

CANADA / JUDGMENT

Tietz v. Cryptobloc Technologies Corp.

2021 BCSC 189

COURT

Supreme Court of British Columbia

DECIDED

5 February 2021

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2021 BCSC 189 Tietz v. Cryptobloc Technologies Corp. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tietz v. Cryptobloc Technologies Corp., 2021 BCSC 189 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 Respondents/Applicants Kootenay Zinc Corp, Anthony Jackson, Robert Tindall: P.J. Sullivan Counsel for PreveCeutical Medical Inc., Stephen Van Deventer, Shabira Rajan (by video): R.B. Fraser S. Batkin C. Rempel Counsel for BridgeMark Financial Corp., Jackson & Company Professional Corp., (by video): P.J. Sullivan J. Cytrynbaum Counsel for Bam Bam Resources (formerly New Point Exploraiton Corp.), Cryptobloc Technologies Corp. and Abattis Bioceuticals Corp. (by video): D. Yaverbaum Counsel for BLOK Technologies Inc. (by video): L. Smith Counsel for Affinor Growers Inc. (by video): J.M. Young Counsel for Yari Alexander Nieken, Neil William Stevenson-Moore and Bryn Gardener-Evans (by video): P. Taylor F. Lin Counsel for Sam Chaudhry (by video): E.S. Bojm D.W. Gibbons 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 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. 5 The Kootenay Respondents' petition response and evidence. 6 Case

management orders. 7 Reply evidence filed by the petitioners. 8 Objections by the Kootenay Respondents to the petitioners' reply evidence. 8 The Khory Affidavit 8 Does the rule against case splitting apply to leave applications under the Act?. 9 Are the petitioners attempting to split their case?. 9 Conclusion. 10 Costs. 10

- [1] This is an application by three 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 the 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 application of Kootenay Zinc Corp. ("Kootenay"), Anthony Jackson, and Robert Tindall (together, the "Kootenay Respondents").

Background

- [4] On July 11, 2019, the petitioners filed the Proposed Class Action advancing claims against 11 issuers and the directors and officers, including the Kootenay 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 by the issuers, all of which completed at different times during 2018.
- [6] Secondary market liability claims require leave of the court under 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 Kootenay Respondents is based on alleged misrepresentations in five documents. One of those documents is Kootenay's 2018 Audited Financial Statements for the year ending February 28, 2018, and released June 28, 2018 (the "2018 Statements"). The misrepresentations alleged in those statements are as follows:
 - a) the statement in the 2018 Statements that the shares issued under the subject private placement were purchased at \$0.27 per unit resulting in gross proceeds of \$1,215,000 was untrue and constituted a misrepresentation;
 - b) the 2018 Statements wrongfully omitted to disclose the conclusion of consulting agreements with the subject subscribers which provided for lump sum payments;

- c) the 2018 Statements wrongfully omitted to disclose the conclusion of consulting agreements with any consultant which provided for lump sum payments; and
 - d) the 2018 Statements wrongfully omitted to disclose the impact the payments to the consultants would have on the proceeds of the private placement. Statutory leave requirement for secondary market liability claims under the Act
- [8] 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 of 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
- [9] 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 five subject documents released by Kootenay, including the 2018 Statements, all of which are alleged to contain misrepresentations.
- [10] 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. Lee, purchased shares of Kootenay in 2018. A second affidavit of Mr. Lee was sworn in July 2020. Other similar affidavits from other proposed petitioners were also sworn at this time. The Kootenay Respondents' petition response and evidence
- [11] In September 2020, the Kootenay Respondents filed their response to petition. The Kootenay Respondents rely on filed affidavits from its CEO and respondent, Mr. Tindall (the Tindall Affidavit"); its CFO and respondent, Mr. Jackson (the "Jackson Affidavit"); two affidavits from Ms. Tsai, a legal assistant; and an affidavit and expert report prepared by Ms. Meyer ("the Meyer Affidavit").
- [12] Mr. Tindall deposes that Kootenay is a publicly traded junior mining company that engaged consultants to promote, market, and advertise the company. He describes why Kootenay needed those services. He further deposes that he believed the contents of the subject disclosure documents are accurate, including the representations regarding the use of subscription proceeds. He deposes that, in his experience, the descriptions regarding use of proceeds was consistent with how publicly traded junior mining companies described their proposed use of capital. He attached the 2018 Statements as an exhibit to his affidavit, deposing that he reviewed them at the time they were approved by the board of directors and considered them to be properly prepared and accurate.

- [13] Mr. Jackson sets out the history of Kootenay in his affidavit. He also deposes to facts surrounding the private placement and consulting agreements at issue in the petition. He then deposes to the details of the private placement and consulting agreements that were disclosed in the 2018 Statements.
- [14] Ms. Meyer has experience as a corporate secretary, officer, director, and CFO of numerous mineral exploration companies. For many years, until 2018, she was a chartered professional accountant in British Columbia. She was asked by counsel for the Kootenay Respondents to provide her opinion regarding a number of questions with respect to junior mineral exploration companies. This included an opinion on what the key components required to be included in financial statements of an early stage mineral exploration company, what should be disclosed with regard to the raising of capital and use of the proceeds, and whether it is common for consultants of such companies to participate in private placements with companies they service. Ms. Meyer was not asked for her opinion with regard to any public disclosures made by Kootenay, including the disclosures containing the alleged misrepresentations.
- [15] Ms. Meyer includes in her report opinions on the application of international financial reporting standards ("IFRS") to junior exploration companies. She concludes that IFRS applies to all companies. She notes there is one specific standard that applies to mining companies which addresses the adoption of a policy on treating property acquisition and exploration expenses, and includes disclosure requirements for identification of exploration for and evaluation of mineral resources. Case management orders
- [16] 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
- [17] On October 9, 2020, the petitioners served affidavit number 3 of Ms. Chan in response. 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 Kootenay Respondents to the petitioners' reply evidence
- [18] The Kootenay Respondents filed this application on November 13, 2020, to strike the Khory Affidavit inasmuch as it refers to or opines on Kootenay. The Kootenay Respondents submit this is not proper reply evidence and is an attempt by the petitioners to improperly split their case. The Khory Affidavit

- [19] 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 Kootenay. 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 periods materially misstated from an accounting perspective?"
- [20] Nowhere in his report does Mr. Khory suggest that he is replying to any evidence of the Kootenay Respondents. Mr. Khory does not refute Ms. Meyer's opinion that IFRS applies to Kootenay, including the mining specific standards. Mr. Khory opines on the materiality of omissions in financial statements based on disclosures that took place on or after the alleged correction date.
- [21] 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 Kootenay's 2018 Statements, "complied with the applicable accounting standards, as asserted by the respondent applicants in the responses and affidavits ". The petitioners concede in their response to application that the Khory Affidavit does not address the actual misrepresentation claims asserted by the petitioners.
- [22] The petitioners have not pled a misrepresentation with regard to compliance with accounting standards and the 2018 Statements. The Kootenay Respondents did not submit evidence regarding whether the 2018 Statements complied with IFRS. Mr. Khory bases his opinion on a review of Kootenay's financial statements in addition to the 2018 Statements.
- [23] Mr. Khory's opinion is 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.
- [24] This is not proper reply evidence. Does the rule against case splitting apply to leave applications under the Act?
- [25] 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?
- [26] The Khory Affidavit raises new issues regarding non-compliance with IFRS as a material misrepresentation. The petitioners in their application response submit that the additional statements which were the subject of Mr. Khory's opinion are in the same form as the 2018 statements and therefore there should be no objection to Mr. Khory's evidence. This misses the point: Mr. Khory is presenting opinions on those statements non-compliance with accounting standards which is an entirely new matter. This is fresh evidence raising novel claims.

[27] The prejudice to the Kootenay 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 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

[28] After consideration of the submissions of and authorities cited by the parties, based on my reasons set out above, I order that all references to and opinions of Mr. Khory to the Kootenay Respondents contained in the Khory Affidavit and exhibits are struck. Costs

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

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Prepared on 29 October 2026 · Esheria