there have not been full submissions, we do not understand *Clozza* to provide support for Staff's more specific submission that a constitutional remedy in this case is contingent on us first finding that Kraft would meet the NCOB exception if it were applied on a subjective/objective basis.

[348] Similarly, we find *Zang* to be of little assistance to us. In *Zang* the Alberta Court of King's Bench found that it was premature for Zang to bring a constitutional challenge regarding the actions of the Alberta Securities Commission where the challenge was hypothetical and speculative and the Alberta Securities Commission had not yet found him to be in contravention of the *Securities Act* (Alberta).

[349] In the circumstances, although we do find Staff's submissions to be logical and compelling, given the lack of jurisprudence offered in support, we have opted to decide the constitutional question.

5.3 The *Charter* analysis

[350] Kraft submits that in prescribing an objective test (as opposed to a subjective/objective test) for the NCOB exception, s. 76(2) of the Act infringes his s.2(b) freedom of expression under the *Charter* and that the limitation cannot be justified under s. 1 of the *Charter*.

[351] Staff submits that s. 76(2), considered along with the anti-tipping provisions of the Act and the operation of Part XVIII (Continuous Disclosure) of the Act as a whole, is not inconsistent with s. 2(b) of the *Charter* and does not infringe s. 2(b) of the *Charter.* To the extent that we find that s. 76(2) infringes the s. 2(b) freedom, Staff submits that the infringement is justified under s. 1 of the *Charter*.

5.3.1 Does s. 76(2) of the Act infringe s. 2(b) of the *Charter?*

[352] Kraft submits that the expression at issue here was a communication by him to Stein made for the ostensible purpose of advancing WeedMD's business and that it clearly meets the established test for determining whether an expressive activity is protected under s. 2(b) of the *Charter*. The test requires the following three questions to be answered:

a. Does the activity in question have expressive content, thereby bringing it *prima facie*, within the scope of s. 2(b) protection?

b. Is the activity excluded from that protection as a result of either the location or the method of expression?

c. If the activity is protected, does an infringement of the protected right result from either the purpose or the effect of the government action? [76]

[353] Kraft submits that the scope of protected expression should be given a broad and generous interpretation. He submits that there is nothing about the location or method of Kraft's expression that should take it outside protected expression. He further submits that there is no doubt that both the purpose and effect of s. 76(2) are to curtail the right of a person in a special relationship with an issuer from engaging in expressive activity and that this is clear from the language of s. 76(2) itself that imposes an explicit prohibition on the communication: "no person shall inform".

[354] Staff submits that although the language of s. 76(2), examined in isolation, might suggest that it amounts to a facial violation of freedom of expression, the suggestion of a facial violation becomes less clear if s. 76(2) is considered as part of the general scheme under Part XVIII of the Act which is directed at ensuring the sharing of an issuer's material information in a timely and even-handed way, thereby fostering fair and efficient capital markets, as well as confidence in the integrity of the capital markets.

[355] Staff argues that because s. 76(2) does not impose a general prohibition on communicating information, but instead only prohibits selective disclosure of material information, and also because nothing would have prevented Kraft (or any other insider) from any form of expression or communication, provided that the material information was contemporaneously generally disclosed to the market, s. 76(2) does not infringe Kraft's or anyone's freedom of expression. Staff referred us to various passages in the Québec Court of Appeal's decision in

[76] *Canadian Broadcasting Corp v Canada (Attorney General)*, 2011 SCC 2 at para 38

Procureur général du Québec c. Gallant (***Gallant***)[77] as ostensibly offering some comfort in justification of Staff's submission.

[356] Having considered Kraft's and Staff's submissions, we are satisfied that s. 76(2) of the Act, including the NCOB exception within s.76(2), infringes s. 2(b) of the *Charter* because its purpose is to control attempts to convey a message by directly restricting the content of expression.

[357] We did not find Staff's submissions based on *Gallant* to be persuasive to this issue because the passages to which we were referred were focussed principally on the burden of establishing the *effect* of restricting free expression in circumstances where the purpose of the government action was *not* to control or restrict attempts to convey meaning—a different situation altogether.

[358] Furthermore, we do not accept Staff's submission that s. 76(2) does not infringe Kraft's freedom of expression because there is no prohibition in the Act against Kraft disclosing WeedMD's material information once that material information has been generally disclosed. While that argument may be superficially appealing – it does not address the fact that s. 76(2) purports to control and restrict the timing and the conditions under which a message can be conveyed. We conclude that this amounts to a purpose of controlling attempts to convey a message and restricting the content of expression.

5.3.2 Is the infringement of s. 2(b) justified under s. 1 of the *Charter?*

[359] Legislation infringing a fundamental constitutional right or freedom may be found to be valid and enforceable as a reasonable limit under s. 1 of the *Charter* if the limit is prescribed by law and "can be demonstrably justified in a free and democratic society."[78]

[360] The structure of the s. 1 analysis is well settled. In order to be justified under s. 1 of the *Charter*, the limitation must:

a. be prescribed by law;

b. address a pressing and substantial governmental objective; and

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[77] 2021 QCCA 1701, 2021 CarswellQue 22970 at paras 262-263 and 265

[78] *Charter*, s. 1

c. be proportional to that objective.[79]

[361] The proportionality test itself comprises three elements:

a. the limitation must be rationally connected to the legislative objective;

b. the limitation must infringe the subject *Charter* right no more than reasonably necessary (also referred to as "minimal impairment"); and

c. the salutary effects of the legislation must not exceed the deleterious effects on the protected right.[80]

5.3.2.a The nature of the expression and nature, scope and context of the infringement

[362] Staff submits that the nature of the expression at issue should be taken into account in the s. 1 analysis and also submits that it is important to clearly delineate the nature, scope and context of the infringement. We agree. We also note that not all expression is equally worthy of protection, nor are all infringements of free expression equally serious.[81]

[363] Staff submits that the speech in issue is best characterized as "economic speech" (as distinguished from "commercial speech" that typically references advertising).

[364] Staff submits that the economic speech in issue here is at the outer edges of any constitutional protection as it does not involve artistic, political or religious expression and falls short of advancing the principles and values that underlie freedom of expression, namely the pursuit of truth, participation in the community or individual self-fulfillment and human flourishing.[82] Staff also contends that the infringement itself is not serious, given both the nature of the

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[79] *Carter v Canada (Attorney General)*, 2015 SCC 5 (***Carter***) at paras 94-96; *R v N.S.*, 2022 ONCA 160 (***N.S.***) at para 159

[80] *Carter* at paras 94-96; *N.S.* at para 159

[81] *Rocket v Royal College of Dental Surgeons of Ontario*, [1990] 2 SCR 232 (SCC) (***Rocket***) at paras 30-32

[82] *Rocket* at paras 30-32; *Gallant* at para 163 citing *Irwin Toy Ltd. v Québec (Attorney General)*, [1989] 1 SCR 927 at 976-977 and citing *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139 at 187

expression involved and the fact that the infringement on expression is narrowly limited.

[365] Kraft takes issue with Staff's submission that the type of expression in issue here is deserving of limited constitutional protection. Kraft argues that the expression in issue here is required to advance another important objective, namely the objective of ensuring that corporations are able to be governed effectively by boards of directors in a way that advances the interests of shareholders and all other stakeholders and in a way that fosters capital formation, which is a recognized purpose of the Act.

[366] We agree with Staff that the infringement involves economic speech that is at the outer edges of constitutional protection and also that the infringement in question is not serious. The prohibition on expression is only partial and the impacted expression involves the selective disclosure to a single or few persons of only a narrow category of business information (MNPI) in circumstances where such disclosure is not in the necessary course of business.

[367] In the circumstances, we accept that the infringement on expression under s. 76(2) of the Act is easier to justify under s. 1 than other infringements of s. 2(b). In our view, Kraft's submissions about the links between the expression in issue and corporate governance and capital formation are more appropriately considered below under the second and third elements of the proportionality test.

5.3.2.b Prescribed by law

[368] Both Kraft and Staff agree that the limitation on freedom of expression in s. 76(2) is prescribed by law.[83] We agree. In short, we agree that objective necessity in the NCOB exception provides an intelligible standard and thus is not vague.

[83] We note that Kraft confirmed this in oral submissions.

5.3.2.c Pressing and substantial governmental objective

[369] Both Kraft and Staff agree that the limitation on freedom of expression in s. 76(2) addresses a pressing and substantial governmental objective. However, they characterize the governmental objective slightly differently.

[370] Staff submits that the objectives of s. 76(2) have to be considered within the overall scheme of Part XVIII of the Act and its goal of fostering confidence in Ontario's capital markets. Staff articulates the pressing and substantial objectives of s. 76(2) to be the protection of the investing public and the preservation of the integrity of Ontario's capital markets, along with the fostering of confidence in Ontario's capital markets.

[371] In support, Staff cites the Ontario Court of Appeal's decision in *Finkelstein v Ontario Securities Commission* that confirms:

a. the important premise of securities law that all investors and prospective investors ought to be given access to material information about securities so that they can make informed investment decisions;

b. the risk that insider trading will undermine investor confidence in the capital markets; and

c. the principle of Canadian securities regulation that markets operate efficiently on the basis of timely and full disclosure of all material information and that prohibitions against both insider trading and tipping support this principle.[84]

[372] Kraft describes the pressing and substantial legislative objective to be the prevention of insider trading and tipping and acknowledges that this objective is tied to ensuring public confidence in the capital markets.

[373] We do not find Staff's and Kraft's characterization of the pressing and substantial governmental objective to be at odds, but prefer Staff's articulation as being consistent with our understanding of the legislative goals of s. 76(2) within the overall framework of Part XVIII of the Act. These legislative goals are reflected in the stated purposes of the Act, including providing protection to investors from

[84] 2018 ONCA 61 at paras 23-25

unfair, improper or fraudulent practices and fostering fair, efficient and competitive markets and confidence in the capital markets.[85]

5.3.2.d Is the limitation proportional to the legislative objective?

5.3.2.d.i Rational connection to legislative objective

[374] Kraft contends that s. 76(2) is arguably not rationally connected to its legislative objective to the extent of its overbreadth. He submits that the provision is overbroad to the extent that it prohibits the selective disclosure of MNPI in circumstances where such disclosure is objectively unnecessary despite the fact that the person making the selective disclosure honestly and reasonably believed that the selective disclosure was necessary to advance the issuer's business interests. He argues that there is no rational connection between maintaining investor confidence in the integrity and fairness of the capital markets and penalizing corporate insiders who honestly misjudge the necessity of selective disclosure.

[375] We note that Kraft ultimately conceded in oral submissions that this overbreadth argument is more appropriately addressed at the minimal impairment stage of the s. 1 analysis. That said, we are swayed by Staff's submission that Kraft's overbreadth argument would have merit only if the objectives of s. 76(2) and Part XVIII of the Act are limited to preventing intentional or morally culpable tipping activity. In our view, the legislative purpose of providing protection to investors, fostering fair, efficient and competitive markets and public confidence through the creation and enforcement of a level informational playing field for all market participants is rationally connected to a prohibition against selective disclosure that is based on an objective standard that does not depend on moral culpability.

[376] We agree that the limitation on freedom of expression in s. 76(2) addresses a pressing and substantial legislative objective and is rationally connected to that objective.

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[85] Act, ss. 1.1(a) and 1.1(b); *Rosborough* at para 12; *Rankin (Re)*, 2008 ONSEC 6 at para 27-29, citing *Report of the Attorney General's Committee on Securities Legislation in Ontario*, March 1965, Brief of Studies/Reports and *R v Plastic Engine Technology Corp,* [1994] 4 CCLS 1

5.3.2.d.ii Minimal Impairment

[377] Kraft and Staff disagree fundamentally on the second element of the proportionality test, namely whether the s. 76(2) limitation infringes the s. 2(b) freedom no more than reasonably necessary, or minimally impairs the s. 2(b) freedom.

[378] The vast majority of their respective constitutional submissions and evidence were focussed on this stage of the analysis. Kraft and Staff each called experts (Waitzer and Halperin, respectively) to provide opinion evidence.

[379] Waitzer expressed the opinion that introducing a precedent where a securities regulator retrospectively determines the objective necessity of selective disclosures between corporate directors and officers and their professional advisors "would risk" a chilling effect on the ability of corporate officers and directors to discharge their duties which requires them to properly inform themselves through consultation with consultants and experts, "could" discourage informed decision making and "could" discourage qualified candidates from agreeing to serve as directors of public issuers.

[380] In response, Halperin expressed the opinion that he does not believe that there are significant practical implications from a corporate governance perspective of a retrospective assessment of objective necessity and that Waitzer overstates the potential chilling effect of that scenario. Halperin pointed out that there are well recognized and longstanding conflicts between corporate and securities law with which corporate directors and their advisors have to deal. Halperin also expressed the view that given the generous regulatory safe harbour within which disclosures in the necessary course of business can be properly made, Waitzer overstates the likelihood that a strict interpretation of or retrospective regulatory assessment of reliance on the NCOB exception could discourage qualified candidates from agreeing to serve as directors of public issuers.

[381] The minimal impairment stage of the s. 1 analysis has been articulated by the Supreme Court of Canada as follows:

> "At this stage of the analysis, the question is whether the limit on the right is reasonably tailored to the objective. The inquiry into minimal impairment asks "whether there are less harmful means of achieving the

legislative goal". The burden is on the government to show the absence of less drastic means of achieving the objective "in a real and substantial manner". The analysis at this stage is meant to ensure that the deprivation of the *Charter* rights is confined to what is reasonably necessary to achieve the state's object."[86]

[382] Kraft submits that the minimal impairment test is not met in the circumstances. Kraft submits that s. 76(2) does not infringe freedom of expression "as little as possible" and an NCOB exception established on an honest and reasonable belief (subjective/objective standard) would equally achieve the legislative objective.

[383] Kraft further submits that the fact that certain defences to the prohibition against selective disclosure of MNPI are available under the Act demonstrates that it is not necessary to impose a strictly objective standard for the NCOB exception in order to achieve the legislation's purposes. In this regard Kraft points to the available defences under s. 76(4) of the Act and s. 175(5) of the General Regulation in circumstances where the person making the disclosure mistakenly (but honestly and reasonably) believes that the information has been generally disclosed to the market or was already known by the recipient of the information.

[384] Along the same lines, Kraft refers to multiple instances in other legislation where a reasonable and honest belief standard is applied to actions that are permitted if "necessary" and prohibited if "unnecessary". These other instances include:

a. the defence of self-defence under the *Criminal Code*;

b. the authority of peace officers to use necessary force under the *Criminal Code*;

c. the common law power to conduct warrantless searches; and

d. various provisions in a wide range of other Ontario statutes and regulations.

[385] In addition, Kraft submits that corporate insiders, including directors and officers, responsible for making business decisions cannot effectively conduct the

[86] *Carter* at para 102

business of the corporation if consultations that they honestly and reasonably believe to be necessary at the time they were undertaken might ultimately be found to be unnecessary in contravention of s. 76(2) of the Act.

[386] Kraft argues, relying on the opinion evidence of Waitzer, that this will have a chilling effect and corporate insiders including directors and officers will be discouraged from seeking guidance and advice from persons outside the corporation for fear of contravening s. 76(2). In a related argument, Kraft submits that because a determination of whether a disclosure is "necessary" for the issuer's business is a determination that is inherently difficult to make, this also creates an unjustified chilling effect on free expression.

[387] Kraft also contends, relying on the opinion evidence of Waitzer, that an objective NCOB exception under s. 76(2) makes the Act and the Ontario *Business Corporations Act* (**OBCA**) inconsistent and also causes them to operate at cross-purposes. In particular, Kraft argues that an objective test for "necessity" under s. 76(2) is inconsistent with the business judgment rule under the OBCA that calls for the application of a subjective/objective standard to evaluate the conduct of directors and officers.

[388] Kraft takes this argument a step further and also contends that the chilling effect of the objective standard for the NCOB exception under s. 76(2) will discourage a director or officer from seeking out the information or advice that they honestly believe is required and that would be required to demonstrate that their decisions are reasonably informed in order to claim the benefits of the business judgment rule. Kraft also contends, relying on the opinion evidence of Waitzer, that the chilling effect of an objective test could discourage qualified and informed candidates from agreeing to serve as directors of public issuers.

[389] Staff submits that in considering the minimal impairment stage of the s. 1 analysis, we must be mindful that the infringement involves economic speech that, in the circumstances, including the partial restriction placed on a narrow class of speech, is easier to justify.[87] Staff submits that a broader "margin of appreciation" should be accorded to the Legislature in the circumstances. In

[87] *Rocket* at para 30; *R v Lucas*, [1998] 1 SCR 439 at para 34; *Thomson Newspapers Co v Canada (Attorney General)*, [1998] 1 SCR 877 at para 91

other words, the Legislature need not be held to a standard of "perfection" at the minimal impairment stage of the analysis.[88]

[390] Staff also submits that the choice to voluntarily participate in the capital markets that are highly regulated, is relevant to our analysis. Although choosing to participate in the capital markets does not require individuals to abandon their *Charter* rights, Staff submits that it is significant that participation in the capital markets is a privilege, and not a right,[89] and market participants voluntarily choose to assume certain obligations, including the obligations to safeguard the MNPI of reporting issuers.

[391] Staff further submits that we have to look no further than the facts of this case for a clear demonstration of why the objective standard for the NCOB exception was chosen by the Legislature. Staff says that the Legislature did so to provide real protection to the market and that the wisdom of that choice is borne out by Kraft's own evidence, which reveals the mindset that the objective standard for the NCOB exception seeks to address:

> Q. I put it to you, Mr. Kraft, that you did not believe it was necessary to seek advice from Mr. Stein in relation to the Perfect Pick Farms deal?
>
> A. You can –with all due respect, sir, you can put anything you want, you're not in my head. No two people think the same way. And **nobody tells me what's necessary, I made my own decisions and I make my own judgments**. So that may be, you know, five years later, easy for you to basically to make assumptions, but if you're not in the transaction and you're not there and you're not accountable to a leadership team, a board, shareholders and yourself, if I don't have the power to decide what I want to do or to make recommendations and to pursue certain initiatives, and you're going to tell me five years later what's necessary and what isn't, that wasn't my understanding of how I can operate and what I can and can't do, so." *[emphasis added]*

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[88] *Gallant* at para 267

[89] *Erikson v Ontario (Securities Commission)*, (2003), 26 OSCB 1622 (ONSC) at para 55; *Doulis (Re)*, 2014 ONSEC 31 at para 180

[392] Staff submits that the objective standard to establish the NCOB exception is a feature of the legislation intended to ensure that individuals are cautious before they make selective disclosure of MNPI and that the Legislature was deliberate about this for good reason.

[393] Staff also submits that Kraft's submissions and Waitzer's opinions about the alleged chilling effect of the objective standard on the behaviour of corporate insiders, including directors and officers, are overstated. Kraft's and Waitzer's comments about the alleged chilling effect of s. 76(2) are premised on the notion that there is uncertainty and unpredictability in the application of the NCOB exception and that such uncertainty and the related risk of regulatory proceedings may be too much for some persons. Staff submits that we should prefer Halperin's opinions to Waitzer's including his opinion that there is significant authoritative guidance in the form of NP 51-201 to provide comfort.

[394] Having considered the parties' submissions and the evidence, including the opinion evidence of Waitzer and Halperin, we find that it was open to the Legislature, operating within the margin of appreciation available to it under s. 1 of the *Charter*, to select an objective standard for the NCOB exception under s. 76(2) of the Act.

[395] We agree with Staff that a broader margin of appreciation is applicable in the circumstances. We do not accept Kraft's submission that an NCOB exception established on an honest and reasonable belief (subjective/objective standard) would equally achieve the legislative objective. We find instead that the facts of this case serve to highlight the importance of impressing caution on corporate insiders.

[396] We prefer Halperin's opinion evidence to that of Waitzer, find it to be more in keeping with common sense, and believe Waitzer's expressed concerns about a potential chilling effect of an objective test of necessity to be overstated.

[397] As we note above, NP 51-201 offers helpful guidance to market participants regarding the availability of the NCOB exception and there are numerous reasonable steps available to corporate insiders to position themselves to establish the availability of the NCOB exception. Furthermore, we note that there was no evidence before us that s. 76(2) is actually having or has actually had a

chilling effect on corporate insiders' willingness to seek external advice or willingness to serve as directors. Properly construed, s. 76(2) has always provided for the potential of an objective retrospective consideration of the availability of the NCOB exception.

5.3.2.d.iii Proportionality

[398] The requirement that a limit be proportional requires us to examine the nature of the infringement, when balanced against the pressing and substantial objective achieved by s. 76(2) of the Act.

[399] Kraft submits that the deleterious effect of the law (namely, the chilling effect on consultations by directors and officers with outside advisors) is not proportional to the benefits to the legislative objectives achieved through an objective (as opposed to a subjective/objective) NCOB exception.

[400] Given our conclusions above, we find that what is accomplished by s. 76(2) is more than proportional to the minimal intrusion.

5.4 Conclusion regarding Kraft's conditional *Charter* challenge

[401] For the foregoing reasons, we dismiss Kraft's conditional *Charter* challenge. Although we find that s. 76(2) of the Act, including the NCOB exception within s.76(2), infringes s. 2(b) of the *Charter*, we have concluded that such infringement is justified under s. 1 of the *Charter*.

6. CONCLUSION

[402] For the above reasons, we conclude that:

a. By providing Stein with draft documents for the Perfect Pick Transaction on October 23, 2017, Kraft provided Stein with MNPI contrary to s.76(2) of the Act; and

b. Stein traded shares of WeedMD while in possession of MNPI contrary to s.76(1) of the Act.

[403] In dismissing Kraft's conditional constitutional argument, we also conclude that while s. 76(2) of the Act infringes s. 2(b) of the *Charter*, that infringement is justified under s. 1 of the *Charter*.

[404] The parties shall contact the Registrar by 4:30 p.m. on November 3, 2023, to arrange an attendance in respect of a hearing regarding sanctions and costs. The attendance is to take place on a date that is mutually convenient, that is fixed by the Governance & Tribunal Secretariat, and that is no later than December 1, 2023.

[405] If the parties are unable to present a mutually convenient date to the Registrar, then each party may submit to the Registrar, for consideration by a panel of the Tribunal, one-page written submissions regarding a date for the attendance. Any such submissions shall be submitted by 4:30 p.m. on November 3, 2023.

Dated at Toronto this 20th day of October, 2023

"*Andrea Burke*"

Andrea Burke

"*M. Cecilia Williams*"

M. Cecilia Williams

"*Sandra Blake*"

Sandra Blake