

CANADA / JUDGMENT

Tietz v. Cryptobloc Technologies Corp.

2021 BCSC 187

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 187 Tietz v. Cryptobloc Technologies Corp. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tietz v. Cryptobloc Technologies Corp., 2021 BCSC 187 Date: 20210205 Docket: S202110 Registry: Vancouver Between: Michael Tietz and Duane Loewen Petitioners And Cryptobloc Technologies Corp., Bam Bam Resources Corp. (formerly known as Kopr Point Ventures Inc. and New Point Exploration Corp.), Kootenay Zinc Corp., Affinor Growers Inc., Green 2 Blue Energy Corp., Beleave Inc., Citation Growth Corp. (formerly known as Liht Cannabis Corp, and Marapharm Ventures Inc.), BLOK Technologies Inc., PreveCeutical Medical Inc., Abattis Bioceuticals Corp., Speakeasy Cannabis Club Ltd., Anthony Jackson, Cameron Robert Paddock, Von Rowell Torres, Neil William Stevenson-Moore, Kenneth Clifford Phillippe, Brian Biles, Bryn Gardener-Evans, Robert Tindall, Nicholas Brusatore, Sam Chaudhry, Slawomir Smulewicz, Michael Young, Glenn Little, Andrew Wnek, Bojan Krasic, Linda Sampson, David Alexander, Yari Alexander Nieken, Hanspaul Pannu, Robert Dawson, James Hyland, Stephen Van Deventer, Shabira Rajan, Robert Abenante, Kent McParland, Marc Geen, Mervyn Geen, Jeremy Ross, and Alexander Kaulins Respondents Before: The Honourable Madam Justice Wilkinson Reasons for Judgment Counsel for the Petitioners/Respondents Michael Tietz and Duane Loewen (in person): (by video): P.R. Bennett M.W. Mounteer R. Mogerman, Q.C. N. Novak Counsel for the Respondent/Applicant Affinor Growers Inc.: J. Young Counsel for Sam Chaudhry: E.S. Bojm D.W. Gibbons Counsel for PreveCeutical Medical Inc., Stephen Van Deventer, Shabira Rajan (by video): R.B. Fraser S. Batkin C. Rempel Counsel for BridgeMark Financial Corp, Kootenay Zinc Corp., Anthony Jackson, Jackson & Company Professional Corp., and Robert Tindall: (by video): P.J. Sullivan J. Cytrynbaum Counsel for Bam Bam Resources (formerly New Point Exploration Corp.), Cryptobloc Technologies Corp. and Abattis Bioceuticals Corp (by video): D. Yaverbaum Counsel for BLOK Technologies Inc., (by video): L. Smith Counsel for Yari Alexander Nieken, Neil William Stevenson-Moore and Bryn Gardener-Evans (by video): P. Taylor F. Lin Counsel for Nicholas Brusatore (by video): A.S. Dosanjh N.E. John Appearing in person on behalf of Citation Growth Corp.: E. Anderson, CEO No one appearing on behalf of the remaining Respondents Place and Date of Hearing: Vancouver, B.C. December 7-11, 14, 2020 Place and Date of Judgment: Vancouver, B.C. February 5, 2021 Table of Contents Background. 4 Statutory leave requirement for secondary market liability claims under the Act. 5 The evidence in support of the petition. 6 Affinor's petition response and evidence. 6 Case management orders. 7 Reply evidence filed by the petitioners. 7 Objections by the Affinor Respondents to the petitioners' reply evidence. 7 Chan

Affidavit No. 3. 8 The Khory Affidavit 9 Does the rule against case splitting apply to leave applications under the Act?. 10 Are the petitioners attempting to split their case?. 10 Conclusion. 11 Costs. 11

- [1] These are applications by two of the respondents in a petition seeking leave pursuant to s. 140.8 of the Securities Act, R.S.B.C. 1996, c. 418 [Act], to bring secondary market claims against 11 securities issuers within a proposed class action. That proposed class action is filed in a notice of civil claim under Action No. S197731 (the "Proposed Class Action").
- [2] Five of the respondent issuers and/or principals have applied to strike all or portions of three affidavits filed by the petitioners purportedly in response or reply to the evidence filed by the respondents on the petitioners' application for leave under the Act.
- [3] For reasons that follow, I grant the applications of Affinor Growers Inc. ("Affinor") and Mr. Chaudhry (the "Affinor Respondents").

Background

- [4] On July 11, 2019, the petitioners filed the Proposed Class Action advancing claims against 11 issuers and their directors and officers, including the Affinor Respondents, for conspiracy, negligent or fraudulent misrepresentation, and secondary market liability under s. 140.3 of the Act. At the time of hearing this application the petitioners confirmed that they intended to proceed to seek leave with regard to eight of the issuers originally named.
- [5] The Proposed Class Action concerns a number of private placements made by the issuers over different periods of time all within 2018. Affinor is one of those issuers. Mr. Chaudhry was the CFO of Affinor in 2018.
- [6] Secondary market liability claims require leave of the court pursuant to s. 140.8 of the Act. That leave is being sought by the petitioners through this petition, which was filed on February 24, 2020. The application for leave is scheduled to be heard over five days beginning March 8, 2021.
- [7] The petitioners' secondary market liability claims against the Affinor Respondents is based on alleged misrepresentations in six documents. Three of the documents are news releases dated March 5, 8, and 16, 2018, and one is a Form 9 regarding a private placement filed March 8, 2018. The others are a management discussion and analysis ("MDA") and interim financial statements (the "2018 Interim Statements"), both for the nine-month period ending February 28, 2018, and both filed April 13, 2018 .
- [8] The misrepresentations alleged in those documents are as follows:

- a) The March 5 and 8, 2018 news releases and the Form 9 state that the shares issued under the subject private placement were purchased at \$0.16 per unit resulting in gross proceeds of \$4 million and that those proceeds would be used for operations, corporate development, and general working capital. It is alleged these statements were untrue and constituted a misrepresentation.
 - b) The March 16, 2018 news release states that the increase in share trading can be attributed to the prior news releases concerning the private placement. It is alleged this statement was a misrepresentation because increases in trading volumes were a result of the sale by the subscribers of shares acquired under the private placement at sale prices that were discounted but higher than the effective price they paid for the shares.
 - c) It is alleged the MDA and 2018 Interim Statements misrepresented the share price and gross proceeds which resulted from the private placement. Further, it is alleged these documents wrongfully omitted to disclose the impact of the payments made under the consulting agreements from the proceeds of the private placement. Statutory leave requirement for secondary market liability claims under the Act
- [9] In the Proposed Class Action the petitioners seek statutory damages for secondary market misrepresentations pursuant to ss. 140.3 and 140.5 of the Act. The test articulated in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, applies to leave applications under s. 140.8 of the Act. For my discussion of the background of this legislation and my findings regarding the leave requirement under the Act, see my decision on the application of another respondent, *PreveCeutical Inc.*, in *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 186, at paras. 8-13. The evidence in support of the petition
- [10] The petitioners filed their own affidavits in support of the petition, deposing to their purchase of shares in two of the respondent issuers. Also filed was affidavit number one of Ms. Chan which included a number of publicly available documents as well as graphs and tables with respect to share pricing prepared by one of the petitioners' lawyers. Ms. Chan attaches the six documents released by Affinor, including the 2018 Interim Statements, all of which are alleged to contain misrepresentations.
- [11] In March 2020, the petitioners further filed affidavit number two of Ms. Chan which attached affidavits of further proposed petitioners with regard to their purchases of shares in other respondent issuers. One of those proposed petitioners, Mr. Dotto, purchased shares of Affinor in 2018. Affinor's petition response and evidence
- [12] In October 2020, the Affinor Respondents filed their responses to petition. Affinor's only evidence filed in support of its petition is an affidavit of a legal administrative assistant, Ms. Nigh, attaching certain Affinor documents which are publicly available from the System for Electronic Document Analysis and Retrieval ("SEDAR") filing system operated by the Securities and Exchange Commission for the United States (the "Nigh Affidavit").
- [13] These documents are:

- a) News releases dated February 14 and 21, 2018, and March 8, 13, and 16, 2018;
 - b) Audited Consolidated Financial Statements for years ending March 31, 2018 and 2017, dated September 26, 2018; and
 - c) Management Discussion and Analysis for the year ending May 31, 2018, based on information known to management as of September 26, 2018.
- [14] Mr. Chaudhry filed a secretarial affidavit from his counsel's firm attaching the following documents:
- a) The March 8, 2018, press release;
 - b) The MDA and 2018 Interim Statements;
 - c) A May 2, 2018, press release; and
 - d) The March 8, 2018, Form 9. Case management orders
- [15] On September 29, 2020, as the case management judge, I made certain orders with regard to the petition hearing. This included requiring the petitioners to file any reply affidavits by October 9, 2020; requiring the petitioners to file any reply expert evidence by October 23, 2020; and requiring that any cross-examinations of affiants, other than experts, be completed by November 6, 2020. The hearing of the petition was originally scheduled for five days commencing December 7, 2020. Reply evidence filed by the petitioners
- [16] On October 9, 2020, the petitioners served affidavit number three of Ms. Chan in response ("Chan Affidavit No. 3"). The petitioners also advised the respondents for the first time that they were in the process of obtaining their own expert evidence. On October 23, 2020, the petitioners delivered the affidavits of Cyrus Khory (the "Khory Affidavit") and Adam Werner. Objections by the Affinor Respondents to the petitioners' reply evidence
- [17] The Affinor Respondents filed their applications on November 13, 2020, to strike portions of the Chan Affidavit No. 3 and related exhibits (which are all documents that were publicly available to the petitioners when they filed their petition) and the Khory Affidavit.
- [18] The Affinor Respondents seek to strike this evidence because, they submit, it is not proper reply evidence and it is submitted in an attempt to improperly split the petitioners' case. Chan Affidavit No. 3
- [19] The evidence objected to by the Affinor Respondents contained in Chan Affidavit No. 3 is set out in paragraphs 4, and 14-16, and exhibits 3, 35, 36, 37, 38, and 39 as follows:
- a) Affinor's Audited Consolidated Financial Statements for the years ending May 31, 2018 and 2019, dated October 2, 2019;
 - b) Canadian Stock Exchange Policies Nos. 4 and 6;

- c) Form 51-102F1 Management's Discussions & Analysis, as published by the British Columbia Securities Commission (the "Commission"); and
 - d) Two decisions of the Commission dated February 20, 2020, and May 26, 2020.
- [20] All of these documents were available to the petitioners when they filed their evidence in support of the petition. There is no clear connection between the evidence submitted in reply and the evidence submitted by the Affinor Respondents. Affinor's financial statements in Chan Affidavit No. 3 were published after the date which the petitioners allege is the correction date, and no allegation of misrepresentation is alleged in those financial statements. Additionally, the Affinor Respondents did not provide any testimony with regard to the financial statements attached to their responses to petition.
- [21] I agree with the applicants that the evidence objected to by the Affinor Respondents is not proper reply evidence. The Khory Affidavit
- [22] The Khory Affidavit attaches Mr. Khory's expert report as Exhibit A. The report states that it concerns the annual and/or interim financial statements of certain issuers including Affinor. Mr. Khory describes the question he was asked to opine on: "Were the financial statements of Blok, Preveceutical, Kootenay, Affinor and Cryptobloc released during the class period materially misstated from an accounting perspective?"
- [23] The petitioners sought this opinion despite the fact that the Affinor Respondents filed no expert evidence or other evidence attesting to compliance with accounting standards.
- [24] Mr. Khory refers to Affinor's response to petition once in his report referring to one of the SEDAR documents. While he states that he relies on the Nigh Affidavit, there is no reference to that affidavit in the report. Mr. Khory does not rely upon the response or evidence of Mr. Chaudhry. The vast majority of information Mr. Khory relies upon to prepare his report is information that was publicly available to the petitioners when they filed their material in support of the petition and prior to the filing of the responses to petition.
- [25] Mr. Khory opines on the materiality of omissions in financial statements based on disclosure that took place on or after the alleged correction date.
- [26] The petitioners confirm in their application response that the only purpose of the Khory report is to provide an expert opinion on whether financial statements of five issuers, including Affinor's 2018 Interim Statements, "complied with the applicable accounting standards, as asserted by the respondent applicants in the responses and affidavits".
- [27] Mr. Khory opines on accounting standards compliance with respect to Affinor's consolidated interim financial statements for the nine months ending February 28, 2018, issued April 13, 2018; audited consolidated financial statements for the fiscal year ending May 31, 2018, issued September, 2018; and condensed consolidated interim financial statements for the three months ending August 31, 2018, issued October 30, 2018.

- [28] The petitioners concede in their response to application that the Khory Affidavit does not address the actual misrepresentation claims asserted by the petitioners.
- [29] The petitioners have not pleaded a misrepresentation with regard to compliance with accounting standards and the 2018 statements. The Affinor Respondents did not submit evidence regarding whether the 2018 Interim Statements or the year end statements complied with International Financial Reporting Standards ("IFRS").
- [30] Mr. Khory's opinion is further based on assumptions presented to him regarding the veracity of the consulting agreements and conspiracy allegations set forth in the notice of civil claim, and not the allegations of misrepresentations set out in the petition seeking leave under the Act. He opines on whether a variety of financial statements were materially misstated from an accounting perspective.
- [31] This is not proper reply evidence. Does the rule against case splitting apply to leave applications under the Act?
- [32] For the reasons set out in the companion decision Tietz, at paras. 44-58, I find that the traditional rule against case splitting applies to leave applications to bring secondary market claims under the Act. Are the petitioners attempting to split their case?
- [33] Chan Affidavit No. 3 contains material which is available to the petitioners when they filed their supportive materials. As I found, it is not responsive to the evidence of the Affinor Respondents. The evidence appears to be submitted in an attempt to buttress their case, waiting to submit this evidence in the form of reply is inappropriate and leads to inefficiencies. There are also hearsay and reliability issues in connection with some of the evidence in the manner in which it is submitted.
- [34] The Khory Affidavit raises new issues regarding non-compliance with IFRS as a material misrepresentation. Mr. Khory presents opinions on non-compliance with accounting standards which is an entirely new matter, not evident from the materials filed in support of the petition. This is fresh evidence raising novel claims.
- [35] The petitioners are attempting to split their case with this evidence.
- [36] The prejudice to the Affinor Respondents is similar to that found in Tietz, at paras. 63-64. As in that decision, I find it is insufficient to redress the unfairness of allowing the material objected to in Chan Affidavit No. 3 and the Khory Affidavit to be considered on the leave application through a costs order. It is also not an appropriate case to allow sur-reply or impose terms given the time it has already taken to proceed with the application for leave.

Conclusion

- [37] After consideration of the submissions of and authorities cited by the parties, based on my reasons set out above, I make the following orders:

- a) Paragraphs 4, and 14-16 of Chan Affidavit No. 3, and exhibits 3, 35, 36, 37, 38, and 39 are struck; and
- b) All references to and opinions of Mr. Khory regarding Affinor contained in the Khory Affidavit and exhibits are struck. Costs

[38] Costs will be in the cause. "Wilkinson J."

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