

CANADA / JUDGMENT

Tietz v. Cryptobloc Technologies Corp.

2021 BCSC 522

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 522 Tietz v. Cryptobloc Technologies Corp. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Tietz v. Cryptobloc Technologies Corp., 2021 BCSC 522 Date: 20210323 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 (by video): P.R. Bennett M.W. Mounteer R. Mogerman, Q.C. N. Novak Counsel for the Respondent/Applicant BLOK Technologies Inc. (by video): L. Smith Counsel for Kootenay Zinc Corp., Anthony Jackson and Robert Tindall (by video): P.J. Sullivan J. Cytrynbaum Counsel for PreveCeutical Medical Inc., Stephen Van Deventer, Shabira Rajan (by video): R.B. Fraser S. Batkin C. Rempel Counsel for Bam Bam Resources (formerly New Point Exploration Corp.) and Abattis Bioceuticals Corp. (by video): D. Yaverbaum Appearing on behalf of Cryptobloc Technologies Corp. (by video) B. Goodwin Counsel for Affinor Growers Inc. (by video): J.M. Young L. Williams Counsel for Von Rowell Torres (by video): S. Arrandale Counsel for 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): N.E. John Counsel for Citation Growth Corp.: J. Facchin J. Der T. Cerazy, A/S No one appearing on behalf of the remaining Respondents Place and Date of Hearing: Vancouver, B.C. March 8, 2021 Place and Date of Judgment: Vancouver, B.C. March 23, 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 BLOK's petition response and evidence. 6 Case management orders. 7 Reply evidence filed by the petitioners. 8 BLOK's objections to the petitioners' reply evidence. 8 Does the rule against case splitting apply to

leave applications under the Act?. 9 The Khory Affidavit and Report 9 BLOK Exhibits to Chan Affidavit No. 3. 10 Conclusion. 12 Costs. 13

- [1] This is an application by one 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] The petitioner brings this application following my decisions on applications brought by five other respondent issuers and/or principals 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 BLOK Technologies Inc. ("BLOK").

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. The petitioners now seek to proceed against eight of those issuers.
- [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. The petitioners filed this petition seeking leave under the Act on February 24, 2020. The application for leave is now scheduled to be heard over ten days beginning March 8, 2021.
- [7] The petitioners' secondary market liability claims against BLOK is based on alleged misrepresentations made by BLOK in five documents:
 - a) news release dated June 1, 2018;
 - b) Canadian Securities Exchange ("CSE") Form 9 Notice of Issuance of Shares filed June 1, 2018;
 - c) news release dated June 8, 2018;
 - d) Interim Financial Statements for six months ended June 30, 2018, filed August 29, 2018; and
 - e) CSE Form 9 filed September 26, 2018 (the "BLOK Documents").
- [8] The petitioners allege that BLOK failed to disclose within these documents that during the period of the private placement referred to in the documents, BLOK entered into prepaid consulting agreements with persons or also subscribed for shares in the private placement. They further allege that such an omission was a material misrepresentation under the Act because the consultants effectively obtained their shares at a price that was far less than the price set out in the documents, and that only a small portion of the proceeds from the private placement was available as general working capital, as referenced in the documents.

- [9] The petitioners also allege that certain of the documents which describe the private placement stated that the shares issued would be subject to a four month and one day sale restriction, which the petitioners allege is a misrepresentation with respect to shares issued to the consultants since they were exempt from that hold period.
- [10] The petitioners further allege that a public correction, under the Act, of the misrepresentations, is found in the British Columbia Securities Commission ("Commission") Commission news release and Temporary Order and Notice of Hearing issued November 26, 2018. Statutory leave requirement for secondary market liability claims under the Act
- [11] 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
- [12] 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. With respect to BLOK, Ms. Chan attached the five BLOK Documents alleged to contain the misrepresentations, BLOK's certificates of interim filings, BLOK's profile from the System for Electronic Document Analysis and Retrieval ("SEDAR"), a Notice of Change of Director, and the above-mentioned graph with respect to BLOK's trading price. As well, exhibited to the affidavit is a copy of the Commission news release and order from November 26, 2018.
- [13] In March 2020, the petitioners further filed affidavit number two of Ms. Chan which attached affidavits of further proposed plaintiffs in the Proposed Class Action and petitioners with regard to their purchases of shares in other respondent issuers. One of those proposed petitioners, Mr. Greenwood, purchased shares of BLOK in August 2018. A second affidavit of Mr. Greenwood was sworn on August 21, 2020 within this petition, again setting out his purchase of BLOK shares. Other similar affidavits from other proposed petitioners were also sworn at this time. BLOK's petition response and evidence
- [14] In September 2020, BLOK filed its response to petition. BLOK relies on a filed affidavit from a paralegal; attaching 12 documents publicly filed by BLOK in 2018.
- [15] Those documents are the five BLOK Documents, the Management Discussion and Analysis ("MDA") which was filed in conjunction with the BLOK interim financials (one of the five BLOK Documents), and six additional public filings made by BLOK. These additional public filings pre-date the private placement period in issue as well as the BLOK Documents. They are:

- a) news release dated January 16, 2018 regarding AGM results and a name change;
 - b) CSE Form 1A Application for Listing letter dated January 26, 2018 and filed February 2, 2018;
 - c) CSE Form 7 Monthly Progress Report for February 6, 2018, filed March 9, 2018;
 - d) CSE Form 2A Listing Statement (Amendment 2) filed February 7, 2018;
 - e) Consolidated Condensed Interim Financial Statements for the three months ended March 31, 2018 and 2017, filed on SEDAR May 30, 2018; and
 - f) MDA for the period referred to in (e).
- [16] BLOK submits the additional documents are placed in evidence to provide background about BLOK and its business. BLOK apparently changed its business prior to trading its shares on the CSE. Case management orders
- [17] 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
- [18] On October 9, 2020, the petitioners filed affidavit number three of Ms. Chan in response ("Chan Affidavit No. 3"). Ms. Chan attaches 27 exhibits which relate directly to BLOK. All of these exhibits are publicly available documents filed in 2018 and 2019 by BLOK on SEDAR during the private placement period which began in June 2018 as well as after the alleged public correction date. They are as follows:
- a) Interim financial statements for the 9 months ended September 30, 2018, filed November 27, 2018 (Exhibit 5);
 - b) Audited financial statements of BLOK for the financial year ending December 31, 2018, filed May 1, 2019 (Exhibit 6);
 - c) 23 consulting agreements entered into by BLOK during May, June and August 2018, filed on September 19, 2019 (Exhibits 7 to 29);
 - d) SEDAR search result showing documents filed September 1 to 30, 2019 (Exhibit 30);
 - e) BLOK news release dated September 19, 2019 and filed that day (Exhibit 31).

- [19] 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") exhibiting the expert report of Mr. Khory (the "Khory Report") and Adam Werner. The Khory Report refers to the BLOK- related exhibits to Chan Affidavit No. 3 as information relied upon in reaching the opinions contained in the report. BLOK's objections to the petitioners' reply evidence
- [20] Pursuant to a further case management order setting timelines for hearing the petitioners' outstanding applications and BLOK's application, BLOK filed this application on February 26, 2021 to strike, as improper reply evidence, all references to and opinions regarding BLOK contained in the Khory Report, and paragraphs 6 to 11 and Exhibits 5 to 31 of Chan Affidavit No. 3. BLOK submits that this evidence is an attempt by the petitioners to improperly split their case. Does the rule against case splitting apply to leave applications under the Act?
- [21] For the reasons set out in my previous decision in *Tietz v. Cryptobloc*, 2021 BCSC 186, 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. The Khory Affidavit and Report
- [22] The Khory Report, Exhibit A to the Khory Affidavit, states that it concerns the annual and/or interim financial statements of certain issuers including BLOK. 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?"
- [23] The petitioners do not oppose BLOK's application with regard to the Khory Affidavit and Report. This is based on the reasoning set out in my rulings on the applications of other respondents with respect to the Khory Report: *Tietz v. Cryptobloc*, 2021 BCSC 186, 2021 BCSC 187, 2021 BCSC 188, and 2021 BCSC 189. In particular, see 2021 BCSC 187 at paras. 30-31 and 34. In those decisions I found that the Khory Report was not proper reply evidence and that, in advancing the opinion evidence regarding the novel issue of whether or not respondent issuers' financial statements were presented in accordance with international accounting standards was an attempt to split the case of the petitioners.
- [24] I note the petitioners reserve their right to argue on a possible appeal of a decision on the leave application, an error in those decisions relating to the Khory Report.
- [25] In accordance with my previous decisions regarding the Khory Report, and considering that BLOK's application is unopposed, I grant BLOK's application to strike those portions of the Khory Affidavit and Report as they relate to Mr. Khory's opinion regarding BLOK's financial statements being materially misstated from an accounting perspective. BLOK Exhibits to Chan Affidavit No. 3
- [26] The petitioners admit that all of these documents were available to them when they filed their evidence in support of the petition. However, they explain that legal counsel were not aware of the filings until September 10, 2020, even though they could have been located

earlier through due diligence. This date is troubling because it was prior to the delivery date for BLOK's responsive materials. Counsel for the petitioners go on to explain that they made a strategic decision to await the delivery of the response materials from BLOK, and then file the additional BLOK documents in reply if it was necessary to do so.

- [27] The petitioners, despite taking the initial position that the documents are proper reply, readily submitted in oral submissions that the additional BLOK documents are confirmatory in nature. It is the necessity argument upon which they ultimately reply: *Servatius v. Alberni School District No. 70*, 2020 BCSC 15.
- [28] The petitioners submit that there are admissions and acknowledgements in the additional financial filings which establish the misrepresentation claims, and excluding them will cause significant prejudice to the petitioners' ability to make their case for leave. They submit it "essentially establishes their claim". What those audited year end statements provide is that the company identified, as of April 2019, a large percentage of the value of the pre-paid consulting agreements entered into contemporaneously with subscriptions to the private placement by the consultants, never resulted in services being provided to BLOK. As such, the private placement proceeds were quantified differently from the interim statements, recognizing the limited services received. There is nothing in the year end statements which detail the timing of the company's identification of not receiving services, apart from the fact that it would appear to have been sometime after the nine-month period interim statements dated November 26, 2018, which contains no reference to the failure to provide services, and prior to April 2019 with the issuance of the December 31, 2018 year end financial statements.
- [29] In their defence, the petitioners submit that counsel's judgment or oversight should not be used as a reason to deny substantive justice to the petitioners. They refer me to *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, [2009] O.J. No. 4492 for the proposition that "An overly rigid interpretation [of the rules] can lead to unfairness by punishing a litigant for an oversight by counsel" at para. 14. However, this is not simply an instance of oversight. Counsel clearly made a strategic decision not to file this evidence once identified, and instead to lie in wait to see if they somehow actually needed it. Now they submit it is necessary.
- [30] They cannot have it both ways. The necessary elements required in support of the petition for leave would have been known to counsel when framing their petition for leave and presenting their case in chief. Counsel confirm they put their minds to this when making the decision to hold back on filing the additional documents.
- [31] Counsel submitted that they are still of the view that the petitioners' claims are adequately supported on the evidence filed in chief. BLOK would be placed in a position to rethink their response to the petition, as the petitioners would have been rightly assumed to have placed these documents into evidence if they were of the view they were probative.

- [32] This is a clear instance of case splitting and I do not find that it would result in an injustice to strike the evidence now sought to buttress the petitioners' claim. BLOK played no role in the petitioners' delay in discovering the documents. BLOK is entitled to base its response upon the petitioners' evidence as set out in chief when BLOK made its determination of what evidence it would rely upon in response.
- [33] With regard to the filed consulting agreements, despite again knowing of their existence by September 10, 2020 and holding off filing them with their case in chief, they submit that they are proper reply evidence to BLOK's response that investors had the ability to identify BLOK's reliance on consultants for their new line of business due to prior disclosures they filed in evidence. In support of the agreements being rebuttal evidence, the petitioners submit the contracts themselves dispute this proposition as they make no reference to the new line of business, but instead speak in general terms as to services to be provided. However, BLOK's additional responsive evidence predates the contracts and private placement and does not actually reference the contracts or their terms.
- [34] It is in the petitioners' evidence by way of the misrepresentation documents in which the existence of the contracts or failure to disclose their existence is raised. It is the petitioners who have put the actual contracts themselves into the constellation of facts in support of the petition. Furthermore, the purpose for which the petitioners seek to file the contracts as rebuttal evidence would appear to be in support of their conspiracy claim under the Notice of Civil Claim and rebuttal to BLOK's evidence being led to show BLOK would be engaging consultants in support of their new line of business. The contents of these contracts are not probative of whether services were actually provided and whether the effective price of the shares subscribed to by the consultants resulted in fewer net proceeds to BLOK from the private placement.
- [35] I do not find that the consulting contracts are proper reply evidence. The petitioners are in a similar position with regard to these documents as they are with the additional financial statement documents.

Conclusion

- [36] 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 BLOK contained in the Khory Affidavit and exhibits are struck.
- [37] I further order that paragraphs 6 to 11 and Exhibits 5 to 31 of Chan Affidavit No. 3 are struck.
Costs
- [38] Costs will be in the cause. "Wilkinson J."

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