IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tietz v. Cryptobloc Technologies Corp.,* 2021 BCSC 2275

Date: 20211122
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

Brought under the *Class Proceedings Act,* R.S.B.C. 1996, c. 50

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

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Appearing in person on behalf of Global Elsimate Capital Corp., formerly Cryptobloc Technologies Corp.:	B. Goodwin
No other appearances	
Place and Dates of Hearing:	Vancouver, B.C. April 19-23, 26-30, 2021 May 17-19, 2021
Place and Date of Judgment:	Vancouver, B.C. November 22, 2021

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[1] The petitioners apply for leave pursuant to s.140.8 of the *Securities Act,* R.S.B.C. 1996, c. 418 [*Act*] to bring secondary market claims within a proposed class action against six of the named 11 securities issuers in their petition filed February 24, 2020. Leave under s 140.8 of the *Act* is also sought with regard to certain directors and officers of those issuers.

[2] The petitioners also seek an order permitting them to amend their petition, pursuant to a notice of application filed March 13, 2020 attaching their proposed amended petition (the "Proposed Class Action").

[3] As proposed in the amended petition, if leave under s. 140.8 of the *Act* is granted, the petitioners seek an order *nunc pro tunc* such that leave is retroactive to July 11, 2019, the filing date of the notice of civil claim ("NOCC") filed under Action No. S197731.

[4] Within their petition, the petitioners filed a proposed amended notice of civil claim. As with applications heard prior to the hearing of the petition, the parties all refer to the proposed amended notice of civil claim when referring to the secondary market allegations within the claim.

[5] The petitioners, as set out in the petition and amended petition, are purchasers, sellers, or purchasers and sellers of the respondent issuers on the secondary market during the relevant period under the statutory claims.

[6] The respondent issuers and directors and officers subject to the application for leave under the severed hearing of the petition before me are:

a) PreveCeutical Medical Inc. ("PreveCeutical"), Stephen Van Deventer, and Shabira Rajan;

b) Kootenay Zinc Corp. ("Kootenay"), Anthony Jackson, Robert Tindall, Von Rowell Torres;

c) Affinor Growers Inc. ("Affinor"), Nicholas Brusatore, Sam Chaudhry;

d) Global Estimate Capital Corp., formerly known as Cryptobloc Technologies Corp. (“Cryptobloc”), Brian Biles, Kenneth Clifford Phillippe, Neil William Stevenson-Moore;

e) BLOK Technologies Inc. (“BLOK”), David Alexander, Robert Dawson, and James Hyland; and

f) Bam Bam Resources Corp., formerly known as KOPR Point Ventures Inc., formerly known as New Point Exploration Corp. (“New Point”), and Bryn Gardener-Evans.

[7] These reasons address the applications for leave with respect to the above respondents except PreveCeutical, Stephen Van Deventer, and Shabira Rajan which remain under reserve.

Leave sought to file the Amended Petition

[8] The petition filed by Mr. Tietz and Mr. Loewen February 21, 2020 did not include petitioners who held a number of the respondents’ shares. On March 13, 2020 those petitioners filed a notice of application seeking to add Mike Lee, Mike Dotto, Malcom Runkee, Americo Morlani, Greg Lomnes, Grant Greenwood, Stacey Dionne and Calvin Kalyniuk as petitioners and amending the petition to specify their respective involvement with respect to the statutory claims.

[9] The respondents submit it is a requirement, even if the petition relates to a proposed class action, that the application for leave under the *Act* requires at least one petitioner who has standing under the *Act* as a shareholder for each respondent.

[10] Whether this is the case or not, I do not see any prejudice to the respondents in granting the amendments sought in conjunction with the hearing of the petition. I grant the orders sought in the petitioners’ Notice of Application filed March 13, 2020.

Background

[11] The Proposed Class Action concerns certain private placements made by the respondent issuers during different time periods in 2018.

The petitioners' secondary market liability claim against the respondents is based on misrepresentations in documents they released regarding the raising of capital under private placements and the use of the proceeds raised. While each of the claims against each issuer are specific to their documents, the general theme of the misrepresentation allegations is that issuers failed to disclose that they were entering into consulting agreements with certain consultants with the condition that the consultants purchase shares under the private placements. In so doing, the consultants were paid for their consulting services from a significant portion of the proceeds raised through the private placements, and in so doing reduced the effective price raised under the private placements.

[12] In the circumstances of the issuers, the petitioners submit that the arrangement between the issuers and the consultants was a material fact related to the private-placements.

[13] The petitioners further submit that the misrepresentations were publicly corrected on November 26, 2018 when the British Columbia Securities Commission (the "Commission") disclosed its investigation into certain named and other unnamed issuers, the purported consultants and the issuance of an enforcement order.

Part 16.1 of the *Act* – Civil Liability for Secondary Market Disclosure

[14] 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*.

[15] Securities legislation provides a distinct form of consumer protection, and is to be interpreted broadly: *Kerr v. Danier Leather Inc*., 2007 SCC 44 at para. 32.

[16] When a company issues shares it does so on the "primary market" by selling them directly to investors. The "secondary market" is where investors buy and sell

their own investments in shares with each other. To effect the policy goals of securities legislation as it relates to the secondary market, issuers are required to make continuous disclosure as it relates to their operations: *Continuous Disclosure Obligations*, B.C. Reg. 110/2004, s.7.1. Part 16.1 of the *Act* then provides that shareholders may bring a claim against a company for breaches of the disclosure obligations. This form of securities legislation "emerged directly out of Canada-wide efforts to develop a more meaningful and accessible form of recourse for investors": *Theratechnologies inc. v. 121851 Canada inc.,* 2015 SCC 18 at para. 27.

[17] The disclosure obligations require accurate and complete disclosure. To require otherwise would render the requirements meaningless (*Philip Services Corp*. (*Re*) (2006), 29 OSC Bull 3941; CarswellOnt 2818 at para. 7):

> [7] Disclosure is the cornerstone principle of securities regulation. All persons investing in security should have equal access to information that may affect their investment decisions. The Act's focus on public disclosure of material facts in order to achieve market integrity would be meaningless without a requirement that such disclosure be accurate and complete and accessible to investors (see *Pacific Coast Coin Exchange of Canada v. Ontario (Securities Commission),* [1978] S.C.R. 112).

[18] Misrepresentations by issuers seriously undermine the efficient and fair operation of the capital markets (*Michaels (Re),* 2014 BCSECCOM 457 at para. 8):

> 8. Not far behind fraud, and the scale of seriousness of misconduct, stands misrepresentation. Those who operate and profit in the capital markets by misstating material facts (through commission or omission), undermine the confidence of the public in one of the cornerstones of capital markets regulation, the provision of accurate and complete information for investors to make informed investment decisions.

[19] The statutory cause of action for secondary market misrepresentations was created in securities legislation across Canada due to Canada's securities regulators recognizing that the regulatory sanctions were "an inadequate deterrent" for public corporations failing to comply with disclosure requirements, and that "the common law remedies available to aggrieved investors for misleading disclosure in secondary trading markets were so onerous that they were, "as a practical matter largely

academic": *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras. 63-64 [*Canadian Imperial Bank of Commerce* SCC].

[20] In *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 186 at para. 13 [*Tietz* I], I found that the provisions of Part 16.1 of the *Act* are substantially similar to the provisions under Part XXIII.1 of the *Ontario Securities Act*, R.S.O. 1990, c. S.5 [*OSA*], as well as the equivalent provisions in Quebec's *Securities Act*, CQLR c V-1.1. The Supreme Court of Canada described the overarching policy behind the *OSA* within the context of an application for leave in *Canadian Imperial Bank of Commerce* SCC at para. 75:

> … both the CPA [Class Proceedings Act] and Part XXIII.1 *OSA* are remedial in nature, and should thus be interpreted broadly and purposively. The end result of the legislature's consideration was that the scheme includes a leave requirement that serves as a precondition to the commencement of an action, a limitation period and no requirement to prove reliance on the misrepresentation. The combined effect of these features is to promote efficiency and fairness for both parties.

[21] Some respondents argued that it was never the intention of the legislature to provide relief under Part 16.1 of the *Act* to shareholders of "penny stock" junior companies like the respondents in this case. There is no substance to this argument. The legislation makes no distinction between stock trading prices and standing of a shareholder to bring a claim. To find there is a minimum share price threshold under the *Act* would be to infer that the legislature of this province sought to limit shareholder's claims significantly, given the prevalence of junior companies subject to these provisions of the *Act*. There is nothing within Part 16.1 which indicates such an intention.

[22] The process to bring an action for damages against issuers and certain officers and directors for alleged secondary market misrepresentations is set out in Part 16.1 of the *Act*. The petitioners seek leave under s. 140.8 of the *Act* to bring their claim pursuant to s. 140.3(1) of the *Act*:

> 140.3(1) Where a responsible issuer or a person with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person who acquires or

> disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against
>
> (a) the responsible issuer,
>
> (b) each director of the responsible issuer at the time the document was released,
>
> (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document,
>
> …

[23] "Misrepresentation" is defined in s. 1(1) of the *Act*:

> "misrepresentation" means
>
> (a) an untrue statement of a material fact, or
>
> (b) an omission to state a material fact that is
>
> (i) required to be stated, or
>
> (ii) necessary to prevent a statement that is made from being false or misleading in the circumstances in which it was made;

[24] It is clear that the definition of misrepresentation encompasses "half-truths." An issuer cannot escape liability by only stating facts that are, strictly speaking, true, but which become misleading when considered alongside the omitted information (*Kerr v. Danier Leather Inc.* (2005), 261 D.L.R. (4th) 400 at paras. 112-113 (Ont. C.A.):

> [112] … By defining "an omission to state a material fact necessary to make a statement not misleading in the light of the circumstances in which it was made" as a misrepresentation, the Legislature intended to capture under the rubric of misrepresentation so-called "half-truths."
>
> [113] For example, if an issuer said in a prospectus, truthfully, that it had acquired a patent, but it omitted to say that it was engaged in litigation challenging the validity of the patent, it may well be liable for prospectus misrepresentation. Or, if an issuer had said that over the past ten years its profits had averaged $4 million annually, without also disclosing that its profits were $40 million in the first year and zero in the next nine years, this half-truth would also likely amount to a misrepresentation. In each example, the second statement was necessary to make the first statement - "in the circumstances" - not misleading.

[25] A "material fact" is defined in s. 1(1) of the *Act*, with respect to a security:

> "material fact" means,
>
> > (a) when used in relation to a security issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the security,
> >
> > …

[26] Materiality is a highly contextual and fact specific inquiry. Omitted information is material if its inclusion would have "significantly altered the 'total mix' of information available" to the reasonable investor in making the investment decision: *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.,* 2011 SCC 23 at paras. 52, 61 [*Sharbern*]; *Cappelli v. Nobilis Health Corp.,* 2019 ONSC 2266 at paras. 147-149.

[27] Specific evidence on the issue of materiality is not always necessary. The objective importance of the facts or omissions for the investment decision can, in appropriate cases, be inferred as a matter of common sense: *Sharbern* at paras. 52, 58-61.

[28] The definition of "document" for the purposes of Part 16.1 is set out in s. 140.1 of the *Act.* It is very broad in that includes both documents that are required to be filed or not required to be filed and even extensive documents that are not filed with the Commission:

> "document" means a written communication, including a communication prepared and transmitted only in electronic form,
>
> (a) that is required to be filed with the commission, or
>
> (b) that is not required to be filed with the commission and
>
> > (i) that is filed with the commission,
> >
> > (ii) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with an exchange or quotation and trade reporting system under its bylaws, rules or regulations, or
> >
> > (iii) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer;

[29] Section 140.1 of the *Act* further defines "core document" which is a subset of documents:

"core document" means

(a) a prospectus, a take over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements and an interim financial report of the responsible issuer, where used in relation to

(i) a director of a responsible issuer who is not also an officer of the responsible issuer,

(ii) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or

(iii) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

(b) a prospectus, a take over bid circular, an issuer bid circular, a directors' circular, a notice of change or variation in respect of a take over bid circular, issuer bid circular or directors' circular, a rights offering circular, management's discussion and analysis, an annual information form, an information circular, annual financial statements, an interim financial report and disclosure required under section 85 (b) of the responsible issuer, where used in relation to

(i) a responsible issuer or an officer of the responsible issuer,

(ii) an investment fund manager, where the responsible issuer is an investment fund, or

(iii) an officer of an investment fund manager, where the responsible issuer is an investment fund, or

(c) any other document that is within a class of documents prescribed for the purpose of this definition.

[30] Section 85(b) of the *Act* referenced in the definition of “core document” sets out the requirement placed upon reporting issuers to provide continuous disclosure, including disclosure of a material change:

85 A reporting issuer must, in accordance with the regulations,

(a) provide prescribed periodic disclosure about its business and affairs,

(b) provide disclosure of a material change, and

(c) provide other prescribed disclosure.

[31] Section 1(1) of the *Act* provides a definition of “material change”:

> "material change" means,
>
> (a) if used in relation to an issuer other than an investment fund,
>
> (i) 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 a security of the issuer, or
>
> …

[32] A company must analyse what constitutes a material change objectively: "When a reporting issuer is considering material change disclosure, it must apply an objective test as to the expected market impact as it will not have the benefit of actual market impact information": *Cornish v. Ontario Securities Commission*, 2013 ONSC 1310 at para. 50. At the time of disclosure, materiality in the market is determined objectively, "from the perspective of the reasonable investor": *Cappelli* at para 177.

[33] The alleged misrepresentations of the respondents are contained in annual financial statements, interim financial statements, management discussion and analyses ("MDA"), material change reports and Form 9s. The parties agree that all of these documents qualify as core documents under the *Act*, except for Form 9s. The respondents dispute whether Form 9s are core documents. The Canadian Stock Exchange ("CSE") requires issuers listed on the CSE to post and file Form 9s when they complete private placements.

[34] The *Act* differentiates between misrepresentations in "core documents" and misrepresentations in non-core documents. For misrepresentation within non-core documents, the plaintiff must prove an additional level of knowledge or wrongdoing on the part of the defendant pursuant to s. 140.4(1):

> 140.4(1) In an action under section 140.3 in relation to a misrepresentation in a document that is not a core document, or a misrepresentation in a public oral statement, a person is not liable, subject to subsection (2), unless the plaintiff proves that the person
>
> (a) knew, at the time that the document was released or public oral statement was made, that the document or public oral statement contained the misrepresentation,
>
> (b) at or before the time that the document was released or public oral statement was made, deliberately avoided acquiring knowledge that

> the document or public oral statement contained the misrepresentation, or
>
> (c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

[35] With respect to misrepresentations in non-core documents, the plaintiff is not required to lead direct evidence regarding the defendant's state of mind. The requisite knowledge or misconduct can be determined from "appropriate inferences": *Kauf v. Colt Resources Inc*., 2019 ONSC 2179 at paras 83.; *Silver v. Imax Corp.* (2009), 66 B.L.R. (4th) 222 at para. 334; *Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637 at paras. 443-445; *Stevens v. Ithaca Energy Inc.*, 2019 ABQB 474 at paras. 49-58.

Are Form 9's "core documents"?

[36] I agree with the Court in *Abdula v. Canadian Solar*, 2014 ONSC 5167 at paras. 44-46 that it is not necessary to definitively determine, at the leave stage, whether a particular document is a "core document." The "onus is on the plaintiff to show that there is a reasonable possibility that it will be found at trial that the representations or some of them were contained in core documents": *Abdula* at para. 46.

[37] The *Act* defines "core document" in s. 140.1 to include, in relation to responsible issuers and officers, a "disclosure required under s. 85(b.)" Section 85(b) states that a reporting issuer must "provide disclosure of a material change" in accordance with the regulations. The CSE Form 9 sets out details of an issuer's private placement. The respondents submit that since Form 9s are not entitled "material change report", they do not qualify as a document referred to as a disclosure required under s. 85(b).

[38] It is reasonably possible that the petitioners will prove at trial that the Form 9s, as I set out below, disclose material changes to the respondent issuers' capital. They are a type of formal document more akin to core documents under the *Act* than non-core documents.

[39] I find there is a reasonable possibility that the court will conclude at trial that Form 9's are "core documents."

Public correction

[40] In addition to a misrepresentation, the plaintiff must also show that the misrepresentation was publicly corrected in order to set out the "time post for the proposed class period and any eventual damages calculation": *Drywall Acoustic Lathing and Insulation, Local 675 Pension Fund v. Barrick Gold Corporation*, 2021 ONCA 104 at para. 66 [*Drywall*], citing the Allen Committee. The public correction is not, however, a constituent element of the statutory misrepresentation claim.

[41] The only persons with the right of action are those who acquire or dispose of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected: *Swisscanto v. Blackberry*, 2015 ONSC 6434 at para. 57. This requirement fixes the time period for liability.

[42] The Ontario courts have developed a set of characteristics or criteria for determining whether there has been a public correction under their legislation (*Drywall* at paras. 22, 76):

> (i) There must be some linkage or connection between the alleged misrepresentation and the alleged public correction;
>
> (ii) The public correction must share the same subject matter and, in some way, relate back to the misrepresentation; and,
>
> (iii) The public correction must be reasonably capable of revealing to the market the existence of an untrue statement of material fact, or an omission to state a material fact [though it need not specifically identify them].

[43] These characteristics and criteria are also applicable under the *Act*. For the purposes of the application for leave, the critical question is "whether the alleged public correction is reasonably capable of being understood in the secondary market as correcting what was misleading in the impugned statement": *Drywall* at para. 76.

[44] The purpose of requiring a public correction provision is not to establish loss causation. It is not one of the safeguards against frivolous strike suits since "[w]here there is a reasonable possibility of a misrepresentation, the plaintiff's claim can hardly be characterized as a strike suit": *Drywall* at paras. 68 and 71. The act of bringing the action in itself "suggests that there was a public correction. The plaintiff must have learned of the misrepresentation somewhere": *Drywall* at para. 71.

[45] Once a misrepresentation and a public correction are demonstrated, causation is presumed and damages are calculated by applying a formula using trading prices during a set period of time applied to specific circumstances of the shareholder, or an amount the court considers just where there is no published market pursuant to s. 140.5 of the *Act*: *Swisscanto* at para. 58.

[46] Under s. 140.5(3) of the *Act*, defendants have the opportunity to establish that any change in the security's market price during the period identified under the *Act* is unrelated to the misrepresentation: *Swisscanto* at paras. 58, 64; *Drywall* at para. 72.

The Test for Leave

[47] The cause of action for misrepresentation under the *Act* can only be brought with leave of the court pursuant to s. 140.8 of the *Act*:

> 140.8(1) No action may be commenced under section 140.3 without leave of the court granted upon motion with notice to each defendant.
>
> (2) The court may grant leave only where it is satisfied that
>
> (a) the action is being brought in good faith, and
>
> (b) there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff.
>
> (3) Upon an application under this section, the plaintiff and each defendant must serve and file with the court one or more affidavits setting forth the material facts upon which each intends to rely.
>
> (4) If an affidavit is filed with the court, a person who made the affidavit may be examined on it in accordance with the Supreme Court Civil Rules.
>
> (5) A copy of the application for leave to proceed and any affidavits filed with the court must be sent to the commission when filed.

[48] The decision to grant leave is discretionary under the *Act*, which differs from the mandatory wording under the *OSA*.

Whether the action is brought in good faith

[49] A plaintiff must not bring the claim for a collateral purpose. The claim must be consistent with the purposes of the remedy provided under the *Act*. This branch of the test is seldom opposed and from a review of the authorities, very few applications for leave fail to meet the good faith requirement.

[50] A supporting affidavit setting out that the claim is brought in good faith for purposes consistent with the legislation is sufficient absent evidence to the contrary: *Mask v. Silvercorp Metals Inc*., 2015 ONSC 5348 at paras. 34-35.

[51] Ultimately, the good faith of the plaintiff in a statutory claim is a question of fact to be determined on the evidence and circumstances of the case: *Jiang v. Piccolo*, 2020 BCSC 1584 at para. 72.

Whether there is a reasonable possibility of success for the plaintiff at trial

[52] I adopt my reasoning as set out in *Tietz* I at para. 12:

> [12] Leave of the court is not a formal or nominal requirement. It is a robust deterrent screening mechanism which requires a plaintiff to show that there is a reasonable or realistic chance that the claim will succeed. The leading authority setting out the test for leave is *Theratechnologies inc. v. 121851 Canada inc*., 2015 SCC 18. *Theratechnologies* considered the test for leave in the context of the Quebec securities legislation. This test has since been applied in the context of the Ontario securities legislation: *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60 at paras. 122, 212. At para. 39 in *Theratechnologies*, Justice Abella, writing for a unanimous Court, explained:
>
> > [39] A case with a reasonable possibility of success requires the claimant to offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim. This approach, in my view, best realizes the legislative intent of the screening mechanism: to ensure that cases with little chance of success - and the time and expense they impose - are avoided. I agree with the Court of Appeal, however, that the authorization stage under s. 225.4 should not be treated as a mini-trial. A full analysis of the evidence is unnecessary. If the goal of the screening mechanism is to prevent costly strike suits and litigation with little chance of

> success, it follows that the evidentiary requirements should not be so onerous as to essentially replicate the demands of a trial. To impose such a requirement would undermine the objective of the screening mechanism, which is to protect reporting issuers from unsubstantiated strike suits and costly unmeritorious litigation. What is required is sufficient evidence to persuade the court that there is a reasonable possibility that the action will be resolved in the claimant's favour.

[53] The reasonable possibility test, while merit based, is a low threshold. While the hurdle is more than a speed bump, “it is not the Matterhorn”: *Drywall* at para. 36. The Ontario Superior Court in *DALI Local 675 Pension Fund (Trustees) v. Barrick Gold*, 2019 ONSC 4160 at para. 35 described the threshold in terms of percentages:

> [35] The "reasonable possibility" test means that in many cases the defendant may have persuaded the leave judge on the evidence before the court that the defendant will *probably* prevail at trial. This doesn't mean that the judge is obliged to dismiss the motion for leave. The judge may still conclude that the plaintiff has a "reasonable possibility of success" at trial. For example, if the judge thinks in terms of percentages, the judge may say to herself that the chances of the defendant succeeding at trial are excellent -- 80 or even 90 per cent. This still leaves a 10 to 20 per cent chance of success for the plaintiff, enough to clear the "reasonable possibility" hurdle.
>
> [Italic emphasis in original.]

[54] In addition to considering the evidence presented in support and opposition to the application, the court must take into consideration the limitations on the available evidence at such a preliminary stage of the proceedings (*Rahimi v. SouthGobi Resources Ltd*., 2017 ONCA 719 at paras. 48-49 [*SouthGobi*]):

> [48] To be clear, the motion judge's duty to scrutinize the entire record is not restricted to a review of the evidence filed on the motion. The motion judge is also obligated to consider what evidence is *not* before her. She must be cognizant of the fact that, at the leave stage, full production has not been made and the defendant may have relevant documentation that has not been produced or relevant evidence that has not been tendered. Consideration of these evidential limitations of the leave stage is important because they can work to the prejudice of plaintiffs who have potentially meritorious claims.
>
> [49] Equally important is the requirement that the motion judge thoroughly examine the state of the evidence to determine whether there are contentious issues of credibility that impact on the decision whether to grant leave. Where such credibility issues are extant, the motion judge must ask herself whether they can be resolved on the existing record.
>
> [Italic emphasis in original.]

[55] I note the petitioners repeatedly asked the Court to consider the fact that some of the respondents did not provide any evidence or failed to produce certain evidence in response. The *Act* does not require the respondents to provide any evidence on the application for leave. Adverse inferences should generally only be made against the party who bears the onus of proof: *Ranahan v. Oceguera*, 2019 BCSC 228 at para. 126. The onus of meeting the standard for granting leave is solely upon the petitioners.

[56] Accordingly, if there is credible evidence which shows a reasonable possibility the claim will succeed then leave may be granted, even if the court at this stage is of the opinion that the claim is unlikely to succeed at trial. This is a fairly low threshold.

The Alleged Misrepresentation Claims Against Respondent Issuers and Directors and Officers

[57] Between January 2018 and August 2018, each of the respondent issuers carried out prospectus exempt distribution of their securities pursuant to the s. 2.24 prospective exemption for consultants in National Instrument 45-106 (*Prospectus Exemptions*, BCSC NI 45-106, B.C. Reg. 227/2009 [*NI 45-106*]) (the "s. 2.24 Exemption"). For each of the private placements, the relevant Issuer: (i) issued two news releases, one announcing the private placement and one announcing its closing, (the "Private Placement News Releases"); and (ii) filed a Form 9 with the CSE.

[58] One of the issuers, Cryptobloc, also filed material change reports in relation to their private placements. Each of the material change reports referenced and attached the issuers' private placement news release as a full description of the material change which had been issued to announce the closing of the private placement.

[59] As discussed in detail below, each issuer in each of their respective Private Placement News Releases, Form 9s, and the material change reports represented that:

a) shares would be or had been issued under the relevant private placement at a certain price per share;

b) gross proceeds resulting from the sale of shares at that price would be or had been received by the issuer; and

c) the proceeds of the private placement would be used either to fund particular operations or projects of the Issuer or for general working capital.

[60] The petitioners allege that as a condition for either all or certain subscribers' participation in the private placements, each issuer entered into 22 consulting agreements with those subscribers and their designated associates, contemporaneously with or shortly before the private placements. Under those agreements, each issuer paid lump sum consulting fees to those subscribers and their designated associates contemporaneously with or shortly after the closing of the closing of the private placement.

[61] The petitioners in their written argument further say the consulting agreements were a sham and a false pretence, in that the purported consultants never intended to provide services of any real value and the issuers had no *bona fide* expectation of receiving such services. However, as I found in prior decisions in this matter, the pleadings setting out the statutory claims with respect to the respondents do not include allegations of conspiracy or that the consulting agreements were a sham: *Tietz* I at para. 60; *Tietz v. Cryptobloc Technologies Corp,* 2021 BCSC 187 at para. 30; *Tietz v. Cryptobloc Technologies Corp,* 2021 BCSC 189 at para. 31; *Tietz v. Cryptobloc Technologies Corp,* 2021 BCSC 522 at para. 34. The petition seeking leave and the Proposed Class Action do not set out that the statutory claims include allegations of conspiracy between the consultants and issuers with regard to the allegation that no services were intended to be provided or received. By necessity, this means that the petitioners' allegations regarding the consultants' lack of intention to provide services and the respondents' knowledge of that at the time of entering into the agreements is not properly before

the Court on this application for statutory leave. As such the respondents objected to this line of argument. The petitioners have not sought to amend the petition or proposed class action to include the conspiracy allegations with respect to the consulting agreements within the statutory misrepresentation claims and as such they are not the subject of the application for leave under the *Act*. In any event, the vast majority of the allegations of misrepresentations for failing to disclose that the consulting agreements were a sham are not supported in the evidence before me. The allegations are too speculative.

[62] Furthermore, in written argument the petitioners submit that there is an additional legal basis in support of their claim that the disclosure regarding the price paid by the consulting subscribers under the private placements was misleading or untrue due to s. 64 of the *Business Corporations Act*, S.B.C 2002, c. 57 ("*BCA*") or s. 25 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("*CBCA*"), which address an issuer's ability to issue shares upon payment for them. This legal basis was not set out in the petition or amended petition. This is a new basis for their application, notice of which was provided to the respondents less than two weeks before the hearing of this application, within the petitioner's 260 pages of written submissions.

[63] I agree with the respondents that the petitioners have not properly plead the *BCA* or *CBCA* as a legal basis for their application. Furthermore, such late notice prejudices the respondents to such an extent that it would render the Court's consideration of this argument to be unfair. "Pleadings give opposing parties fair notice of the case to be met and set the boundaries and context for matters…": *Weaver v. Corcoran*, 2017 BCCA 160 at para. 63. Pleadings are "foundational [and] guide the litigation process," ensuring that parties understand the issues of the case and allow them to respond accordingly: *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 at para. 21.

[64] The petitioners allege that in the circumstances, the issuers' statements regarding the price and proceeds of each private placement were untrue statements

of material fact. The petitioners say that as a result of the lump sum consulting fees paid to the subscribers, (i) the subscribers obtained the shares at an effective purchase price per share that was substantially less than the price disclosed to the public, and (ii) the proceeds from the share issuance that were actually available to each issuer for its specific business purposes or as general working capital was substantially less than the amount the issuer stated was available.

[65] This is so, they claim, for two distinct and separate reasons.

[66] First, the consulting agreements between the issuers and the subscribers and their designated associates, and the lump sum payments made pursuant to those agreements, were conditions of the subscriptions for shares under the private placements.

[67] The consulting agreements were an integral part of the private placement transaction. Once the transaction had been completed, the true cost to the subscribers, and the true proceeds received by the issuers, for the shares issued under the private placement was the amount remaining from after the issuer paid the consulting fees. The funds paid as consulting fees were never available for the issuer to use for any purpose other than to pay those fees. These amounts cannot properly be regarded as part of the consideration paid by the subscribers for their shares or as proceeds resulting from the issuance of those shares.

[68] The petitioners submit in argument that the consulting agreements, even if they were perfectly legitimate agreements for future services, cannot stand as part of the consideration for the shares, or constitute part of the “proceeds” received from their issuance, because shares cannot lawfully be issued for future services: *BCA*, ss. 64(2) and (3); *CBCA*, s. 25(3). I agree with the respondents that it is not open to the petitioners to argue this legal basis. This is not set out within the legal basis of the petition. This is a new legal position argued by the petitioners at the hearing of the petition. As such, the respondents have not had adequate advance notice, which may have overcome the prejudice caused to them. I will not consider this legal basis since it has not been properly plead.

[69] The petitioners claim that the only proceeds standing as consideration for the shares, after the private placement transaction completed, was the amount left in the hands of the issuers after paying the consulting fees, and the effective price for the shares must be calculated in relation to those proceeds.

[70] The petitioners also claim that the issuers made misrepresentations by omission in the disclosures they made about their private placements in the Private Placement News Releases and the Form 9s, and for Cryptobloc in its material change reports. None of these disclosures about the private placements disclosed that the issuers had entered into or agreed to enter into consulting agreements with subscribers and their designated associates under the private placement contemporaneously with and as a condition for the subscribers' acquisition of shares under the private placement. None of the disclosures revealed that most of the proceeds the issuers represented they had received for use as general working capital would be or had been paid back to the subscribers and their designated associates as lump sum consulting fees, leaving an amount much smaller than what the issuers had reported to the public.

[71] The petitioners say that these material facts were necessary for an investor to properly understand the private placement transactions and their economic impact on the issuers. The disclosure of these facts was also necessary to prevent the issuers' statements from being false and misleading, even if those statements could be considered as strictly accurate by a reason of the amounts paid by the subscribers to the issuers.

[72] In the days and weeks after each private placement, the petitioners allege that most of the subscribers who acquired shares in each private placement accrued a significant profit by selling most or all of their shares at a price significantly lower than what the issuers represented had been paid for the shares, but significantly more than the effective price of what the subscribers had truly paid. The volume of shares being sold and the prices at which those shares were sold caused the trading price for each issuer's shares to fall significantly.

[73] Following this increase in trading activity, three of the issuers, Kootenay, Affinor, and Cryptobloc, issued news releases addressing the change in market activity (the "Trading News Releases"). Kootenay and Affinor attributed the majority of their increased trading volumes to the news releases disclosing the private placements. Cryptobloc stated that management was unaware of any material change that would account for the recent increase in trading.

[74] The petitioners' claim alleges that each of the Trading News Releases contained misrepresentations because these issuers knew that:

a) the subscribers had acquired free trading shares through the private placement for an effective price that was substantially less than the price that had been disclosed to the public and the market price for the issuers' shares; and

b) the increased trading volumes were likely a result of the subscribers selling their shares at prices significantly below the market price which resulted in a substantial profit to them.

[75] The petitioners also seek leave to bring claims of misrepresentation against three of the issuers (Kootenay, Affinor and BLOK), for statements made and information omitted concerning their private placements in the first financial statements they released and filed following the completion of the private placements (the "Financial Statements"). Each of the Financial Statements referenced the issuer's private placement and repeated the same statements concerning the price paid and proceeds received for the shares issued, which were contained in the Private Placement News Releases and which the petitioners say are untrue, for the reasons set out above. None of the Financial Statements disclosed the consulting agreements and consulting fees as part of the private placement transaction.

[76] Again, the petitioners say that these were material facts which needed to be disclosed in order for any investor to properly understand the private placement and its economic impact on the Issuer.

[77] As set out in detail below, each of the issuers' officers and directors was either an officer or director, or both, of one of the issuers when the private placement occurred, and when one or more of the private placement news releases, Form 9s, material change reports, Trading News Releases, and Financial Statements was issued or filed by that issuer. Further, most of the issuers' officers and directors either expressly authorized one or more of the Private Placement News Releases and Trading News Releases, or certified one or both of the Form 9 or the Financial Statements.

The public correction: November 26, 2018 Commission News Release and Temporary Order

[78] On November 26, 2018, the Commission issued a news release (the "Commission News Release") and *Re BridgeMark Financial*, 2018 BCSECCOM 369 [*Temporary Order*] (collectively, the "Commission Documents"). The Commission News Release announced that the Executive Director of the Commission had "temporarily prohibited a group of purported consultants from buying or selling the securities of 11 companies listed on the Canadian Securities Exchange (CSE) alleging that they participated in a scheme that is abusive to the capital markets." The 11 companies included the six issuers who are the subject of this application for leave.

[79] The Commission News Release stated:

> The orders arises from an ongoing BCSC investigation into transactions between the purported consultants – which Executive Director Peter Brady refers to as "the BridgeMark Group" – and B.C. companies operating in the cannabis, cryptocurrency, mining and alternative energy sectors.
>
> The Executive Director alleges that four companies, after selling a total of $17.9 million worth of shares to members of the BridgeMark Group earlier this year, returned $15.3 million to members of the group. The BridgeMark Group then sold those securities in the market, often at prices far below what its members had paid, netting about $6.2 million.

> The four companies subsequently issued news releases saying they had raised a certain amount of money by selling their shares, even though they had paid most of the purchase amount back to BridgeMark, the Executive Director alleges.
>
> The Executive Director alleges that the securities sales to BridgeMark were illegal because they improperly used the consultant exemption to avoid filling a prospectus, a formal document that provides details of an investment. The Executive Director is concerned that the BridgeMark Group's members are not consultants, that they provided little or no consulting services to the issuing companies, and engaged in the scheme for their own profit – conduct the Executive Director describes as "abusive to the capital markets."
>
> The Executive Director is concerned that the BridgeMark Group engaged in similar transactions with seven other companies. Altogether, the BridgeMark Group purchased a total of more than 252 million securities from 11 listed companies between February and August, paying $50.9 million. The temporary order prohibits the 11 CSE-listed companies from using the consultant exemption to sell their shares."

[80] The Temporary Order stated that the staff of the Commission were investigating "a scheme that involves conduct abusive to the capital markets and the illegal distribution of securities" and then stated:

> 2. Staff are concerned that members of the BridgeMark Group generated profits for themselves and that the Issuers raised capital through the scheme, as follows:
>
> a) members of the BridgeMark Group entered into agreements to provide consulting services to the Issuers,
>
> b) members of the BridgeMark Group paid for fee-trading securities of the Issuers through private placements,
>
> c) the Issuers issued securities through private placements to members of the BridgeMark Group relying on the consultant exemption to the prospectus requirement in section 2.24 of National Instrument 45-106 (Consultant Exemption),
>
> d) members of the BridgeMark Group purported to be consultants under the Consultant Exemption but were not,
>
> e) the Issuers paid most of the private placements funds back to members of the BridgeMark Group and kept very little of the money raised,
>
> f) members of the BridgeMark Group sold securities of the Issuers in the market, often at prices below the private placement acquisition cost, and
>
> g) the Issuers issued news releases informing the market they raised the full amount of the private placement when they had only retained a small portion of the funds.

[81] The petitioners submit the above statements in the Commission Documents constitute a public correction of the misrepresentations alleged by the petitioners. They submit the statements are more than reasonably capable of revealing to the market the issuers made misrepresentations about the price paid and proceeds received for shares issued under the private placements, and that they had omitted material information concerning the consulting agreements and fees from the disclosures about their private placements.

[82] The petitioners submit that in the 10 trading days after the issuance of the Commission News Release and the Temporary Order, the shares of each issuer traded at prices significantly below the prices at the time of the private placements and the weeks following the announcement of each private placement.

Subsequent Commission decisions

[83] Following a hearing held in December 2018, on January 15, 2019 the Commission decided to extend the temporary order against three of the six issuers (Cryptobloc, New Point, and BLOK) against which the petitioners seek leave, and Green 2 Blue Energy Corp. ("Green Corp."). While the Commission's investigation was still in its early stages, the Executive Director had obtained those companies' banking records, consulting agreements, invoices and conducted interviews with some of the companies' representatives. The Commission summarized that evidence it considered in *Re BridgeMark Financial Corp*., 2019 BCSECCOM 14 at para. 13 [*Temporary Order Extension* I]:

> [13] That evidence reveals that the following occurred with respect to each of these four Issuers:
>
> - each of the four Issuers carried out private placements for gross proceeds of between $4.2 million and $4.7 million where certain of the Non-Issuer Respondents comprised all (or virtually all) of the subscribers;
>
> - the Issuers purported to use the Consultant Exemption in connection with their distributions to the subscribers;
>
> - the Issuers entered into consulting agreements with the subscribers and with certain other Non-Issuer Respondents who were not subscribers;
>
> - in most cases, the consulting agreements provided for prepayment, or a one-time payment, of the consulting fees;

> - banking records of the Issuers indicate that cash payments, either immediately prior to, on the same day as, or within a few days after, the closing date of the private placements were made to certain of the Non-Issuer Respondents (both subscribers and not) by the Issuers, consuming the vast majority of the proceeds of the private placements;
>
> - in many cases, the cash payments by the Issuers under the consulting agreements and the payments by the subscribers (who were the same person as the consultant) to the Issuers were effectively "cash swaps", in full or in part; and
>
> - most of the subscribers in the private placements, although not all of the subscribers, sold all (or virtually all) of the shares they acquired from the four Issuers soon after the closing of the private placements at an average selling price (in all but one circumstance) which was a substantial discount from the price at which those shares were acquired in the private placements."

[84] At para. 28 the Commission concluded there was prima facie evidence that each of Cryptobloc, New Point, and BLOK, engaged in conduct that raised significant public interest concerns:

> [28] We do find that the totality of the transactions described in paragraph 13 establishes such public interest concerns, as a consequence of the following:
>
> - the four Issuers involved appear to have actually retained far less money than they raised (following the cash payments to the Non-Insider [sic] Respondents);
>
> - in many cases, the subscribers engaged in what were essentially "cash swaps" with the four Issuers;
>
> - the four Issuers, very unusually, pre-paid substantial consulting fees; and
>
> - the subscribers (almost universally), very shortly after the closing of the private placements, sold all (or virtually all) of the shares acquired in the private placements at average prices substantially less than what they paid for the shares, all of which were undisclosed to the investing public. What was disclosed to the public by the Issuers with respect to their private placements and the actual net benefit to the Issuers of completing those transactions were two very different things.

[85] The Commission also extended the Temporary Order to most of the respondents described by the Commission as the "Non-Issuer Respondents." These were the parties who had participated in the private placements as subscribers, consultants or both. As a result, most of these parties remained unable to purchase any shares on the CSE under the s. 2.24 Exemption, or trade at all in the shares of Cryptobloc, BLOK or New Point.

[86] For the other seven respondent companies, which included Kootenay and Affinor, the Commission noted that, at the time of the hearing, the Executive Director's investigation had only obtained publicly available information and some trading records. According to the Commission, that information revealed that each of those issuers had carried out private placements pursuant to the s. 2.24 Exemption. In *Temporary Order Extension* I at para. 15 the Commission stated that

> Most of the respondent subscribers in the private placements, although not all of them, sold all of the shares they acquired from the seven Issuers soon after the closing of the private placements at an average selling price (in all but a few instances) which was a substantial discount from the price at which those shares were acquired in the private placements.

[87] At para. 31 the Commission concluded that, while some of the evidence was suspicious, the Executive Director had not provided prima facie evidence of misconduct sufficient to justify extending the *Temporary Order* against these companies:

> [31] With respect to the remaining seven Issuers (Kootenay, Affinor, Beleave, Liht, PreveCeutical, Speakeasy and Abattis), we find that the executive director has not provided prima facie evidence of their having engaged in conduct contrary to the public interest. The evidence establishes that they completed private placements with certain of the Non-Issuer Respondents using the Consultant Exemption and that the subscribers then quickly sold most of their shares acquired in the private placements at an average price less than the subscription price. There is also evidence that three of these Issuers paid significant consulting fees during the same financial period as the private placements, but we have no evidence on the nature of these services and to whom they were paid. That is suspicious and involves elements of the transactions of the other four Issuers. However, this evidence is closer to the "unsubstantiated suspicion" described in *Fairtide* than prima facie evidence of misconduct. Therefore, we are not going to extend the temporary orders against these seven Issuers.

[88] After another hearing on April 9, 2019, the Commission further extended the *Temporary Order* to May 27, 2020: *Re BridgeMark Financial Corp.,* 2019 BCSECCOM 191 [*Temporary Order Extension* II]. In so doing, the Commission concluded that the Executive Director had provided:

> [40] (a) *prima facie* evidence of at least four Issuer Respondents (Cryptobloc, New Point, Green 2 and BLOK) having engaged in transactions that, as a whole, raise substantial public interest concerns; and

> (b) *prima facie* evidence of a significant number of Non-Issuer Respondents having participated in one or more of the transactions with Cryptobloc, New Point, Green, and BLOK – again in a manner that raised substantial public interest concerns; in particular, the misuse of the Consultant Exemption.

[89] The Commission went on to conclude: "we find a striking similarity in the transactions which are at the heart of the matters set out in the Notice of Hearing", and that "the similarity of the transactions (along with our public interest concerns about those transactions) raises substantial public interest concerns, in and of itself": *Temporary Order Extension* II at para. 41. The Commission reiterated that Cryptobloc, New Point and BLOK "were themselves *prima facie* engaged in conduct that raises substantial public interest concerns": *Temporary Order Extension* II at para. 41.

Kootenay, Anthony Jackson, Robert Tindall, Von Rowell Torres

[90] Kootenay's shares trade on the CSE. It is a reporting issuer in British Columbia and therefore a "Responsible Issuer" within the meaning of s. 140.1 of the *Act*.

Anthony Jackson, Robert Tindall, and Von Rowell Torres, were all directors of Kootenay at the time Kootenay made the impugned representations. Mr. Jackson was the CFO who authorized or certified Kootenay's Form 9, financial statements, and certification of annual filings. Mr. Tindall authorized or certified Kootenay's private placement news releases, trading news release, financial statements, and annual filings.

[91] Kootenay issued the following three documents at or around the time of its private placement:

a) private placement news release dated January 30, 2018, authorized by Mr. Tindall;

b) private placement news release dated February 2, 2018, authorized by Mr. Tindall (collectively, "the Kootenay News Releases"); and

c) Form 9, certified by Mr. Jackson, dated February 2, 2018.

[92] In each of the above documents, Kootenay purported to describe the substance of the private placement, including specific representations regarding its price, proceeds and Kootenay's intended use of those proceeds. For example, in the January 30, 2018 private placement news release Kootenay stated:

> KOOTENAY ANNOUNCES PRIVATE PLACEMENT FOR
>
> $2,000,000
>
> Vancouver, Canada, January 30, 2018 – Kootenay Zinc Corp… ispleased to announce that they have arranged a non-brokered private placement for up to 7,407,407 units for gross proceeds $2,000,000 at a price of $0.27 per unit.
>
> …
>
> The proceeds of the private placement will be used for the Company's exploration activities and general working capital.

[93] Kootenay made essentially the same statements in its February 2, 2018 private placement news release announcing the closing of the "first tranche" of the private placement, whichwas also signed by Mr. Tindall:

> KOOTENAY CLOSES FIRST TRANCHE OF PRIVATE PLACEMENT FOR $1,215,000
>
> Vancouver, Canada, February 2, 2018 - Kootenay Zinc Corp. …is pleased to announce that they have closed the first tranche of the non-brokered private placement for 4,500,000 units for gross proceeds $1,215,000 at a price of $0.27 per unit.
>
> …
>
> The proceeds of the private placement will be used for the Company's exploration activities and general working capital.

[94] Similarly, in the Form 9 dated February 2, 2018, signed by Mr. Jackson, Kootenay stated that the shares in the private placement were purchased at $0.27 per unit, for proceeds of $1,215,000, which would be used as "General working capital."

[95] The Form 9 listed the subscribers to the Kootenay private placement as Justin Liu, Mr. Jackson, Detona, Cameron Paddock, and Northwest (collectively, the "Kootenay Subscribers") and Konstantin Lichtenwald. The Form 9 noted that each of

the Kootenay Subscribers were acquiring shares pursuant to the s. 2.24 Exemption, and described each as a consultant of the company, except Mr. Jackson who was described as Kootenay's CFO. The following table summarizes the number of shares purchased by each of Kootenay Subscribers and Mr. Lichtenwald, and the value of those shares at the purchase price disclosed in its Form 9:

Kootenay Subscriber	Number of Shares	Value
Mr. Liu	900,000	$243,000
Mr. Jackson	900,000	$243,000
Detona	900,000	$243,000
Mr. Paddock	900,000	$243,000
Northwest	880,000	$237,600
Mr. Lichtenwald	20,000	$5,400
Total:	**4,500,000**	**$1,215,000**

[96] Kootenay left blank the section of the Form 9 which requires information regarding any agent's fees, commissions, finder's fees or other compensation paid or to be paid in connection with the private placement.

[97] In the Kootenay News Releases and its Form 9, Kootenay informed investors that:

a) Kootenay had arranged, and later closed, a $1,215,000 private placement, where 4,500,000 shares in Kootenay were sold at $0.27 per unit;

b) the proceeds would be used for Kootenay's exploration activities and general working capital;

c) the investors consisted of consultants and Kootenay's CFO; and

d) no finder's fees or other compensation was paid in connection with the private placement.

[98] On February 9, 2018, Kootenay issued a trading news release, authorized by Mr. Tindal, in which Kootenay explained the recent increase in the trading volumes for its common shares, as follows:

> Following the Company's January 31, and February 2, 2018 news releases the trading volumes on the OTCQB increased, and the Company attributes the majority of any increased trading volumes on the OTCQB to the contents of its January 31, 2018 and February 2, 2018 news releases and the Company's change in management and ability to finance the Company.

[99] Kootenay repeated information about the private placement in its audited financial statements for the year ended February 29, 2018, which it released on June 28, 2018. These were signed and certified to be true by Mr. Jackson and Mr. Tindall, and approved by them and Mr. Torres as directors of Kootenay. In the financial statements, Kootenay again represented that the private placement closed at $0.27 per unit for gross proceeds of $1,215,000.

Good faith

[100] Mr. Lee, purchased 21,270 shares in Kootenay between February 6, 2018 and April 30, 2018. Within the same period, Mr. Lee sold 12,445 shares in Kootenay in a series of transactions. These transactions fall between the time Kootenay released its first private placement news release, on January 30, 2018, and the date of the alleged public correction on November 26, 2018.

[101] While it is preferable for applicants to make it expressly clear that they are seeking to bring a claim in good faith, it is not a necessity when on the evidence the court is able to find the good faith exists. Like the other respondents, the Kootenay respondents submit that Mr. Lee has not provided evidence of his good faith in bringing his claim. Mr. Lee in cross-examination deposed that he sought out legal counsel after searching the internet about lawsuits against Kootenay. He recalls reviewing the claim and understood that he was required to be acting in good faith in order to bring his claim.

[102] I find on the evidence that Mr. Lee brings his statutory claims against Kootenay in good faith.

Reasonable possibility of success

[103] Mr. Lee alleges that as a condition of the Kootenay Subscribers' acquisition of their shares under the private placement, Kootenay entered into consulting agreements (the "Kootenay Consulting Agreements") with the Kootenay Subscribers and their designated associates (whose identities are unknown). Under the Kootenay Consulting Agreements, Kootenay agreed to, and subsequently did pay, lump sum consulting fees (the "Kootenay Consulting Fees"), in the likely amount of $733,958 and possibly more, from the $1,215,000 paid to Kootenay under the private placements. As a result, Kootenay was left with approximately $481,000, and perhaps less, from the private placement to use in its ongoing business operations.

[104] Mr. Lee seeks leave to bring two distinct claims of misrepresentations in respect of Kootenay's disclosures about the private placement in the Kootenay News Releases and its Form 9s. One claim is for positive misrepresentation, that the statements made in documents concerning the price paid and the amount of proceeds received by Kootenay for the shares issued under the private placement were false. Mr. Lee submits that as a result of the Kootenay Consulting Fees, the true price paid for the shares issued to the Kootenay Subscribers, and the true amount of proceeds received by Kootenay for those shares was likely 60% less, and perhaps a greater percentage than that, than what was represented in the Kootenay News Releases and Form 9s.

[105] The petitioner says this is because Kootenay Consulting Fees cannot stand as part of the consideration for or part of the proceeds received from the shares issued to the Kootenay Subscribers.

[106] The second claim is for misrepresentation by omission, for Kootenay's failure to disclose information about the Kootenay Consulting Agreements and Fees and their relationship to the private placement in the Kootenay News Releases and Form 9. These documents each failed to disclose that the subscriptions Kootenay received from the Kootenay Subscribers were conditional upon Kootenay first entering into the Kootenay Consulting Agreements and paying the Kootenay Consulting Fees

from the proceeds of the private placement. None of the documents disclosed any condition or *quid pro quo* attached to the Kootenay Subscribers' participation in the private placement, and not one where Kootenay would and did return 60% or more of the proceeds to the investing group.

[107] Mr. Lee alleges that the trading news release contained a misrepresentation because, in reality, the increased trading volume resulted from Kootenay returning a large portion of the private placement proceeds to the Kootenay Subscribers. This resulted in the Kootenay Subscribers purchasing a large number (4.5 million) of Kootenay's shares at a very low price, which they then could, and the petitioner submits did, quickly sell in high volumes for a considerable profit.

[108] The main factual issue arising under the Kootenay private placement was whether they were conditional upon Kootenay entering into Kootenay Consulting Agreements and paying the Kootenay Consulting Fees from the funds paid to Kootenay by the Kootenay Subscribers in the private placement. This issue is the foundations for Mr. Lee's claim that Kootenay misstated the price paid and proceeds received for the shares issued to the Kootenay Subscribers. It is also central to the Mr. Lee's allegation that Kootenay omitted to disclose material facts concerning the private placement transaction.

[109] The petitioner submits Kootenay cannot assert that it received $1,215,000 in proceeds from the private placement because it acquired part in cash (either $481,000 or $756,000) and part in pre-paid consulting agreements for future consulting services (worth either $733,958 or $459,000).

[110] According to Mr. Jackson, on January 1, 2018, shortly before Kootenay announced its private placement on January 30, 2018, Kootenay entered into consulting agreements with each of the Kootenay Subscribers. No such agreement was entered into with Lichtenwald, although he was described on Kootenay's Form 9 as a consultant to Kootenay. Mr. Jackson deposed that Kootenay agreed to pay the Kootenay Subscribers a total of $459,001 in consulting fees.

[111] The petitioner submits that Kootenay's financial statements provide evidence that more than $459,001 was paid for the Kootenay Consulting Fees. The petitioner refers to Kootenay's February 28, 2019 year end statements which set out that Kootenay paid $733,958 in that fiscal year to consultants named on the Commission's *Temporary Order* dated November 26, 2018. Taking the financial statements at face value (since no allegation of misrepresentation is made with respect to them), that means the Kootenay Subscribers were paid consulting fees after February 28, 2018. Mr. Jackson deposed that each of the Kootenay Subscribers received their consulting fees as lump sum payments between March 8, 2018 and May 7, 2018. The petitioner submits that such timing is contemporaneous with the private placement which completed February 2, 2018.

[112] However, the evidence also shows that without the private placement proceeds from the Kootenay Subscribers, it would have been difficult for Kootenay to meet its commitment to pay the consulting fees to the Kootenay Subscribers, let alone the other additional consultants named in the Commission's *Temporary Order*. According to Mr. Jackson, Kootenay had no operating cash flows and no revenue at all relevant times. By the end of November 2017, Kootenay had less than $900,000 in cash, $500,000 of which was funding provided by Mr. Jackson and another director via a different private placement. For the nine months ended November 30, 2017, Kootenay reported a net loss of $1,532,048. The consulting fees represented an extant liability requiring at least 50% of Kootenay's cash, the equivalent of 25% of the total value of its assets. Without the private placement proceeds from the consultants, it would have been quite difficult for Kootenay to pay the consulting fees, even if the total amount owing was only $459,001, as admitted by Jackson, but certainly if it was $733,958. The petitioner submits this strongly suggests that the two transactions were closely, and causally, linked.

[113] Kootenay submits in its response to the petition that from the totality of Kootenay's financial disclosures at the time of the private placement, Kootenay had disclosed to investors that Kootenay would be using the proceeds from the private

placement to pay consultants who participated in the Private Placement. However, it does not admit to a *quid pro quo* arrangement.

[114] The petitioner acknowledges that the consulting payments set out by Mr. Jackson in his affidavit do not have the same contemporaneity as the consulting payments made in the other private placement transactions. However, the petitioner submits there is an obvious reason why this was not the case with Kootenay. Mr. Jackson, one of the Kootenay Subscribers, was Kootenay's CFO and as such, was in control of the company's finances. In these circumstances, there is not the same need to ensure the payments from the subscribers and the payments to the consultants occur within days of each other in order to successfully carry out the swap transaction. It is sufficient to implement the cash swap transaction, and less obvious that it is occurring, if the consulting fees are paid before the company uses the funds for any other purpose. The petitioner submits as Kootenay's CFO, Mr. Jackson was in a position to ensure that would happen.

[115] On cross-examination, Mr. Jackson stated that the consulting agreements he describes in his affidavit as being entered "in January 2018" were entered on January 1, 2018, and that there was no understanding that he and the four other purported consultants, would participate in the private placement. He asserted that the idea of their participation in the private placement was brought up when Kootenay consolidated its shares, almost one month after the consulting agreements had been concluded, although Mr. Jackson then qualified that evidence by stating that when the consulting agreements were completed on January 1, 2018, "financing discussions might have happened."

[116] Mr. Jackson specifically identified Mr. Liu's subscription to the private placement and Mr. Liu's provision of $234,000 in financing in the private placement as a service that Mr. Liu provided in exchange for his $100,000 consulting fee, pursuant to his consulting agreement. Mr. Jackson's answer suggests that the $100,000 "consulting fee" was the *quid pro quo* for Mr. Liu's subscription under the private placement.

[117] The evidence leads me to find that is a reasonable possibility Mr. Lee will be able to prove, at trial, that the Kootenay Subscribers' participation in the private placement was conditional upon receiving the Kootenay Consulting Fees under which Kootenay agreed to pay the bulk of the subscription proceeds back to the Kootenay Subscribers and related purported consultants.

[118] In its Trading News Release, Kootenay attributed its increased trading volume following the closing of the private placement to the contents of the Kootenay News Releases and its "change in management and ability to finance the Company."

[119] According to the Form 9, Kootenay had 4,864,324 issued and outstanding shares before the private placement, in which it issued an additional 4,500,000 shares to the six Kootenay Subscribers. The shares issued in the private placement were free trading and were issued for prices that were significantly discounted from the market. The disclosed price of the private placement was $0.27 per share and according to the Form 9, the closing market price of Kootenay's shares on the day the private placement was announced was $0.36 per share.

[120] There is evidence that Kootenay agreed to return at least $459,001 of the private placement proceeds to the Kootenay Subscribers and related purported consultants in lump sum payments within four months after the private placement. As a result, in the private placement, Kootenay sold nearly half of its outstanding shares at a considerable discount. This says the petitioner, created a clear risk that the Kootenay Subscribers would seek to capitalize on the obvious profit to be made by quickly selling the shares at prices above what they had effectively paid, but well below the market price.

[121] For example, there is evidence that Northwest, one of the Kootenay Subscribers, paid $243,000 for 880,000 shares in Kootenay, and then received a lump sum payment of $241,500 from Kootenay. The petitioner says that this suggests that Northwest obtained 880,000 shares in Kootenay for, effectively, nothing. Thus, there was an obvious profit to be made, by Northwest, by quickly

selling its very cheaply acquired Kootenay shares at any price it concluded appropriate to generate a sale.

[122] Kootenay submits that attributing an increase in volume of sales is an opinion and therefore not capable of being a misrepresentation. This fails to take into account that the opinion may not actually held by Kootenay representatives. Kootenay also notes that holders of private placements are not required to disclose their trading unless they are directors or officers. Kootenay also submits that even if it was aware of those sales of private placement shares, this is not material since the Kootenay Subscribers' ability to trade was already disclosed. This latter position fails to take into account the fact that Kootenay made a representation about what caused a majority of the increase in trade in volume which did not refer to private placement trading.

[123] I agree with the petitioner that there is a reasonable possibility that Mr. Lee will be able to establish, at trial, that Kootenay knew that the increased trading volume in Kootenay shares following the private placement was, in reality, caused in significant part by the Kootenay Consulting Agreements under which most of the supposed proceeds from the private placement would be used to pay the Kootenay Consulting Fees to the Kootenay Subscribers. This allowed the Kootenay Subscribers to acquire 4.5 million Kootenay shares at an even greater discounted price, which they could then quickly sell for a substantial profit. As well, the timing of the subscription at the disclosed discounted price was within Kootenay's knowledge and there is a reasonable possibility that the petitioner will establish that Kootenay was aware those circumstances which materially contributed to the trading increase.

Materiality of the alleged misrepresentations

[124] The petitioner submits that without the information regarding the *quid pro quo* arrangements with the Kootenay Subscribers, it was impossible for investors to understand the substance of the private placement transactions and the true risks and benefits of it for Kootenay. The petitioners say that excluding this information

from the Kootenay News Releases and Form 9 rendered those documents misleading and constitutes a misrepresentation under the *Act*.

[125] Kootenay disclosed that during the years ended February 28, 2019 and 2018, it incurred consulting fees of $733,958 and $396,962 to consultants named in the Commission's *Temporary Order*. Kootenay made that disclosure in a note titled "Non-Related Consulting Transactions: Significant consulting compensation."

[126] Whether the consulting expense incurred in connection with the private placement was $459,001 or $733,958, it was a significant amount in the context of the financial statements as a whole. An aggregate cost of $459,001 for consulting would have been Kootenay's largest cash expense during the year. Kootenay's disclosure of the consulting agreements and fees incurred under them demonstrates that it regarded the fees as significant enough to be material for financial reporting purposes. Mr. Tindall certified the truth of those financial statements and confirmed this in his cross-examination.

[127] The petitioner submits the consulting agreements were material from the moment Kootenay entered into them, and both the fact of their conclusion and impact on the proceeds of the private placement was material information Kootenay was obliged to disclose in the Kootenay News Releases, its Form 9, and its audited financial statements.

[128] It is not in dispute that Kootenay had no operating cash flows, no revenue and was a going concern risk. Those were the known facts speaking to Kootenay's small size and constrained financial position. The significance of capital to Kootenay was, therefore, obvious. This is not only because it had going concern risk, but because it was continuing to pursue a property known as the "Sully Property," which would cost money.

[129] As of November 30, 2017, Kootenay had total assets of approximately $2 million, of which approximately $880,000 was cash. Included in the cash was $500,000 that had been provided by Mr. Jackson and a fellow director in the fall of

2017. As Mr. Tindall stated, “for Kootenay, one of the biggest challenges was finding individuals willing to invest significant capital ($200,000 or more) to fund the company’s operations.” He said, “there are few individuals with those financial resources willing to take a risk on zinc…”

[130] Against that backdrop and based on disclosures, as of January 25, 2018 investors understood that while Kootenay had limited cash, it remained focused on discovering a large-scale zinc deposit at the Sully Property. Investors also understood that Kootenay’s interest in the Sully Property was by way of an option and to complete the acquisition of the Sully Property, Kootenay was required to incur expenditures, namely:

a) exploration expenditures totaling $1,500,000 by October 21, 2018; and

b) a payment in the form of cash to the Sully Property vendors of $200,000 on or before April 21, 2018.

[131] While it was never guaranteed that Kootenay would continue to pursue the Sully Property or be able to satisfy the remaining obligations under the option, as of January 25, 2018 Kootenay represented that the Sully Property remained its primary focus. On cross examination, Mr. Jackson stated that in January 2018 Kootenay very much intended mining the Sully Property.

[132] Kootenay remained focused on the Sully Property until June 28, 2018. At that time, Kootenay disclosed that it had not made the April 21, 2018 payment due under the option and was dropping their plan to purchase the Sully Property entirely.

[133] From the evidence reviewed above concerning Kootenay’s exploration expenditures and from note 7 to Kootenay’s audited financial statements for the year ending February 28, 2018, it appears that the total expense Kootenay had to incur to maintain its interest in the Sully Property was over $800,000. This consisted of over $600,000 in further exploration expenses (the $1.5 million required under the Sully Property agreement before October 21, 2018, less the $880,886 in cash

expenditures incurred to February 28, 2018) plus the $200,000 payment due under the option before April 21, 2018.

[134] The petitioner submits that given Kootenay's financial circumstances as of January 2018 and having regard to these remaining obligations in relation to the Sully Property at that time, the consulting fee obligation assumed by Kootenay, be it $459,001 or $733,958, was undeniably material.

[135] Kootenay's audited financial statements for the year ending February 28, 2018, show Kootenay's cash position at that date to be $1,558,000, which included the $1,215,000 received under the February 2, 2018 private placement as well as an additional $175,500 in over-subscribed proceeds that were carried on the financial statements as an amount payable. This means that without the funds from the February 2, 2018 private placement, Kootenay's cash position as of February 28, 2018 would have deteriorated to approximately $168,000. By the time the private placement was announced in late January 2018, its position would presumably have been somewhere between that amount and the cash balance of $880,000 as of November 30, 2017.

[136] According to its Form 9, Kootenay expected to be paid the subscription fees by the Kootenay Subscribers on February 2, 2018. Thus, at the time of Kootenay's first private placement news release on January 30, 2018, the evidence shows the consulting agreements concluded in January represented a liability to Kootenay that was:

a) likely in excess of its cash on hand, and reflected 50% of the cash balance available to Kootenay as of November 30, 2017;

b) approximately 25% of its total asset value as of November 30, 2018; and

c) incurred while the Sully Property remained its focus, for which investors understood that important expenditures were yet to be incurred.

[137] Kootenay's expert Doris Meyer provided her opinion on disclosure and consulting services retainers with regard to junior mining companies like Kootenay. Ms. Meyer's opinion is that general and administrative expenses should not exceed half of a company's expenditures in any one year, and that within that category of expenses, investment relations expenses should not exceed half of that amount (or 25%).

[138] Kootenay submits that in the context of Kootenay, disclosing the Kootenay Consulting Fees was unnecessary, or immaterial, because its Form 9 had already disclosed that the private placement was occurring pursuant to the s. 2. 24 Exemption. The petitioner submits the most a reasonable investor could have understood from the Form 9 was that the Kootenay Subscribers were, or had been consultants, nothing more. A reasonable investor would not have known that, in effect, 38% of the private placement proceeds had been committed to the Kootenay Consulting Fees. Nor could such an investor have known that the consulting fees were to be paid in cash as a lump sum, in advance and in conjunction with a commitment to also pay additional consulting fees to related purported consultants, which would further reduce the private placement proceeds available to Kootenay by 60%.

[139] In addition to failing to disclose the basic existence of the consulting fee commitments, Kootenay also failed to inform investors that its receipt of the private placement funds was contingent upon it paying at least $459,001 or $733,958, to the Kootenay Subscribers and related consultants. The petitioner submits this information would reasonably be expected to significantly affect the market price or value of Kootenay's securities.

[140] Based upon what Kootenay disclosed in the Kootenay News Releases, its Form 9, and later the audited annual financial statements, investors were given the impression that Kootenay had secured $1.215 million in financing, which it intended to use for advancing its business and for general corporate purposes. However, at least when the private placement was announced, Kootenay had to spend $800,000

to pursue what the market understood to be the focus of Kootenay's business operations, the Sully Property. The petitioner submits that in reality, Kootenay had sold the shares for, at best, $755,999 in cash and agreements to receive consulting services which Kootenay valued at $459,001.

[141] I agree that there is a reasonable possibility that the petitioner will prove at trial that the Kootenay Consulting Agreements were material at the time of the January 30, 2018 private placement news release. I agree with the petitioner that this, along with others below where leave is granted, is one of those cases where common sense, without expert evidence of the reasonable investor, comes into play.

[142] The agreements represented an extant liability that required, at the very least, 50% of Kootenay's cash, was the equivalent of 25% of the total value of its assets as of November 30, 2017. Further, this liability was incurred in circumstances where, as of January 30, 2018, Kootenay had only "arranged" the private placement, but had not yet received the subscription fees, and the market understood the Sully Property was Kootenay's primary focus for which there remained important, near term obligations to be settled.

[143] I find that there is a reasonable possibility that the court will find at trial that the Kootenay Consulting Agreements were material for the purposes of the Kootenay News Releases, its Form 9 and its audited annual financial statements. Without disclosing the relationship between concluding the consulting agreements and the private placement subscriptions there is a reasonable possibility of proving that it was impossible for investors to understand that, in effect, much of the money was already spent when the private placement closed.

[144] Kootenay knew that the increased trading volume may have been caused by the Kootenay Subscribers quickly selling their shares to make a profit. There is a reasonable possibility that failing to mention this and ascribing cause elsewhere would be reasonably expected to have a significant effect on the value of Kootenay's securities.

Non-core documents – knowledge, wilful blindness or gross misconduct

[145] The non-core documents at issue are the Kootenay News Releases and Kootenay's trading news release. For the misrepresentations in non-core documents, Mr. Lee will need to prove, at trial, that Kootenay, Mr. Jackson, Mr. Tindall and Mr. Torres either knew about the misrepresentations at the time the documents were released, deliberately avoided acquiring knowledge of the misrepresentations or, through action or failure to act, were guilty of gross misconduct in connection to the release of the document: s. 140.4(1) of the *Act*.

[146] There is no dispute that Mr. Jackson and Mr. Tindall were aware of the private placement at the time it occurred. It is also reasonably possible the court will conclude that Mr. Torres, as a director of Kootenay, knew about the private placement given its significance to the company. Kootenay's Form 9 confirms that Kootenay nearly doubled the total number of issued shares with the private placement. There is also a reasonable chance the court will conclude that Mr. Jackson, Mr. Tindall and Mr. Torres were aware of the consulting fee commitments or, if they were unaware, such ignorance could only result from wilful blindness or gross misconduct, for the following reasons:

a) Mr. Jackson confirmed he was aware of the Kootenay Consulting Agreements but has limited recollection regarding their terms;

b) Mr. Tindall asserts that, when the first private placement news release was issued on January 30, 2018, with his signature, he was unaware of the Kootenay Consulting Agreements, but by the time of the second private placement news release, on February 2, 2018, which was also issued with his signature, he claims he knew that consulting agreements existed, but not how many, who the consultants were, other than Mr. Liu and Mr. Jackson, or what the consultants would be paid;

c) In their response to the petition, Kootenay, Mr. Tindall and Mr. Jackson contend that investors knew from the Form 9

disclosure that Kootenay had entered the Kootenay Consulting Agreements and would be using the funds from the private placement to pay the Kootenay Consulting Fees;

d) Mr. Torres, according to Mr. Jackson, was part of the "company decision" to negotiate the consulting agreements with the Kootenay Subscribers; and

e) There is a reasonable possibility the Court will conclude that the consulting fee commitment was such a significant expense for Kootenay, that, as directors and/or one of the three members of Kootenay's management team, Mr. Jackson, Mr. Tindall, and Mr. Torres necessarily either knew about it or, if not, such ignorance could only be regarded as wilful blindness or gross misconduct.

[147] Regarding the positive misrepresentation of the private placement's price, there is also a reasonable possibility that Kootenay, Mr. Tindall, Mr. Jackson and Mr. Torres were aware of the contemporaneous nature of the Kootenay Consulting Agreements and Fees under the private placement such that the effective price paid for the shares was less than the amount disclosed by nature of a "cash swap."

[148] For similar reasons, there is also a reasonable chance the court will conclude, at trial, that Mr. Jackson, Mr. Tindall and Mr. Torres were aware of the misrepresentation in the trading news release regarding the cause of the increased trading activity following the private placement. As noted above, according to the preliminary finding of fact by the Commission, there is evidence that most of the Kootenay Subscribers quickly sold all of the shares they acquired at prices substantially discounted from the purchase price soon after the closing of the private placement.

[149] In the context of knowing that approximately half of Kootenay's shares were held by the Kootenay Subscribers who were free to trade them, it is reasonably

possible that Mr. Jackson, Mr. Tindall and Mr. Torres were either aware that the increased trading resulted from the Kootenay Subscribers selling their shares or, if not, their ignorance resulted from wilful blindness or gross misconduct, given that the truth would have been relatively easy to discover through minimal inquiry to the Kootenay Subscribers.

[150] In both his affidavit and cross-examination, Mr. Tindal claims that he was wholly unaware of and had no involvement in the trading news release, even though it was issued in his name. Mr. Tindall claims that even though he was the CEO, he was unaware that the private placement would result in the Kootenay Subscribers acquiring free-trading shares. I agree with the petitioner that there is a reasonable possibility the court will conclude that Mr. Tindall lacking the knowledge of the shares' free-trading status would be an act of wilful blindness or gross misconduct in the performance of his role as CEO, particularly given the amount of shares issued under the private placement. Mr. Tindall in his response to the petition, along with Kootenay, and Mr. Jackson, asserts that even "…prospective investors would have been aware that the private placement shares were not subject to a hold period."

Public correction and impact on share price

[151] According to listed securities trades report data, in the 10 trading days after the Commission issued the Commission Documents on November 26, 2018, the average price for Kootenay shares was approximately $0.057. This was less than the prices at which the shares traded when Kootenay announced the private placement on January 30, 2018, and below the prices at which the shares traded over the nine months following that announcement.

[152] There is a reasonable possibility that the petitioner will be successful at trial in showing that the November 26, 2018 Commission Documents had a statistical impact on the share price of Kootenay.

Affinor, Nicholas Brusatore, Sam Chaudhry

[153] Affinor's shares trade on the CSE. It is a reporting issuer in British Columbia and therefore a "Responsible Issuer" within the meaning of s. 140.1 of the *Act*.

[154] Two of Affinor's officers and directors, Nicholas Brusatore (CEO) and Sam Chaudhry (CFO), were officers of Affinor at the time Affinor made the impugned representations or omissions, and each explicitly authorized or certified one or more of the following documents.

[155] Affinor issued the following three documents just before, or at the same time as, its private placement:

a) private placement news release dated March 5, 2018, authorized by Mr. Brusatore;

b) private placement news release dated March 8, 2018, authorized by Mr. Brusatore (collectively, the "Affinor News Releases"); and

c) Form 9 dated March 8, 2018, certified by Mr. Chaudhry.

[156] In each of the above documents, Affinor describes the substance of the private placement including specific representations regarding its price, proceeds, and Affinor's intended use of the proceeds. For example, in its March 5, 2018 private placement mews release, Affinor stated:

> **Affinor Growers to Raise $4 million**
>
> Vancouver (Canada), March 5, 2018 – Affinor Growers Ltd. … is pleased to announce that it has arranged by way of a private placement of 25 million Units (the "Units") at $0.16 per Unit, a financing of $4 million.
>
> …
>
> The proceeds of the offering will be used to fund Affinor's operations,corporate development and for general working capital purposes.
>
> Nick Brusatore, CEO, commented that "the opportunity to raise a significant amount of funds for Affinor came up and we are pleased to have a new strategic shareholder group involved who will also assist with bringing in additional investors to Affinor."

> Affinor plans to close the financing shortly and may pay commissionto certain finders.

[157] A few days later, in its March 8, 2018 private placement news release, Affinor made essentially the same statements when it announced the closing of the private placement as follows:

> **AFFINOR GROWERS CLOSES FIRST TRANCHE OFFINANCING FOR $3,999,666**
>
> **Vancouver (Canada), March 8th, 2018 – Affinor Growers Ltd.** …further to the news release dated March 5th, 2018, the company would like to announce that it has closed the first tranche for total proceeds of $3,999,666. …
>
> The private placement consisted of 24,997,916 units at 16 cents per unit....
> …
>
> The proceeds of the offering will be used to finance Affinor's operations, corporate development and for general working capital purposes.

[158] In its Form 9, which was also filed on March 8, 2018, Affinor stated that the shares in the private placement were purchased at $0.16 per unit for total proceeds of $3,999,666 which would be used for "Working capital, advancing the vertical growing technology."

[159] The Form 9 listed the subscribers to the Affinor private placement as Northwest, Rockshore Advisors Ltd. (then known as Cam Paddock Enterprises Inc.) ("Rockshore"), Detona, and JCN Capital Corp. ("JCN Corp.") (collectively, the "Affinor Subscribers"), and noted that each was acquiring shares pursuant to the s. 2.24 Exemption. The following table summarizes the numbers of shares purchased by each Affinor Subscriber and the value of those shares at the price disclosed in the Form 9:

Affinor Subscriber	Number of Shares	Value
Northwest	8,333,333	$1,333,333.28
Rockshore	8,333,333	$1,333,333.28
Detona	4,268,750	$683,000
JCN Corp.	4,062,500	$650,000
Total:	**24,997,916**	**$3,999,666.56**

[160] Affinor left blank the portion of the Form 9 that requires information regarding any commission, finder's fee or other compensation paid or to be paid in connection with the private placement.

[161] In summary, reading the Affinor News Releases and its Form 9 generously, Affinor disclosed that:

a) it had arranged and, later, closed a $4 million private placement, where shares in Affinor were sold at $0.16 per unit;

b) the proceeds of the offering would be used to finance Affinor's operations,vertical growing technology, corporate development and for general working capital purposes;

c) some or all of the investors were a new strategic shareholder group who would also assist with bringing in additional investors;

d) the investors were purchasing their shares pursuant to the s. 2.24 Exemption; and

e) while Affinor initially thought commissions might be paid to certain finders,no commissions were paid.

[162] The documents set out that Affinor had raised almost $4 million for business development and for general working capital in a private placement participated in by a new strategic shareholder group.

[163] On March 16, 2018, a week after closing the private placement, Affinor issued a trading news release, authorized by Brusatore, in which it explained recent increases in its trading volumes as follows:

> Since listing on the OTCQB, trading volumes have fluctuated, depending on the state of the capital markets and the company's business activities. … The company attributes the majority of its recent increases in trading volumes to the contents of its news releases dated Feb. 14, Feb. 21, Mar. 9, and Mar. 13, 2018, and to the continued positive advancement of the company's business.
>
> …

> Since Jan. 1, 2018, the company has engaged the following providers of investor relations, public relations, advertising and other related services, including the advertising of the company and its securities: Awareness Marketing and JCN Capital Corp.
>
> In the ordinary course of its business and financing activities, the company issues common shares and securities convertible into common shares at prices constituting a discount to the current market rate. The company has recently closed the first tranche of private placement on March 8th, 2018 for total proceeds of $3,999,666. See press release issued on March 8th for further details.

Good faith

[164] The petitioner, Mike Dotto, held shares in Affinor as of March 5, 2018. Between March 5, 2018 and November 26, 2018, Mr. Dotto purchased additional shares and sold some shares in Affinor. As a person who bought or sold securities in Affinor between the time Affinor released its first private placement news release, on March 5, 2018, and the date of the alleged public correction on November 26, 2018, Mr. Dotto has a right of action for damages under s. 140.3(1) of the *Act*.

[165] Mr. Dotto deposed that he would not have bought shares in Affinor after the private placement if he had known that the funds from the private placement would be used to pay consultants participating in that private placement. He could not remember when he concluded that this had occurred, apart from stating it was maybe near the end of 2018. However, he also stated that he became aware of the Commission proceedings involving Affinor through a news announcement. He then contacted the Commission and spoke with an investigator. Mr. Dotto deposed that he was happy about the announcements that Affinor was raising funds when he invested after the private placement. He further stated he did not know whether the information was ever corrected on the public record. He did not think it had.

[166] He also stated that he would hold onto his shares because significant changes in management might occur, I infer as a result of the Commission's investigation, which would improve the stock price.

[167] Mr. Dotto is not a person making a frivolous strike suit. I find that Mr. Dotto brings his claim for statutory relief in good faith.

Reasonable possibility of success

[168] The admissible evidence submitted in support of Mr. Dotto's application is limited. The Affinor respondents chose not to submit any evidence in support of their opposition to the application, which is their right: *Ainslie v*. *CV Technologies Inc* (2008)*.,* 304 D.L.R. (4th) 713 at paras. 24-25, 93 O.R. (3d) 200.

[169] In his submissions, Mr. Dotto refers to evidence which this Court previously struck as being inadmissible on the application. The petitioner also relies on regulatory settlement agreements involving other issuers and purported consultants. Affinor is not a party to those agreements. As I have found above, this evidence is too remote and is not reliable evidence on which to base an inference due to the usual compromises which underly the nature of settlement agreements.

[170] Mr. Dotto also submits that evidence obtained from other respondent's cross-examinations on their affidavits filed in support of their opposition to other petitioner claims may be used to make findings with respect to the Affinor respondents. In *Tietz v*. *Cryptobloc*, 2021 BCSC 683 at para. 42 I ruled that the petitioners could not cross-examine a respondent on their response affidavit with regard to matters related to another respondent issuer. This ruling has the same effect on Mr. Dotto's submission.

[171] The petitioner submits this is actually similar fact evidence. I agree with Affinor that if a party intends to lead similar fact evidence, then as a pre-condition to its admission they must provide advance notice to the opposing parties so that those affected by the evidence have adequate time to deal with it: *Nelson v. British Columbia Provincial Health Services Authority*, 2015 BCSC 2489 at para. 16, affirmed 2017 BCCA 46 at paras. 73 and 74. Such notice was not provided here. It is not clear to me that the conduct of a non-party to this application, as described by another party, would even qualify as similar fact evidence in the context of the claims against Affinor.

[172] What the petitioner does provide in evidence is Mr. Dotto's affidavit and evidence on cross-examination, the Affinor documents containing the impugned

statements, Affinor's financial statements for the year ending May 31, 2018, the Commission Documents and subsequent orders and filings by other respondent issuers. The Affinor Subscribers as set out in the Form 9 are known to have participated in four of the other respondent issuers' private placements, as well as two other unrelated private placements. Those issuers are all are named in the Commission Documents.

[173] Affinor's financial statements provide that on March 1, 2018, four days before announcing their private placement, it entered into 14 three-month consulting agreements for a total of $3.5 million. The private placement was for $4 million.

[174] In the Commission Documents, Affinor is referred to as an issuer which Commission staff are concerned may be engaged in the same conduct as other issuers (Green 2, Cryptobloc, BLOK and New Point) against whom the Commission had made initial determinations against.

[175] The problem with relying upon the Commission Documents is that they are very limited in their evidentiary value. With regard to Affinor, they disclose that the securities regulator is concerned that Affinor may be engaged in conduct which is against the public interest, based on the fact that Affinor engaged some or all of the Bridgemark Group consultants which other respondent issuers engaged.

[176] With respect to those other issues, the Commission states that its staff has obtained evidence that appears to indicate trading that would result in an illegal distribution, as the distribution was made under the s. 2.24 Exemption when the consultants failed to, nor intended to, provide consulting services.

[177] From the Commission Documents, Affinor's financial statements and because Affinor engaged some of the Bridgemark consultants, the petitioner asks the Court to infer that the consultants referred to in Affinor's financial statements were paid the same amount as the cost of their subscriptions, contemporaneously with the private placement. Furthermore, the petitioner asks the court to find a reasonable possibility that those consultants traded their shares quickly, because the Commission had

evidence of them trading other shares while contemporaneously subscribing to other issuer shares.

[178] The evidence to support the theory is thin. A concern expressed by a regulator is not a finding of fact by that regulator. The only fact set out by the Commission would appear to come from Affinor's Form 9 which sets out the consultants and their subscriptions under the private placement. Engaging the same consultants around the same time as other respondent Issuers against whom there is evidence of the quid pro quo agreement does not, in my opinion, overcome the credible evidence standard to support a finding that there is a reasonable possibility of finding the facts which are the foundation of the petitioner's misrepresentation claims.

[179] Therefore, I find there is not a reasonable possibility of the petitioner proving their statutory claims at trial against the Affinor respondents.

Cryptobloc, Brian Biles, Kenneth Clifford Phillippe, Neil William Stevenson-Moore

[180] Cryptobloc carried out its private placement on June 5, 2018. Cryptobloc's shares trade on the CSE. It is a reporting issuer in British Columbia and therefore is a "Responsible Issuer" within the meaning of s. 140.1 of the *Act*.

[181] Cryptobloc was incorporated under the laws of British Columbia on January 16, 2015. Formerly, it had two wholly-owned subsidiaries, Global Remote Technologies Inc. ("Global"), and 1 Linx Ltd.("1 Linx"). Effective January 31, 2017, the company dissolved its formerly wholly-owned subsidiary Global.

[182] The Cryptobloc previously provided products and services for the oil and gas industry. Upon acquiring 1 Linx. on January 5, 2018, the company changed its principal business focus to providing services for application programming interface ("API") in regards to operator look-up, customer look-up, IP information and customer friendly user experience, and developing and implementing blockchain,

distributed ledger, closed loop and cryptocurrency services for government and commercial partners.

[183] In November 2017, prior to their announcement of the intended private placement in May 2018, Cryptobloc's predecessor company, Global, signaled a change in business when it announced the appointment of Mr. Stevenson-Moore as CEO and identified its future business to include future asset acquisition in blockchain technology which would be used with Cryptobloc's existing assets.

[184] 1 Linx has a proprietary blockchain authentication platform and provided services for API. Cryptobloc acquired all of the issued and outstanding common shares of 1 Linx, 1 Linx became a wholly-owned subsidiary of Cryptobloc, in exchange for the Cryptobloc issuing 6,000,000 common shares with a fair value of $3,660,000 (the "1 Linx Transaction"). Cryptobloc issued 300,000 common shares with a fair value of $183,000 as a finder's fee for the 1 Linx Transaction. The 1 Linx Transaction closed on January 5, 2018.

[185] On April 9, 2018, after Global commenced operating under the name Cryptobloc, Cryptobloc announced the conclusion of "a fundamental change process" and that "Cryptobloc is primed and ready to be a leader in the blockchain industry."

[186] Three of Cryptobloc's officers and directors, Brian Biles (Director until November 22, 2018), Kenneth Clifford Phillippe ("CFO and Director until July 3, 2018), and Neil William Stevenson-Moore (CEO until June 26, 2018), were directors or officers (or both) of Cryptobloc when Cryptobloc made each of the impugned representations, and authorized some of the following documents on Cryptobloc's behalf.

[187] Cryptobloc published the following documents in relation to its private placement (collectively, "the Cryptobloc Documents"):

a) private placement news release dated May 18, 2018, authorized by Stevenson-Moore;

b) Form 9, certified by Stevenson-Moore, dated and filed on June 5, 2018;

c) private placement news release dated June 6, 2018, authorized by Stevenson-Moore; and,

d) material change report, dated June 6, 2018.

[188] In each of the above documents, Cryptobloc purported to describe the substance of the private placement including specific representations regarding its price, proceeds and Cryptobloc's intended use of those proceeds.

[189] For example, in the first private placement news release, dated May 18, 2018, Cryptobloc stated:

> **Vancouver, B.C. May 18, 2018** – Cryptobloc… announces a new non-brokered private placement of up to $4,500,000.
>
> Cryptobloc will issue up to 30M units at $0.15 per unit each unit being comprised of one common share in the capital of the Company and one share purchase warrant (a "Warrant"). Each Warrant will entitle the holder to purchase one additional common share for a period of two years at an exercise price of $0.25 per share.
>
> The proceeds to be raised will be used for general working capital and towards new acquisitions.

[190] Cryptobloc made essentially the same statements in its second private placement news release, dated June 6, 2018:

> **Vancouver, B.C. June 6, 2018** - Cryptobloc … is pleased to report that it has closed its previously announced non-brokered private placement of units (each, a "Unit") of the Company at $0.15 per Unit (the "Private Placement"), for gross proceeds of $4,500,000.
>
> …
>
> The proceeds from the Private Placement are anticipated to be used for general working capital and towards new acquisitions.

[191] Cryptobloc set out the same information in its Form 9, dated June 5, 2018, in which it represented that the shares in the private placement were sold at $0.15/unit for total funds of $4,500,000 which would "…be used for general working capital and towards new acquisitions."

[192] Cryptobloc repeated the same information in its material change report, filed on the System for Electronic Document Analysis and Retrieval ("SEDAR") on June 6, 2018, in which it described the "material change" as a private placement of units in the company at $0.15/unit for gross proceeds of $4,500,000 which it "…anticipated to be used for general working capital and towards new acquisitions."

[193] The Form 9 listed the subscribers to the Cryptobloc private placement as Rockshore, (then known as Cam Paddock Enterprises Inc.), Simran Gill, JCN Corp., Essos Corporate Services ("Essos"), Detona, 658111 B.C. Ltd., Altitude Marketing Corp. ("Altitude"), Platinum Capital Corp ("Platinum"), and Sway Capital Corp ("Sway") (collectively, the "Cryptobloc Subscribers"), and noted that each was acquiring shares pursuant to the s. 2.24 Exemption. The following table summarizes the numbers of shares purchased by each Cryptobloc Subscribers, and the value of those shares at $0.15 per unit (the price disclosed in the Form 9):

Cryptobloc Subscriber	Number of Shares	Value
Rockshore	3,166,667	$475,000.05
Somran Gill	300,000	$45,000
JCN Corp.	1,733,333	$265,999.95
Essos	7,066,667	$1,060,000.05
Detona	6,666,667	$1,000,000.05
658111 B.C. Ltd.	1,666,667	$250,000.05
Altitude	1,026,667	$154,000.05
Platinum	1,666,667	$250,000.05
Sway	6,666,667	$1,000,000.05
Total:	**30,000,002**	**$4,500,000.30**

[194] In its Form 9, Cryptobloc left blank the section that requires information regarding any commission, finder's fees or other compensation paid, or to be paid, in connection with the placement.

[195] In summary, within the Cryptobloc Documents, Cryptobloc disclosed that:

a) it had arranged and, later, closed a $4.5 million private placement, where shares in Cryptobloc were sold at a price of $0.15 per unit;

b) the proceeds of the offering would be used for general working capital and new acquisitions;

c) the subscribers were purchasing their shares pursuant to the prospectus exemption for employees, executive officers, directors or consultants; and

d) no finder's fees or commissions were being paid in connection with the private placement.

[196] The petitioner submits investors were left to understand that Cryptobloc had raised almost $4.5 million in financing through a private placement which would be used for general working capital and towards new acquisitions.

[197] In addition, on June 14, 2018, Cryptobloc issued a trading news release, authorized by Stevenson-Moore, in which Cryptobloc stated:

> **UNAWARE OF ANY MATERIAL CHANGE**
>
> Vancouver, B.C. June 14, 2018, At the request of IIROC, Cryptobloc… wishes to confirm that management is unaware of any material change in the Company's operations that would account for the recent increase in market activity.

[198] Petitioner Tietz submits that the reality of the situation was much different. The petitioner submits that as a condition of the Cryptobloc Subscribers' acquisition of their shares under the private placement, Cryptobloc entered into consulting agreements (the "Cryptobloc Consulting Agreements") with the Cryptobloc Subscribers and three of their designated associates (whose identities are known, but not part of the evidential record). Under the Cryptobloc Consulting Agreements, Cryptobloc agreed to, and subsequently did, pay lump sum consulting fees of $3,672,200 (the "Cryptobloc Consulting Fees") from the $4.5 million paid to Cryptobloc under the private placements. As a result, Cryptobloc was left with only $827,800 from the private placement to use in its ongoing business operations.

[199] The petitioner seeks leave to bring two distinct claims of misrepresentations in respect of Cryptobloc's disclosures about the private placement in the May 18 and June 6, 2018 private placement news releases (collectively, the "Cryptobloc News Releases") and its Form 9. One claim is for positive misrepresentation, that the statements made in those documents concerning the price paid and the amount of proceeds received by Cryptobloc for the shares issued under the private placement were false. The petitioner submits that as a result of the Cryptobloc Consulting Agreements, the true price paid for the shares issued to the Cryptobloc Subscribers and the true amount of proceeds received by Cryptobloc for those shares, was likely 81.6% less than what was represented in the Cryptobloc News Releases and its Form 9.

[200] The Petitioner submits this is a misrepresentation because the Cryptobloc Consulting Fees under the Cryptobloc Consulting Agreements, cannot stand as part of the consideration for, or the proceeds received from, the shares issued to the Cryptobloc Subscribers.

[201] The second claim is for misrepresentation by omission, for Cryptobloc's failure to disclose information about the Cryptobloc Consulting Agreements and Fees and their relationship to the private placement in the Cryptobloc News Releases and its form 9. These documents, individually and collectively, failed to disclose that the subscriptions Cryptobloc received from the Cryptobloc Subscribers were conditional upon the Cryptobloc Consultant Agreements under which Cryptobloc agreed to and did pay the Cryptobloc Consulting Fees from the funds that the Cryptobloc Subscribers paid for their shares. Neither the Cryptobloc News Releases nor the Form 9 disclosed any condition or *quid pro quo* attached to the Cryptobloc Subscribers' participation in the private placement, let alone one where Cryptobloc would and did return 81.6% or more of the proceeds to the investing group.

[202] Without this information, which the petitioner submits is material, it was impossible for investors to understand the true substance of the private placement

transaction and the true risks and benefits of it for Cryptobloc. The petitioners say excluding this information from the Cryptobloc News Releases and Form 9 rendered those documents misleading and constitutes a misrepresentation within the meaning of s. 1 of the *Act*.

Good faith

[203] The petitioner, Michael Tietz, held shares in Cryptobloc on June 6, 2018. On June 12, 2018, he purchased additional shares. From June 14 to June 21, 2018, he continued to buy and sell shares in Cryptobloc. As a person who bought securities in Cryptobloc between the time Cryptobloc released its first private placement news release, on May 18, 2018, and the date of the alleged public correction on November 26, 2018, Mr. Tietz qualifies for a right of action for damages under s. 140.3(1) of the *Act*.

[204] Mr. Tietz deposed that he would not have purchased any further shares in Cryptobloc in June 2018 if he had known that Cryptobloc would use most of the proceeds of the private placement to pay the Cryptobloc Consulting Fees. He saw it as a positive sign that Cryptobloc was able to raise $4.5 million in a short period of time. He was also comforted by Cryptobloc's trading news release after there was volatility in stock trading.

[205] Based on the evidentiary record I find that Mr. Tietz brings his statutory claims against Cryptobloc in good faith.

Reasonable possibility of success

[206] The evidence related to the petitioner's claim, in addition to the impugned statements and the Commission Documents, includes the affidavit and cross-examination testimony of Mr. Stevenson-Moore, the Cryptobloc MDA for three months ended April 30, 2018, and Cryptobloc's interim consolidated financial statement dated April 30, 2018. The petitioner also refers the Court to the Commission's decision in *Temporary Order Extension* I.

[207] Cryptobloc first disclosed that it had entered into the Cryptobloc Consulting Agreements in a note to Cryptobloc's interim consolidated financial statements dated April 30, 2018. In the note, headed "Subsequent Events," Cryptobloc stated:

> On May 1, 2018, the Company entered into Independent Consultant Agreements with 12 consultants. The Agreements each have a term of 12 months, which may be renewed for a subsequent 6 month term upon the Company providing written notice to the consultant no later than 30 days prior to the last day of term of the Agreement. Pursuant to the Agreements, the consultants have received fees ranging from $60,000 to $500,000 for the term of the Agreements.

[208] In its interim consolidated financial statements for July 31, 2018, filed on September 28, 2018, Cryptobloc reported that it had pre-paid consulting fees of $2,442,625, as of July 31, 2018, and in addition, it had spent $1,229,575 on consulting fees in the three months ended July 31, 2018. This means that as of July 31, 2018, Cryptobloc had disbursed $3,672,200 on consulting fees in the preceding three months.

[209] This was confirmed by Mr. Steven-Moore in his cross-examination.

[210] Mr. Stevenson-Moore deposed that as a condition of the Cryptobloc Subscribers' participation in the private placement, Cryptobloc entered into consulting agreements with the Cryptobloc Subscribers and three of their designated associates and paid lump sum consulting fees pursuant to those agreements.

[211] He deposed that during the period in question, issuers such as Cryptobloc relied largely on equity fundraising because they had no revenue. Cryptobloc had a small staff and hired consultants to perform various functions including technical, administrative, marketing, investor relations, compliance, reporting and other work. Like many venture issuers, Cryptobloc pre-paid consultants for their services.

[212] Mr. Stevenson-Moore states that in the spring of 2018, Cryptobloc retained consultants to advance its operations, as was required for junior stage company with no revenue producing assets. Cryptobloc's board of directors (the "Cryptobloc

Board") and management determined it was in Cryptobloc's best interests to remunerate the consultants by using the s. 2.24 Exemption.

[213] Mr. Stevenson-Moore deposed that he believed that Cryptobloc was retaining a group of consultants who would provide the services they were contracted to perform and further believed that the consultants' efforts would improve the information available to the public about Cryptobloc. He executed the consulting agreements, but he deposes the contracts were negotiated by members of the Cryptobloc's Board. Cryptobloc was Mr. Stevenson-Moore's first foray into the public market and he relied on Cryptobloc's legal counsel's advice. Before signing the consulting agreements, Mr. Stevenson-Moore discussed the agreements with the Cryptobloc Board and legal counsel and met with Anthony Jackson and Justin Liu, who he believed were representatives of the consultants.

[214] Mr. Stevenson-Moore deposed that he understood that the consultants would help Cryptobloc raise funds through marketing and investor relations. He understood that the consultants' role, in part, was to increase the stock's value, and the real fundraising would be executed when the share price exceeded the warrant price. The warrants were the more significant fundraising mechanism, which would also incentivize the consultants to push the price above the warrant execution price. Mr. Stevenson-Moore understood the consultants would perform their work over time and he expected the consultants to perform the work they contracted to perform.

[215] He states press releases from Cryptobloc were typically drafted by legal counsel or the Cryptobloc Board. Mr. Stevenson-Moore would review them for grammar, but not usually the legal content. He relied on professional advice with respect to the contents of press releases.

[216] Mr. Stevenson-Moore was unaware that the consultants were trading in the shares they received through the private placement or otherwise, including any purchases or sales.

[217] Based upon the above evidence, it is reasonably possible that the petitioner will be able to show at trial that Cryptobloc's receipt of the $4.5 million in private placement proceeds was contingent upon Cryptobloc agreeing to return, and then contemporaneously returning, approximately $3,672,200 of those proceeds to the Cryptobloc Subscribers and related consultants.

[218] In its decision to extend the *Temporary Order* as it applied to Cryptobloc, the Commission found that the evidence submitted by Commission's Executive Director indicated that "…the subscribers (almost universally), very shortly after the closing of the private placements, sold all (or virtually all) of the shares acquired in the private placements at average prices substantially less than what they paid for the shares": *Temporary Extension* I at para. 28. I accept this as being a regulatory finding based on trading evidence admissible before the Commission. As such, I find there is a reasonable possibility at trial that the petitioner will be able to show that the Cryptobloc Subscribers sold a significant amount of their subscribed shares shortly after their acquisition and at prices, on average, substantially less than what they paid for them.

[219] Mr. Stevenson-Moore deposed that he and the Cryptobloc Board suspected the consultants were the cause of the downward share price:

> The agreements were entered into, and then when the – the share price was being driven down, the Cryptobloc board was of course concerned. And we were – it was unclear why this was happening. And I went down and asked. And their assumption was that Mr. Liu and Mr. Jackson were driving the price down, which of course was the opposite of what we contracted them to do.
>
> …
>
> So I went down and confronted them on this point at their offices, at which point they told me that they – that no – that they were not selling anything at all. And of course without any proof, I couldn't do anything beyond confront them on that point.
>
> And then when it continued, I had another meeting that was very similar.

[220] Cryptobloc asserted in its trading news release that it was unaware of any change in operations that could be causing the trading activity. The trading news release was titled "Unaware of any Material Change." Cryptobloc and

Mr. Stevenson-Moore submit that they took the appropriate steps to confirm whether their suspicion was substantiated by questioning Mr. Liu and Mr. Jackson. Mr. Stevenson-Moore did not, however, question any of the other Cryptobloc Subscribers directly.

[221] Given the evidence before me, I find there is a reasonable possibility that Mr. Tietz will be able to establish, at trial, that Cryptobloc's trading news release contained a misrepresentation in that Cryptobloc did have an opinion as to the reason for the downward slide of the share price, contrary to what was represented.

Materiality of the alleged misrepresentations

[222] The Cryptobloc Consulting Fees were pre-paid and totalled $3.6 million. This was a significant amount in the context of Cryptobloc's financial statements as a whole. In fact, the payments were Cryptobloc's largest cash outflows during the three months ended July 31, 2018. The subsequent disclosure of the consulting agreements and fees in the financial statements and MDA demonstrates that Cryptobloc regarded the payments as material for financial reporting purposes.

[223] The Cryptobloc Consulting Agreements represented an extant liability that was approximately 30 times the cash Cryptobloc had access to, approximately 94% of the total value of its assets, and worth more than the 1 Linx acquisition cost in circumstances where, as of May 18, 2018, Cryptobloc had only announced the private placement and had not received the subscription fees.

[224] I find that there is a reasonable possibility that the petitioner will prove at trial that the Cryptobloc Consulting Agreements were material at the time of the May 18, 2018 private placement news release.

[225] There is a significant difference between Cryptobloc telling investors that it had secured $4.5 million in private placement financing, and Cryptobloc telling investors it had sold shares effectively for $827,800 in cash and promises to provide $3,672,200 in consulting services.

[226] Cryptobloc's receipt of the private placement funds was contingent upon it paying $3,672,200 to the Cryptobloc Subscribers and related consultants. That was information which, as a matter of common sense, the petitioner will be able to show at trial would reasonably be expected to significantly affect the market price or value of Cryptobloc securities.

[227] The risk that the Cryptobloc Subscribers would quickly sell their shares which would increase trading volume was clear to the Cryptobloc Board and Mr. Stevenson-Moore. Only two of the subscribers were confronted with this possibility, which they denied. There is a reasonable possibility that at trial the petitioner will be able to prove that this information would reasonably be expected to have a significant effect on the value of Cryptobloc's securities, and that omission of this information from their trading news release rendered that document misleading.

Non-core documents – knowledge, wilful blindness or gross misconduct

[228] For the misrepresentations in non-core documents, the Cryptobloc News Releases and the trading news release, Mr. Tietz will need to prove, at trial, that Cryptobloc, Mr. Biles, Mr. Phillippe and Mr. Stevenson-Moore either knew about the misrepresentations at the time the documents were released, deliberately avoided acquiring knowledge of the misrepresentations or, through action or failure to act, were guilty of gross misconduct in connection with the release of the documents.

[229] Mr. Stevenson-Moore was aware of the omitted information, that Cryptobloc's receipt of the $4.5 million in private placement proceeds was conditional upon it returning $3,672,000 of those proceeds to the Cryptobloc Subscribers and related purported consultants under the Cryptobloc Consultant Agreements.

[230] Mr. Biles and Mr. Phillippe have not provided any evidence regarding their knowledge, or lack of knowledge, of this transaction. However, according to Mr. Stevenson-Moore, Cryptobloc's management team at the time of the private placement consisted of himself (the CEO), Mr. Phillippe (the CFO and a director), Mr. Biles (a director) and Akash Patel (a director). As noted above, Mr. Stevenson-Moore had discussions with the Cryptobloc Board about the 12 consulting

agreements and concluded that it was appropriate for Cryptobloc to enter into the agreements. In addition, the Cryptobloc Board was, apparently, concerned when the share price was being driven down, and assumed that it was caused by Mr. Liu and Mr. Jackson selling their shares.

[231] Mr. Stevenson-Moore advances a reasonable investigation or due diligence defence under s. 140.4(6) of the *Act* based on his evidence regarding the inquiries about the Cryptobloc Subscribers, and that the Cryptobloc Board assembled and engaged the consultants. Mr. Stevenson-Moore's evidence is not so strong as to eliminate the reasonable possibility that the petitioner will show at trial that this defence would not be established. This does not mean he cannot bring the defence at trial.

[232] Based upon all of the above evidence, there is a reasonable possibility that the petitioner will succeed, at trial, in establishing that Mr. Stevenson-Moore, Mr. Phillippe, and Mr. Biles either knew about the true facts of the transaction or, if not, that they were wilfully blind or engaged in gross misconduct in the performance of their managerial roles.

[233] There is also a reasonable possibility that the court will conclude at trial that the Cryptobloc respondents were aware of the misrepresentation in their trading news release regarding the lack of any material change that would account for the increased trading activity following the private placement. There is a reasonable possibility that the petitioner will be able to persuade the court that Mr. Stevenson-Moore, Mr. Phillippe and Mr. Biles were aware that, after seeing the Cryptobloc Subscribers freely trading shares at an effective price well below the market price, they were aware that there was a substantial risk the Cryptobloc Subscribers were capitalizing on the profit to be made by quickly selling the shares at discounted prices.

Public correction and impact on share price

[234] According to listed securities trades report data, obtained from the CSE in the 10 trading days after November 26, 2018 when the Commission issued the

Commission Documents, on November 26, 2018, the average price for Cryptobloc shares was approximately $0.012 (the “Cryptobloc Post Correction Price”), calculated from the trading prices in the 10 trading days after Cryptobloc resumed trading. This is substantially less than the share price on May 18, 2018, when Cryptobloc announced its private placement, and well below the prices at which the shares traded over the subsequent two months, until June 28, 2018 when Investment Industry Regulatory Organization of Canada (the “IIROC”) and the CSE halted trading in Cryptobloc shares.

[235] When trading was halted in Cryptobloc on June 28, 2018, Mr. Tietz held 490,500 shares in Cryptobloc. Mr. Tietz still held those shares when Cryptobloc resumed trading on December 11, 2018 and as of February 24, 2020. At the Cryptobloc Post Correction Price, those shares had an average value of $5,886 during those 10 trading days.

[236] Cryptobloc’s alternative argument is that the Commission Documents could not be a public correction of the misrepresentations because Cryptobloc had already corrected the misrepresentations on July 3, 2018, by releasing their financial statements and MDA in which it disclosed that it had entered into the 12 consulting agreements on May 1, 2018.

[237] However, there is a reasonable possibility that the petitioner will be able to show that those statements were not reasonably capable of revealing to the market the existence of an untrue statement or an omission of a material fact. As such, the financial statements and MDA do not meet the criteria for a public correction. The July 3, 2018 financial disclosures did not tell investors that Cryptobloc’s receipt of the $4.5 million in proceeds from in the private placement, had been conditional upon the Cryptobloc Consulting Agreements or Fees, pursuant to which Cryptobloc had agreed to return, and had returned, 81.6% of the private placement proceeds to the Cryptobloc Subscribers and related purported consultants.

[238] Again, the public correction at this stage serves primarily as a time post.

BLOK, David Alexander, Robert Dawson, and James Hyland

[239] BLOK carried out its private placement on June 7, 2018. BLOK's shares trade on the CSE. It is a reporting issuer in British Columbia and therefore a "Responsible Issuer" within the meaning of s. 140.1 of the *Act.*

[240] Three officers and directors of BLOK, David Alexander (CFO), Robert Dawson (CEO and President), and James Hyland (Director and Audit Committee Chair), were directors or officers (or both) of BLOK at the time BLOK made each of the impugned representations, and each authorized one or more of the relevant documents on BLOK's behalf.

[241] BLOK published the following three documents at or around the date of its private placement:

a) private placement news release dated June 1, 2018, authorized by Mr. Hyland;

b) Form 9 dated and filed on June 1, 2018, certified by Mr. Dawson; and

c) private placement news release dated June 8, 2018, authorized by Mr. Dawson and Mr. Hyland.

[242] In each of the above documents, BLOK described its private placement, including specific representations regarding the price and proceeds of the private placement and BLOK's intended use of those proceeds. For example, in the June 1, 2018 private placement news release, BLOK stated:

> VANCOUVER, British Columbia, June 01, 2018 – BLOK… wishes to announce today that due to investor demand, the Company is increasing the size of the amended Non-Brokered Private Placement (the "Private Placement") previously announced to the market on May 1, 2018.
>
> The Private Placement, which was originally planned to raise gross proceeds of up to C$1,000,000, will be increased by up to C$4,000,000 and now will consist of up to 25,000,000 units (the "Units") of the Company at a price of $0.20 per Unit… to raise up toC$5,000,000 to be sold by the Company by private placement…

> …
>
> "We're pleased to have attracted additional investor interest in our company," said BLOK Tech CEO Rob Dawson, "This financing further enhances our ability to execute the blockchain development projects in hand and explore the many investment opportunities we are identifying in the blockchain sector."
>
> …
>
> All Common Share and Warrants issued under the second tranche of the Private Placement will be subject to a statutory hold period expiring four months and one day after closing of the financing…
>
> The Company may, in its sole discretion, pay a finder's fee within CSE policy guidelines in connection with the Private Placement.
>
> BLOK Tech intends to use the net proceeds from the Offering for the development of emerging blockchain technology, investment in strategic opportunities as well as for general working capital purposes.

[243] On June 1, 2018, BLOK also filed a Form 9 in which it repeated these statements in its June 1, 2018 private placement news release to the effect that the private placement would offer up to 25,000,000 units at a price of $0.20 per unit, for total funds raised of up to $5 million which would be used for "Development of blockchain technology, consulting fees for market awareness investment in potential opportunities as well as for general working capital purposes." BLOK also described a selling agent's commission that could be payable at BLOK's discretion.

[244] BLOK's Form 9 stated that the identities of the subscribers, and the prospectus exemption applicable to their subscriptions, was yet to be determined.

[245] A week later, BLOK announced the closing of the private placement in its June 8, 2018 private placement news release:

> VANCOUVER, British Columbia, June 08, 2018 - BLOK… is pleased to announce that it has closed the second and final tranche of a Non-Brokered Private Placement (the "Private Placement") raising gross proceeds of $4,857,500 from the issuance and sale of 24,287,500 Units at a price of $0.20 per Unit. No new insiders were created, nor has any change of control occurred, as a result of this Private Placement.
>
> The Private Placement was over-subscribed and raised a total of $5,403,384 of the proposed $5,000,000 previously announced on June1, 2018.
>
> …

> Rob Dawson, President and CEO commented, "BLOK Technologies' vision is to develop leading-edge, global solutions that employ blockchain technology. In completing this $5.4M financing, we are taking our company to the next level in the execution of its business model. We are very pleased that key investors have joined us on this journey and we look forward to advancing our worldwide investment projects with top-level strategic partners."
>
> …
>
> These Common Shares and Warrants issued under the second tranche of the Private Placement will be subject to a four month and one day resale restriction expiring October 9, 2018…
>
> The Company intends to use the net proceeds of the Private Placement for the advancement of the Company's blockchain investment projectsthat are currently in the pipeline, evaluating new blockchain opportunities as part of its business model and for working capital purposes."

[246] In summary, in the private placement news releases from June 1 and June 8, 2018 (collectively the "BLOK News Releases") and the Form 9 filed on June 1, 2018, BLOK disclosed that:

a) it had arranged and, later, closed a $4,857,500 private placement, where shares in BLOK were sold for $0.20 per unit;

b) the proceeds would be used for development of blockchain technology, consulting fees for market awareness, investment in potential opportunities and general working capital purposes;

c) some or all of the investors were "key investors" joining BLOK on its "journey" to take the company to the next level in the execution of its business model;

d) BLOK might pay a commission in relation to the private placement; and

e) the shares issued in the private placement were subject to a four month and one day resale restriction, which would expire on October 9, 2018.

[247] The petitioner submits investors were left to understand that BLOK had raised just over $4.8 million in financing from "key investors" in a private placement, which would be used for the advancement of BLOK's current blockchain investment projects, evaluating new blockchain opportunities, consulting fees for market awareness, and general working capital.

[248] The petitioner Mr. Greenwood says that the reality of the situation was much different. Mr. Greenwood alleges that BLOK entered into consulting agreements (the "BLOK Consulting Agreements") with certain subscribers and some of their designated associates as a condition of their acquiring $4.5 million worth of shares under the private placement. As outlined in BLOK's Form 9, those subscribers were Detona, Hunton Advisory Ltd. ("Hunton"), JCN Corp., Keir MacPherson ("MacPherson"), Kendl Capital Limited ("Kendl"), and Tavistock Capital Corp. ("Tavistock") (collectively, the "BLOK Subscribers"). Under the BLOK Consulting Agreements, BLOK agreed to, and subsequently did pay, lump sum consulting fees of $3,770,000 to the BLOK Subscribers and certain of their designated associates (the "Blok Consultant Fees") from the $4.5 million the BLOK Subscribers paid to BLOK under the private placements. As a result, BLOK was left with $730,000 from the subscriptions by the BLOK Subscribers to use in its ongoing business operations.

[249] Mr. Greenwood seeks leave to bring two distinct claims of misrepresentations in respect of BLOK's disclosures about the private placement in the BLOK News Releases and Form 9. One claim is for positive misrepresentation, that the statements made in those documents concerning the price paid and the amount of proceeds received by BLOK for the shares issued under the private placement were false. Mr. Greenwood says that as a result of the BLOK Consulting Fees the true price paid for the shares issued to the BLOK Subscribers, and the true amount of proceeds received by BLOK for those shares, was 83.7% less than what was represented in the BLOK News Releases and Form 9.

[250] The second claim is for misrepresentation by omission, for BLOK's failure to disclose information about the BLOK Consulting Agreements and BLOK Consulting Fees in the BLOK News Releases and Form 9. These documents, individually and collectively, failed to disclose that the subscriptions BLOK received from the BLOK Subscribers were conditional upon BLOK first entering into the BLOK Consulting Agreements then paying the BLOK Consulting Fees from the funds paid by the BLOK Subscribers for their shares. None of the documents disclosed any condition or *quid pro quo* attached to the BLOK Subscribers' participation in the private placement, let alone one where BLOK would and did return 83.7% of the proceeds from their subscriptions to this investing group.

[251] The petitioner submits this was material information, without which it was impossible for investors to understand the true substance of the private placement transaction and the true risks and benefits of it for BLOK. The petitioners say excluding this information from the BLOK News Releases and Form 9 rendered those documents misleading and constitutes a misrepresentation within the meaning of s. 1 of the *Act*.

[252] BLOK repeated the same disclosures on August 29, 2018, when it filed its interim financial statements for the 6 months ended June 30, 2018, which were signed by Mr. Hyland and certified by both Mr. Dawson and Mr. Alexander. In its interim financial statements, BLOK again represented that on June 8, 2018 BLOK issued 24,487,500 units at $0.20 per unit for gross proceeds of $4,857,500 in the private placement.

[253] The petitioners submit BLOK did not inform investors that its receipt of the $4.5 million of the proceeds had been conditional upon BLOK agreeing to return, and contemporaneously returning, $3,770,000 of those proceeds to the BLOK Subscribers and related purported consultants, such that the actual proceeds and price of the private placement were considerably different from what was represented. The petitioners submit that investors could not understand the true

substance of the private placement and the true financial benefits and risks it created for BLOK.

[254] Finally, on September 26, 2018, BLOK filed a second Form 9, which was certified by Mr. Alexander. In the revised Form 9, BLOK again represented that the private placement occurred at a price of $0.20, with total funds raised of $5,403,384, taking into account the two tranches of the private placement. BLOK was slightly more expansive in its description of the use of the proceeds:

> Development of blockchain technology, investment in potential business opportunities, payment of consulting fees, as well as for general working capital purposes. There were two tranches. The first closed on May 14, 2018 and the second on June 8, 2018 (the "Closing Date"). The majority of the second tranche was used for payment of consulting fees.

[255] In the second Form 9, BLOK also listed the following BLOK Subscribers as having purchased their shares pursuant to the s. 2.24 Exemption, and as having paid for their shares on the same day, June 4, 2018. The following table summarizes the number of shares purchased by each BLOK Subscriber, and the value of those shares at the price disclosed in the Form 9, i.e. $0.20 per unit:

BLOK Subscriber	Number of Shares	Value of shares purchased
Detona	2,500,000	$500,000
Hunton	5,000,000	$1,000,000
JCN Corp.	2,500,000	$500,000
MacPherson	2,500,000	$500,000
Kendl	5,000,000	$1,000,000
Tavistock	5,000,000	$1,000,000
Total:	**22,500,000**	**$4,500,000**

[256] While the second Form 9, issued on September 26, 2018, confirmed that the majority of the second tranche was used for paying consulting fees, it did not disclose that the recipients of those consulting fees were the BLOK Subscribers or consultants related to the BLOK Subscribers. It also did not disclose the relationship as alleged by the petitioner between the payment of the consulting fees and the private placement, that BLOK had only received the $4.5 million in proceeds from the

BLOK Subscribers because of the BLOK Consulting Agreements and Fees under those agreements.

[257] In sum, the petitioner Mr. Greenwood alleges that the documents BLOK released in relation to its private placement significantly misstated the price and proceeds of the private placement, and failed to provide investors with an adequate understanding of the transaction and the risks and benefits it created for BLOK. Investors should not have to read between the lines and risk drawing erroneous inferences from incomplete or cryptic disclosure provided about material developments.

Good faith

[258] The petitioner, Mr. Greenwood, purchased shares in BLOK on August 10, 2018 at $0.09 per share for a total cost before commissions of $1,350. As of August 12, 2020, Mr. Greenwood still held those shares. As a person who bought securities in BLOK between the time BLOK released its first private placement news release on June 1, 2018, and November 26, 2018, the date of the alleged public correction, on November 26, 2018, Mr. Greenwood qualifies under s. 140.3(1) of the *Act*.

[259] On cross-examination, Mr. Greenwood deposed that he found information and documents about the class action lawsuit involving BLOK and informed legal counsel of his purchase of BLOK shares. He deposed that he reviewed some of the pleadings and has a general idea of his role as a petitioner with respect to BLOK. He is generally aware of the allegations against BLOK, focussing on disclosure relating to the payment of private placement funds to consultants who subscribed to that private placement.

[260] I find that Mr. Greenwood brings his statutory claim against the BLOK respondents in good faith.

Reasonable possibility of success

[261] In its response to the petition, BLOK does not appear to be contesting the truth of Mr. Greenwood’s allegations. BLOK does not directly dispute the allegation

that payments under the consulting agreements were a condition for the key investors' subscribing the private placement, or that the BLOK Subscribers and their associates were not paid as alleged. Rather, BLOK's responsive position is that investors knew, from the totality of BLOK's disclosures, that BLOK issued shares to fund substantial deficits and was going to use share proceeds to pay consulting fees, such that the alleged omitted information was not material. As such, BLOK submits that there is no reasonable possibility Mr. Greenwood will succeed at trial. None of the BLOK respondents appeared on the application for leave.

[262] In its *Temporary Order Extension*, the Commission found that the evidence submitted by BLOK's Executive Director showed that:

a) BLOK entered into consulting agreements with the subscribers to its private placement, and certain other non-issuer respondents, which, in most cases, provided for pre-payment, or a one-time payment of the consulting fees; and

b) BLOK's banking records indicated that cash payments were made to certain of the non-issuer respondents, both subscribers and not, either immediately prior to, on the same day as, or within a few days after the closing, which consumed the vast majority of the private placement proceeds: *Temporary Order Extension* I, at para. 13.

[263] Further, in relation to BLOK and three other Issuers (Green Corp., Cryptobloc and New Point), the Commission concluded in *Temporary Order* I at para. 28 that:

> - the four Issuers involved appear to have actually retained far less money than they raised (following the cash payments to the Non-Insider [*sic*] Respondents);
>
> - in many cases, the subscribers engaged in what were essentially "cash swaps" with the four Issuers;
>
> - the four Issuers, very unusually, pre-paid substantial consulting fees; and
>
> - the subscribers (almost universally), very shortly after the closing of the private placements, sold all (or virtually all) of the shares acquired in the

> private placements at average prices substantially less than what they paid for the shares,
>
> all of which were undisclosed to the investing public. What was disclosed to the public by the Issuers with respect to their private placements and the actual net benefit to the Issuers of completing those transactions were two very different things.

[264] The Commission concluded that there was *prima facie* evidence that BLOK engaged in same misconduct alleged by petitioner Mr. Greenwood: *Temporary Order* I at para. 29.

[265] There is also some direct evidence before the Court indicating that BLOK agreed to, and did, pay, a substantial portion of the private placement proceeds to the BLOK Subscribers and related purported consultants as consulting fees.

[266] According to BLOK's interim financial statements for the six months ending June 30, 2018, filed on August 29, 2018:

a) BLOK spent $1,105,887 on consulting fees just in the three months from March 30 to June 30, 2018, a significant increase from the $58,422 BLOK spent on consulting fees over the same three months in 2017; and

b) BLOK also, as of June 30, 2018, reported "pre-paid expenses" of $3,139,563, a significant increase from the $199,596 in pre-paid expenses for the same period ended June 30, 2017.

[267] I accept that the evidence before the Commission leading to its findings against BLOK will be discoverable by the petitioner.

[268] I find there is a reasonable possibility that petitioner Mr. Greenwood will be able to establish, at trial, that most or all of both the consulting fee expense for March 30 to June 30 2018, and the large "pre-paid expenses", represent the BLOK Consulting Fees paid under the BLOK Consulting Agreements from the private placement proceeds.

[269] Added together, the three month consulting fee expense and the pre-paid expenses total to $4,245,450.

[270] In the MDA accompanying the interim financial statements, which BLOK also filed on August 29, 2018, BLOK reported the same $1,105,887 spent on consulting fees in three months, and stated that "Consulting fees increased by $1,047,465 (as compared to the same three months in 2017) due to one incentive shares issue to numerous consultants."

[271] While no additional information was provided in the MDA, I find that there is a reasonable possibility that Mr. Greenwood will be able to show that the "shares issue to numerous consultants" referred to the private placement and the BLOK Subscribers.

[272] As noted above, in its second Form 9, which BLOK filed on September 26, 2018, months after the private placement, BLOK reported that "…the majority of the second tranche was used for payment of consulting fees." While the Form 9 was filed on September 26, 2018 and the signature on the certificate of compliance is dated June 20, 2018, the form itself is dated June 7, 2018. This evidence raises a reasonable possibility that the petitioner will be able to prove at trial that as of June 7, 2018, BLOK had already spent the majority of the $4,857,500 in second tranche proceeds on the BLOK Consulting Fees.

[273] The above evidence is sufficient to establish that there is a reasonable possibility Mr. Greenwood will be able to establish at trial that BLOK entered into BLOK Consulting Agreements with the BLOK Subscribers, prior to announcing the private placement, pursuant to which BLOK agreed to return most of the private placement proceeds to the BLOK Subscribers as pre-paid consulting fees.

[274] It is reasonable to infer from the evidence that BLOK entered into the BLOK Consulting Agreements contemporaneously with the private placement a condition of the BLOK Subscribers' participation in the private placement.

[275] However, I do not make this inference, on the evidence which shows that each of the BLOK Subscribers participated in one or more of the five other private placements carried out in 2018 with other issuers where the *quid pro quo* arrangement was more clearly established or where there are admitted terms in settlement agreements to that effect. As I have noted above, that evidence is too speculative and prejudicial to be the foundation of an inference.

Materiality of the alleged misrepresentations

[276] The issuance of the shares for the prices paid and the proceeds received after taking into consideration the alleged cash swap payment to the consultants was 83.7% less than the amount represented to the market.

[277] As noted above, in its interim financial statements for the six months ended June 30, 2018, BLOK disclosed that in the three months ended June 30, 2018 it incurred an expense of $1,105,887 on consulting fees, and it prepaid expenses in the amount of $3,139,563. These were significant amounts in the financial statements as a whole. They were BLOK's largest cash outflows by a significant margin during this period. The inclusion of the payments, distinct and unconnected to the financial statement's disclosure about the private placement, is nonetheless evidence that BLOK regarded the expensed and pre-paid amounts as so significant to be material for financial reporting purposes.

[278] In the accompanying MDA, BLOK did not refer to the pre-payment of consulting fees directly but again disclosed the consulting fees expense and explained that "Consulting fees increased by $1,047,465 due to one incentive shares issue to numerous consultants."

[279] MDAs are a narrative explanation of how a company performed during the period covered by the financial statements and should, among other things, help investors and prospective investors understand what the financial statements show and do not show. While BLOK's MDA statement about the consulting fees increase (about which share issue, the nature of the incentive, and how many consultants

there were), was vague, it is further evidence that BLOK regarded the consulting fees as material.

[280] BLOK's financial statements and MDA were certified by the respondents Mr. Dawson and Mr. Alexander, and the financial statements were approved for issuance by BLOK's board of directors.

[281] Further, BLOK's first and second Form 9s appear to draw a distinction between general working capital and consulting fees. In its second Form 9, filed on September 26, 2018, more than three months after the private placement, BLOK disclosed that as of June 7, 2018 "the majority of the second tranche was used for payment of consulting fees." The disclosure about the second tranche is evidence of the materiality of the consulting fees and the conclusion of the underlying agreements. As stated in *Cornish* at para. 41, "…a central tenet of securities law is that disclosure obligations are limited to material matters."

[282] At the relevant time, BLOK's business was investing in and developing emerging companies in the blockchain technology sector. It did this by "providing capital, technology, and management expertise to produce blockchain enabled business applications." At the relevant time, BLOK was, in effect, a junior mining company turned tech start-up. It had a deficit of about $3.5 million, minimal cash, no revenues or likelihood of them in the near term and was a going concern risk. BLOK disclosed that it expected to require consultants in 2018.

[283] Those were the known facts speaking to BLOK's small size, constrained financial position and how it might operate. Not only did BLOK have going concern risk, the nature of its business was, in part, to invest capital.

[284] These facts, together and as detailed below, are the context in which BLOK concluded $3,770,000 worth of consulting agreements and therefore, the context in which the materiality of the conclusion of the agreements and their impact on the proceeds of the private placement is to be assessed.

[285] As of March 31, 2018, the total value of BLOK's assets was approximately $1.3 million, which included approximately $330,000 of current assets (cash, accounts receivable, prepaid expenses and amounts due from related parties). The balance of BLOK's total asset value was substantially attributable to intangibles acquired in an acquisition. Against BLOK's current assets, it had current liabilities of approximately $500,000. That is, as of March 31, 2018, its current liabilities exceeded its current assets.

[286] The first tranche of BLOK's private placement was carried out in May 2018, for approximately $550,000. The funds obtained from the first tranche may have taken some pressure off BLOK's financial situation by allowing it to settle its current liabilities at the time. Nonetheless, between the first and second tranches closing, BLOK appears to have been well short of being able to settle a lump sum consulting fees obligation of more than several hundred thousand dollars.

[287] Against this backdrop, the second Form 9 suggests that sometime prior to June 7, 2018 (before the private placement had closed) BLOK concluded the BLOK Consulting Agreements under which "the majority of the second tranche" was paid out in the BLOK Consulting Fees.

[288] According to its second Form 9, BLOK expected to be paid or was paid the subscription fees by the BLOK Subscribers on June 4, 2018. There is no evidence before the Court that BLOK received the BLOK Subscribers' private placement fees any earlier than June 4, 2018. Thus, at the time of BLOK's first private placement news release, on June 1, 2018, an obligation to settle any more than several hundred thousand dollars in consulting fees represented a liability to BLOK that it could not likely pay. Its ability to do so likely depended on the private placement.

[289] By incurring obligations to pay $3,770,000 in consulting fees, BLOK was dependent on the BLOK Subscribers' payment of their fees.

[290] I find that it is reasonably possible that the petitioner will be able to show that the BLOK Consulting Agreements and the additional consulting agreements with

other purported consultants were material for the purposes of the BLOK News Releases, the Form 9s and the interim financial statements. As for the BLOK News Releases and the first Form 9, without disclosing the conclusion of the consulting agreements, it was impossible for investors to understand that, in effect, more than 83% of the money from the private placement was already spent. As to the second Form 9 and the interim financial statements, without disclosing the conclusion of the consulting agreements in the context of the private placement, it was impossible for investors to understand the extent of the relationship between the consulting fees and the private placement.

[291] When the context of BLOK is considered, it is reasonably possible that the petitioner will prove that the conclusion of the BLOK Consulting Agreements and the impact of the BLOK Consulting Fees meets the threshold for materiality, and that information if disclosed would reasonably be expected to significantly affect the market price or value of BLOK securities.

[292] Based upon what BLOK disclosed, in the BLOC News Releases, its Form 9s, and interim financial statements, investors were given the impression that BLOK had secured $4,857,500 in financing, which it intended to use for the advancement of its blockchain investment projects that were “currently in the pipeline, evaluating new blockchain opportunities as part of its business model and for working capital purposes.” In reality, BLOK had sold $4.5 million worth of shares in the second tranche for $730,000 in cash and promises to provide $3,770,000 worth of consultant services.

[293] Those scenarios, viewed from the perspective of a reasonable investor seeking to make a profit by buying or selling BLOK shares, are different.

[294] The very real and significant nature of that risk to BLOK is readily apparent from what then happened according to a finding of the Commission, that BLOK Subscribers quickly sold all or virtually all the shares they had acquired at a substantial discount.

[295] I find that there is a reasonable possibility that at trial the petitioner will be able to prove that the BLOK Consulting Agreements were material from the moment BLOK entered them, and both their conclusion and impact on the proceeds of the private placement was material information BLOK was obliged to disclose.

Non-core documents – knowledge, wilful blindness or gross misconduct

[296] For the misrepresentations in the non-core documents, the BLOK News Releases, petitioner Mr. Greenwood will need to prove, at trial, that BLOK, Mr. Alexander, Mr. Dawson and Mr. Hyland either knew about the misrepresentations at the time the documents were released, deliberately avoided acquiring knowledge of the misrepresentations or, through action or failure to act, were guilty of gross misconduct in connection to the release of the documents.

[297] There is some evidence that as of June 1, 2018 each of the individual BLOK respondents were likely aware that BLOK had agreed to, and shortly would, disperse most of the private placement proceeds to the BLOK Subscribers as pre-paid cash consulting fees.

[298] On June 30, 2018, Mr. Alexander, in his role as BLOK's CEO, certified that all of the information in the second Form 9 was true. In that Form 9, BLOK represented that the majority of the private placement, the second tranche, was used to pay consulting fees.

[299] In addition, Mr. Hyland signed, as a director, and both Mr. Dawson as CEO, and Mr. Alexander as CFO, certified the interim financial statements filed August 29, 2018, in which BLOK reported the significant increase in both consulting fees and pre-paid expenses.

[300] The consulting fee expense of $1,105,887 was an extraordinary expenditure for BLOK, let alone one for $3,770,000. The 22,500,000 units issued to the BLOK Subscribers represented a significant increase in BLOK's issued shares and made the BLOK Subscribers significant BLOK shareholders.

[301] I find that there is a reasonable possibility that the petitioner will be able to prove at trial that the BLOK respondents knew about the misrepresentations with regard to the private placement arrangements and effective share price at the time the documents were released, or otherwise ought to have known, or were guilty of gross misconduct in connection to the release of the documents.

Public correction and impact on share price

[302] According to listed securities trades report data obtained from the CSE, in the 10 trading days after November 26, 2018, when the Commission issued the Commission Documents, the average price for BLOK shares was approximately $0.026 (the “BLOK Post Correction Price”). This was substantially less than the prices at which the shares traded when BLOK announced the private placement, on June 1, 2018, and below the prices at which the shares traded over the approximately five months following the announcement.

[303] As of August 12, 2020, Mr. Greenwood still held the 15,000 shares he purchased in BLOK on August 10, 2018, for a total cost before commissions of $1,350. In the ten trading days following November 26, 2018, those shares had an average value of $390 at the BLOK Post Correction Price of $0.026.

[304] In its response, BLOK contends, in the alternative, that the Commission Documents were not a public correction because BLOK had already corrected the misrepresentations on September 26, 2018 in the second Form 9 when it stated that “The majority of the second tranche was used for payment of consulting fees.” However, nothing in the Form 9 told investors that the second tranche had been used to pay consulting fees to the BLOK Subscribers or that this was pursuant to a conditional subscription arrangement.

[305] As such, the statements in the second Form 9 do not eliminate the reasonable possibility that the November 26, 2018 Commission Documents were a public correction in relation to BLOK.

New Point, and Bryn Gardener-Evans

[306] New Point's shares trade on the CSE. It is a reporting issuer in British Columbia and thus a "Responsible Issuer" within the meaning of s. 140.1 of the *Act*.

[307] Mr. Bryn Gardener-Evans was CEO and a director of New Point during the relevant period in 2018. He authorized the New Point's private placement news releases and its Form 9 on New Point's behalf.

[308] New Point published the following documents at or around the time of the private placement:

a) private placement news release dated July 25, 2018;

b) Form 9 dated and filed on August 8, 2018;

c) private placement news release dated August 9, 2018; and

d) material change report, filed August 9, 2018.

[309] In each of the above documents, New Point described the private placement, making specific representations regarding its price, proceeds, and New Point's intended use of the proceeds. For example, in the July 25, 2018 private placement news release announcing the private placement, New Point stated:

> VANCOUVER – July 25, 2018 – New Point… intends to proceed with a non-brokered private placement of up to 40,000,000 units at $0.125 cents per unit to raise gross proceeds of up to CAD$5,000,000.
>
> …
>
> The Company may pay finder's fees or issue finder's warrants up to the amount permitted by the CSE policies. The net proceeds raisedfrom the unit offering are intended to be used for general corporate purposes, including G&A and exploration on the Company's projects.

[310] New Point provided similar information in its August 9, 2018 private placement news release announcing the closing of the private placement:

> VANCOUVER—August 9, 2018— New Point…. is pleased toannounce it has closed a non-brokered private placement financing ("Placement") for aggregate gross proceeds of C$4,651,000.

> The Company has issued 37,208,000 units ("Units") at a price of C$0.125 per Unit….
>
> …
>
> The proceeds of the Placement will be used for general corporate purposes including G&A and exploration on the Company's projects. All securities issued pursuant to the Placement will be free trading upon issuance pursuant to prospectus exemption 2.25 of NI 45-106.
>
> …

[311] In its Form 9, filed on August 8, 2018, New Point again stated that 37,208,000 shares were purchased in the private placement at $0.125 per share, for a total of $4,651,000. New Point further stated that "The net proceeds raised are intended to be used for general corporate purposes, including G&A and exploration on the Issuer's projects."

[312] In its material change report, filed on SEDAR on August 9, 2018, New Point listed "August 9, 2018 – New Point Exploration closes financing," as a summary of a material change, and attached the private placement news release dated August 9, 2018.

[313] The Form 9 listed the subscribers to the New Point private placement as Tavistock, Jarman, Northwest, Lukor Captial ("Lukor"), Escher Invest SA ("Escher"), Haight-Ashbury Media Consultants Ltd. ("Haight-Ashbury"), Hunton, 1153307 BC Ltd. ("1153307 BC"), and Bertho Holdings Ltd. ("Bertho") (collectively, the"New Point Subscribers"). The following table summarizes the number of shares purchased by each subscriber, and the value of those shares at $0.125/unit:

New Point Subscriber	Number of Shares	Value
Tavistock	5,000,000	$625,000
Jarman	5,000,000	$625,000
Northwest	5,000,000	$625,000
Lukor	5,000,000	$625,000
Escher	5,000,000	$625,000
Haight-Ashbury	2,000,000	$250,000
Hunton	5,000,000	$625,000
1153307 BC	4,000,000	$500,000
Bertho	1,208,000	$151,000

Total:	**37,208,000**	**$4,651,000**

[314] The Form 9 also noted that each of the New Point Subscribers was acquiring the shares pursuant to the prospectus exemption in "2.25 of NI 45-106." Section 2.25 of *NI 45-106* is not a prospectus exemption, *per se*, but rather defines certain situations in which an "unlisted reporting issuer" is not permitted to rely upon the s. 2.24 Exemption.

[315] New Point left blank the portion of the Form 9 that requests information regarding any finder's fee, commission or other compensation to be paid in connection with the private placement.

[316] In summary, in its private placement news releases dated July 25 and August 9, 2018 (collectively, the "New Point News Releases"), Form 9 and material change report New Point disclosed that:

a) it had arranged and, later, closed a $4,651,000 private placement, where shares in New Point were sold at a price of $0.125 per unit;

b) the proceeds of the offering would be used for general corporate purposes,including G&A and exploration on New Point's projects;

c) the investors were purchasing their shares pursuant to the exemption for employees, executive officers, directors or consultants, as it applies to unlisted reporting issuers; and

d) no finder's fee, commission or other compensation was paid in connectionwith the private placement.

[317] Mr. Loewen says that the reality of the situation was much different. Mr. Loewen alleges that as a condition of the New Point Subscribers' acquisition of their shares under the private placement, New Point entered into consulting agreements with the New Point Subscribers and five of their designated associates (the "New Point Consulting Agreements"). Under the New Point Consulting Agreements, New Point

agreed to, and subsequently did, pay lump sum consulting fees of $ 3,972,500 (the "New Point Consulting Fees") from the $4.651 million paid to New Point under the private placement. As a result, New Point was left with only $687,500 from the private placement to use in its ongoing business operations.

[318] Mr. Loewen seeks leave to bring two distinct claims of misrepresentations in respect of the New Point's disclosures about the private placement in the New Point News Releases and its Form 9. One claim is for positive misrepresentation, that the statements made in those documents concerning the price paid and the amount of proceeds received by New Point for the shares issued under the private placement were false. Mr. Loewen says that as a result of the New Point Consulting Fees the true price paid for the shares issued to the New Point Subscribers, and the true amount of proceeds received by New Point for those shares, was 85.4% less than what was represented in the New Point News Releases and Form 9.

[319] The second claim is for misrepresentation by omission, for New Point's failure to disclose information about the New Point Consulting Agreements, the New Point Consulting Fees, and their relationship to the private placement in the New Point News Releases and Form 9. These documents, individually and collectively, failed to disclose that the subscriptions New Point received from the New Point Subscribers were conditional upon New Point first entering into the New Point Consulting Agreements, pursuant to which New Point paid the New Point Consulting Fees of $3,972,500 from the funds paid by the New Point Subscribers for their shares. Neither the New Point News Releases nor the Form 9 disclosed any condition or *quid pro quo* attached to the New Point Subscribers' participation in the private placement, let alone one where New Point would and did return 85.4% or more of the proceeds to the investing group.

[320] The petitioner submits that this was material information. Without it, it was impossible for investors to understand the true substance of the private placement transaction and the true risks and benefits of it for New Point. The petitioner says that the exclusion of this information from the New Point News Releases and Form 9

rendered those documents misleading and constitutes a misrepresentation under s. 1 of the *Act*.

Good faith

[321] Mr. Loewen purchased shares of New Point on August 9, 2018. As a person who bought securities in New Point between the time New Point released its first private placement News Release, on July 25, 2018, and the date of the alleged public correction, on November 26, 2018, Mr. Loewen qualifies as an investor to seek damages under s. 140.3(1) of the *Act*.

[322] Mr. Loewen deposed that he purchased the New Point shares after reading New Point's August 9, 2018 private placement news release announcing the private placement. He expected that as an exploration company New Point would allocate 85 % of the private placement funds to go towards exploration and 15% toward "G & A." He further deposed that he would not have purchased New Point shares had he known that 85% of the private placement proceeds would be used to pay the New Point Consulting Fees.

[323] I find that Mr. Loewen brings his statutory claim against New Point in good faith.

Reasonable possibility of success

[324] Mr. Gardener-Evans has acknowledged that New Point entered into consulting agreements and paid lump sum consulting fees pursuant to those agreements as a condition of the New Point Subscribers' participation in the private placements.

[325] On October 29, 2018, New Point issued its audited consolidated financial statements for the years June 30, 2018 and 2017 (the "June 30, 2018 YE Statements"), in which it disclosed that it had entered into nine agreements for investor relations, marketing and consulting services at some point prior to June 30, 2018. The note stated:

> In addition, during the year ended June 30, 2018, the Company entered into agreements with several parties for investor relation, andmarketing and consulting services. The agreements are for periods of six months to one year and the amounts payable are non-refundable.

[326] New Point then listed the "significant agreements entered into as at June 30, 2018", together with the "expiry date" and "annual fee", as follows:

Vendor	Expiry Date	Annual Fee
EscherInvest SA	June, 2019	$300,000
Haight-Ashbury Media Consultants Ltd.	June, 2019	$200,000
Hunton Advisory Ltd.	June, 2019	$300,000
Jarman Capital Corp	June, 2019	$200,000
KOI Communications	December, 2018	$125,000
Lukor Capital	June, 2019	$200,000
Northwest Marketing & Management Inc.	June, 2019	$250,000
Palisade Global Investments Ltd.	June, 2019	$320,000
Tavistock Capital Corp.	June, 2019	$400,000

[327] The total "annual fee" for the above "significant agreements" is $2,295,000. New Point also stated that after June 30, 2018 NewPoint paid $1,650,000 in relation to the above commitments. Seven of the nine listed "vendors", Escher, Haight-Ashbury, Hunton, Jarman, Lukor, Northwest and Tavistock, are New Point Subscribers. Thus, there is evidence that New Point entered into significant consulting agreements with nearly all of the New Point Subscribers prior to June 30, 2018, which is well before New Point announced the private placement on July 25, 2018.Those seven consulting agreementsrequired New Point to pre-pay $1,850,000 in consulting fees.

[328] In addition, later in the June 30, 2018 YE Statements, New Point stated that:

> "Subsequent to June 30, 2018, the Company made the following cash payments for investor relation, and marketing and consulting services agreements and that the payments were made pursuant to the agreements described in Note11, as well as agreements with the following vendors entered into after June 30, 2018":

Vendor	Annual fee
1153307 BC Ltd	$ 490,000

727 Capital Ltd.	$ 300,000
Awareness Consulting Network	USD 42,000
Bertho Holdings	$ 150,000
I0X Capital	$ 300,000
Kendl Capital	$ 400,000
Link Media, LLC	USD 150,000
Detona Capital	$ 105,000
Viral Stocks	$ 315,000

[329] Two of the above "vendors", Bertho and 1153307 BC, are also New Point Subscribers. Mr. Loewen alleges that five of the above "vendors", 727 Capital, 10X Capital, Kendl, Detona, and Viral Stocks, were related to the New Point Subscribers, in the sense that the cash payments to them were also a condition for the New Point Subscribers' participation in the private placement. Each of the five entities have been named as respondents in the Commission proceedings. According to Mr. Gardener-Evans, the same person that presented the first set of consulting agreements to him for execution, Robert Lawrence, also presented the five agreements with 727 Capital Ltd., 10X Capital, Kendal Capital ("Kendal"), Detona, and Viral Stocks.

[330] Months later, on January 9, 2019, New Point issued a news release in which it sought to provide "an update and clarification on the previously announced financing." After again describing the private placement as having closed on August 9, 2018, at a price of $0.125 per unit for proceeds of $4,651,000, New Point stated that "Subsequent to the financing, the Company entered into consulting agreements with 16 different consulting firms from across North America and Europe totaling $4,226,979." New Point listed the name of each of consultant, the date of their engagement, and the "total amount paid", as follows:

Date	**Consultant**	**Total Amount Paid**
31-Jul-18	Escher	$300,000
31-Jul-18	Hunton	$300,000
31-Jul-18	Jarman	$210,000
31-Jul-18	Lukor	$210,000
31-Jul-18	Haight-Ashbury	$210,000
31-Jul-18	Detona	$105,000
31-Jul-18	Northwest	$262,500

31-Jul-18	10X Capital	$300,000
31-Jul-18	Viral Stocks	$315,000
31-Jul-18	727 Capital	$300,000
31-Jul-18	Tavistock	$420,000
31-Jul-18	Kendal	$400,000
31-Jul-18	Bertho	$150,000
21-Aug-18	1153307 BC	$490,000
14-Aug-18	Link Media LLC	$198,510
14-Aug-18	Awareness Consulting (money paid in USD)	$55,969
	TOTAL:	**$4,226,979**

[331] According to the above list, on July 31, 2018 New Point engaged eight of the nine New Point Subscribers as consultants and, on the exact same date, New Point also entered into consulting agreements with five entities Mr. Loewen alleges are related to the New Point Subscribers, Detona, 10X Capital, Viral Stocks, 727 Capital and Kendal. In addition, on August 21, 2018, New Point entered into another consulting agreement with the remaining New Point Subscriber, 1153307 BC.

[332] According to the above list, New Point paid a total of $3,482,500 in consulting fees pursuant the consulting agreements entered into on July 31, 2018, and an additional $490,000 pursuant to the agreement with 1153307 B.C., for a total of $3,972,500 in consulting fees.

[333] For many of the New Point Subscribers, the “amount paid”, as an ostensible consulting fee, nearly equalled or even exceeded the amount the New Point Subscribers had paid for the shares they obtained in the private placement. For example, Bertho, paid $151,000 for the shares it bought in the private placement and received $150,000 as a consulting fee. 1153307 BC paid $500,000 for shares in the private placement, and received $490,000 as an ostensible consulting fee. Haight-Ashbury paid $250,000 for shares, and received $210,000 in the private placement.

[334] In his cross-examination, Mr. Gardener-Evans confirmed that, pursuant to consulting agreements with the New Point Subscribers and 10X Capital, Viral Stocks, 727 Capital, Detona and Kendal, New Point pre-paid total consulting fees of just over $3.9 million. Mr. Gardener-Evans also agreed that, after paying those fees,

New Point was left with roughly $700,000 of the private placement proceeds to use in its business activities.

[335] Mr. Gardener-Evans explained that Bill Boswell, a businessman in Vancouver, introduced him “to what is now referred to as the BridgeMark Group” and in particular to Robert Lawrence, the sole director of Tavistock. Mr. Gardener-Evans then testified that Robert Lawrence arranged for the subscriptions under the New Point private placement, on the condition that New Point enter into consulting agreements with the subscribers.

[336] Mr. Gardener-Evans contended in his cross-examination, that the New Point Subscribers did not require New Point to enter into the consulting agreements with the five non-subscribing consultants (Detona, 10X Capital, Viral Stocks, 727 Capital and Kendal) as a condition for their subscription.

[337] Gardener-Evans subsequently testified that “these services were brought to us basically as a package of services to be disseminated amongst a number of different consultants”, referring to all of the consulting agreements set out in the June 30, 2018 YE Statements. He then agreed that New Point had to enter into all of the agreements as a package deal:

> Q: You say they were brought to you as a package, so it was really a package deal that you had to enter into all these consulting agreements; correct?
>
> A: That’s correct.

[338] I find there is a reasonable possibility that the petitioner will be able to prove at trial that the consulting agreements with the New Point Subscribers were a condition of their subscriptions under the New Point private placement. Furthermore, since there is evidence that the consulting agreements were presented to New Point as a package, it is reasonably possible that the petitioner will be able to prove that the agreement to execute of all the consulting agreements was a condition of the subscriptions of the New Point Subscribers under the private placement.

[339] If the consulting agreements and lump sum consulting fees paid pursuant to those agreements were conditions of the New Point Subscribers' subscriptions for $4,651,000 worth of shares in the New Point private placement, it is reasonably possible for the petitioner to prove that the price paid and the proceeds received by New Point for those shares have been misrepresented by New Point. This transaction was in fact a cash swap as like with the other respondents in the statutory claims.

Materiality of the alleged misrepresentations

[340] It is reasonably possible that the petitioner will show at trial that the issuance of the shares for prices paid and proceeds received that were 85.4% less than the amount represented to the market is a fact that would be reasonably expected to significantly impact the market price or value of New Point's securities.

[341] On October 29, 2018, almost two months after it closed its private placement, New Point disclosed in its audited annual June 30, 2018 YE Statements that it had entered into consulting agreements with the New Point Subscribers prior to June 30, 2018. The disclosure described the agreements as "significant agreements" under which it had incurred non-refundable consulting fees worth, in the aggregate, $2,295,000. The disclosure listed the New Point Subscribers who appear on the impugned Form 9, the expiry dates of their agreements, and the amounts payable to them. The financial statements also disclosed that after June 30, 2018 New Point had paid $1.65 million in relation to the consulting agreements.

[342] As noted above, the June 30,2018 YE Statements further disclosed as a subsequent event that cash payments totaling $2.6 million had been made under the agreements referred to above, as well as under agreements with additional purported consultants. Mr. Gardener-Evans confirmed that the total consulting fees paid under the New Point Consulting Agreements was just over $3.9 million.

[343] The subsequent disclosure of the consulting agreements and fees incurred under them, demonstrates that New Point regarded New Point Consulting Fees as material for financial reporting purposes. The June 30, 2018 YE financial statements

were reviewed by New Point's audit committee and approved and authorized by its board of directors on October 29, 2018.

[344] New Point's January 9, 2019 news release, in which it sought to provide "an update and clarification on the previously announced financing," is also evidence of the materiality of the consulting agreements. In the context of a motion for leave under the *OSA*, courts have held that a company's restatement of its financial statements is an acknowledgment or admission by the company that it has made material misrepresentations and justifies granting leave: *Paniccia* at para. 75; *Silver* at paras. 7, 208, 351. There is a reasonable possibility that the petitioner will show at trial that a similar principal applies to corrective news releases in this context, under the *Act*.

[345] The petitioner submits that New Point provided more comprehensive and balanced disclosure in the January 9, 2019 news release than it did in the New Point News Releases, its Form 9, and material change report.

[346] The petitioner submits the New Point Consulting Agreements were clearly material from the day they were entered, which is clear from a close inspection of New Point's business and financial situation as of, and shortly after June 30, 2018. New Point's principal business was acquiring and exploring mineral properties, although it had not been doing this for long, having only been incorporated in March 2017. As of June 30, 2018, it had three mineral properties, Majuba Hill, Cobalt and Empire Lithium (the "Properties"). However, New Point had only spent a modest amount, approximately $50,000, to carry out exploration on the Majuba Hill property and had spent nothing carrying out the exploration on Cobalt and Empire Lithium properties. New Point had no revenue producing assets and was a going concern risk. The total value of its assets was approximately $1.4 million, which included approximately $453,000 of current assets (cash, receivables etc.) and approximately $925,000 of capitalized exploration and evaluation expenses relating to the Properties. It had no cash equivalents (short-term investments etc.) that it could readily convert into cash, and its current liabilities were approximately $810,000.

[347] In short, as of June 30, 2018, New Point did not have enough money to continue its principal business activities. On cross-examination, Mr. Gardener-Evans agreed that, as of the end of June 2018, New Point needed financing to continue to operate.

[348] Against this backdrop, as mentioned above, the record shows that, sometime prior to June 30, 2018, New Point concluded consulting agreements with New Point Subscribers, worth, in the aggregate, $2,295,000. These were the “significant agreements” referred to above. Additional consulting agreements with other purported consultants were concluded at some point no later than July 31, 2018, taking the total New Point Consulting Fees under the New Point Consulting Agreements to $3,972,500.

[349] After June 30, 2018 and before the private placement, New Point closed a smaller private placement from which it raised approximately $1.7 million. This smaller private placement improved New Point’s financial situation somewhat. However. New Point remained well short of being able to settle the $2,295,000 obligation incurred to the New Point Subscribers given New Point’s $810,000 of current liabilities as of June 30, 2018.

[350] According to its Form 9, New Point expected to be paid the subscription fees by the New Point Subscribers on August 8, 2018. Therefore, at the time of New Point’s first private placement news release, on July 25, 2018, the New Point Consulting Fees likely represented a liability to New Point that was substantially more cash than it appears to have had access to at the time and approached a figure close to New Point’s total asset value, accounting for its current liabilities as of June 30, 2018 and the positive effect of the earlier, $1.7 million private placement.

[351] It is reasonably possible that the petitioner will be able to prove that the consulting agreements with the New Point Subscribers were material at the time of the July 25, 2018 private placement news release. They represented an extant liability that was substantially more than the cash it had, approaching a figure close to the total value of its assets, in circumstances where, as of July 25, 2018, New

Point had only announced the private placement and had not received the subscription fees.

[352] The additional consulting agreements with other consultants added to New Point's problem. By not later than July 31, 2018, New Point had concluded all of the agreements and its obligation was $3,972,500 in the aggregate, far exceeding its available cash and the total value of its assets. New Point was reliant on the New Point Subscribers paying their subscription fees to pay the consulting fees.

[353] It is reasonably possible that the petitioner will be able to prove that the consulting agreements with the New Point Subscribers and the additional consulting agreements with the other purported consultants were material for the purposes of the Form 9, August 9, 2018 private placement news release, and the material change report because without disclosing the conclusion of the consulting agreements, it was impossible for investors to understand that, in effect, over 85% of the money from the private placements was already spent on consulting services alone.

[354] When describing the private placement, New Point also failed to inform investors that New Point's receipt of the private placement funds was, at a minimum, contingent upon it paying approximately $2.259 million to the New Point Subscribers. New Point had secured the New Point Subscribers' participation in the private placement by agreeing to a deal wherein it would be returning at least 50% of proceeds in the form of pre-paid consulting fees, was information which would reasonably be expected to significantly impact the market price or value of New Point securities. I find that the petitioner has a reasonable possibility of proving this as a matter of common sense

[355] Based upon what New Point disclosed in the New Point News Releases, Form 9, and material change report, investors were given the impression that New Point had secured $4,651,000 in financing, which it intended to use for general corporate purposes and exploration. There is a reasonable possibility that the

petitioner will be able to prove that the New Point had sold the shares for $678,500 in cash and promises to provide $3,972,500 worth of consultant services.

[356] Viewed from the perspective of a reasonable investor seeking to make a profit by buying or selling New Point shares, those scenarios are categorically different. Even assuming that New Point truly expected to receive consulting services worth $3,972,500, the New Point Consulting Fees were clearly material. According to Mr. Gardener-Evans, after paying the consulting fees, New Point had very little cash for its operations such that it needed to pay for later consulting services in shares. That it would have very little cash left after making the payments was known or knowable to New Point.

[357] This was a large and risky expense for New Point, which substantially altered the potential benefit and risk of the private placement. If the consulting services did not provide value for New Point, it would have incurred a substantial cost for little or no benefit and the New Point Subscribers would have received non-refundable fees and a large amount of freely tradeable New Point shares at a low price, the latter posing a substantial risk to the market for New Point's securities. This may have in fact occurred as the Commission found that the New Point Subscribers quickly sold all of the shares they had acquired.

[358] There is a reasonable possibility that the Court will conclude, at trial, that New Point agreed to, and did, disburse over 85% of the private placement proceeds to the New Point Subscribers and other purported consultants in pre-paid consulting fees, and this was information that would reasonably be expected to have a significant effect on the value of New Point's securities.

Non-core documents – knowledge, wilful blindness or gross misconduct

[359] For the misrepresentations in the non-core documents, the New Point News Releases, Mr. Loewen will need to prove, at trial, that New Point and Mr. Gardener-Evans either knew about the misrepresentations at the time the documents were released, deliberately avoided acquiring knowledge of the misrepresentations or,

through action or failure to act, were guilty of gross misconduct in connection to the release of the documents.

[360] Mr. Gardener-Evans clearly confirmed that he was aware of the critical features of the transaction. His description of all of the New Point Consulting Agreements as a package, including the non-subscriber consultants, is evidence of the increased significance of the commitments to New Point. He was involved in preparing the financial statements which treated the agreements as material.

[361] The evidence indicates there is a reasonable possibility Mr. Loewen will be able to show at trial that Mr. Gardener-Evans and, by extension, New Point, were aware that New Point's receipt of the private placement proceeds from the New Point Subscribers was conditional upon the New Point Consulting Agreements and paying at least $2,995,000 but more likely $3,972,500, in the New Point Consulting Fees. Furthermore, the effective price realised was much less than what New Point represented due to the cash swap nature of the transaction.

Public correction and impact on share price

[362] The listed securities trades report data obtained from the CSE shows that in the 10 trading days after November 26, 2018 when the Commission issued Commission Documents, the average price for New Point shares was approximately $0.015 (the "New Point Post Correction Price"), which in this instance the petitioner submits is calculated from the trading prices in the 10 trading days after New Point resumed trading on January 10, 2019. The New Point Post Correction Price is substantially below the prices at which the shares traded when New Point announced the private placement, on August 8, 2018, and below the prices at which the shares traded from that date until IIROC halted trading in New Point shares on the CSE.

[363] New Point submits that since New Point's shares did not trade for a 10 day period on the published market after November 26, 2018, fair market value must be used in calculating damages pursuant to s. 140.5 of the *Act*. New Point says there is no fair market value evidence for the New Point Post Correction Price. The petitioner

submits there is evidence of market value in January 2019, and that could be used to support a value to be placed on the shares, which the court must determine in any event.

[364] On January 10, 2019, which was the first trading day in the shares of New Point after November 26, 2018, Mr. Loewen sold his 50,000 shares at the trading price of $0.025 for total proceeds of $1,250 before commissions.

[365] As I have already noted, on a leave application the public correction requirement is likely limited to establishing a time post. Assessment methodology for and proof of damages is best left for trial. In any event, I find that the evidence of trading value in January 2019 when trading resumed is enough to establish a reasonable possibility that the petitioner will be able to prove he incurred damages.

Leave sought *nunc pro tunc*

[366] Each of the petitioners seek leave, if granted, to be *nunc pro tunc* to July 11, 2019, the date of the filing of the NOCC. They submit that the NOCC, which included the statutory claims, was done so based on a misapprehension of the procedure required under R. 15 of the *Supreme Court Civil Rules*, that applications be brought by way of petition. They had assumed an application could be brought within the NOCC process, a procedure apparently followed in other jurisdictions which regularly determine these types of statutory claims.

[367] I find that the respondents have been put on adequate notice of this irregularity, in fact it was one of the initial respondents which brought this irregularity to the petitioners' attention. I do not find that the failure to bring the leave application prior to including the statutory claims within the Proposed Class Action was an irregularity that has prejudiced the respondents. This matter is case managed and the Court along with the respondents were alerted to the irregularity and the petitioners' intention to seek correction.

[368] Where I have granted leave to bring statutory claims, I grant that leave *nunc pro tunc* to July 11, 2019.

Conclusion

[369] In summary, I make the following findings and orders:

1. Leave is granted to file the amended petition;

2. Leave is granted to bring the secondary market claims under s. 140.08 of the *Act* to bring claims under s. 140.3 of the *Act*, as set out in the amended notice of civil claim attached to the application for leave to amend the petition filed March 13, 2020, with respect to the following respondents:

    a. Kootenay respondents;

    b. Cryptobloc respondents;

    c. BLOK respondents; and

    d. New Point respondents.

3. Leave is granted with respect to the leave under the *Act nunc pro tunc* to July 11, 2019.

4. Leave is denied to bring the secondary market claims under s. 140.08 of the *Act* with respect to the Affinor respondents.

Costs

[370] If the parties cannot agree on the matter of costs they may contact trial scheduling to arrange a hearing.

"Wilkinson J."