Tietz v. Cryptobloc Technologies Corp.

British Columbia Judgments

British Columbia Court of Appeal

Vancouver, British Columbia

P.M. Willcock, P. Abrioux and L. Marchand JJ.A.

Heard: June 13-15, 2022.

Judgment: September 13, 2022.

Dockets: CA47311; CA47314; CA47395; CA47396; CA47459; CA47974;

CA47975; CA47977; CA47978, CA47311

[2022] B.C.J. No. 1716 | 2022 BCCA 307

Between Michael Tietz and Duane Loewen, Appellants (Petitioners/Respondents), and Affinor Growers Inc. and Sam Chaudhry, Respondents (Respondents/Applicants), 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, 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 (Respondents) And between Michael Tietz and Duane Loewen, Appellants (Petitioners/Applicants), 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 (Respondents), and And between Michael Tietz and Duane Loewen, Appellants (Petitioners/Respondents), 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.), 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 (Respondents), and BLOK Technologies Inc., Respondent (Respondent/Applicant) And between Michael Tietz, Duane Loewen, and Mike Dotto, Appellants (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 (Respondents) And between Von Rowell Torres, Appellant (Respondent), and Michael Tietz and Duane Loewen, Respondents/Appellants on Cross Appeal (Petitioners/Applicants), and Robin Lee, Appellant on Cross Appeal (Petitioner), 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, 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 (Respondents) And between Kootenay Zinc Corp., Anthony Jackson, and Robert Tindall, Appellants (Respondents), and Michael Tietz and Duane Loewen, Respondents/Appellants on Cross Appeal (Petitioners/Applicants), and Robin Lee, Appellant on Cross Appeal (Petitioner), and Cryptobloc Technologies Corp., Bam Bam Resources Corp. (formerly known as Kopr Point Ventures Inc. and New Point Exploration 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., Cameron Robert Paddock, Von Rowell Torres, Neil William Stevenson-Moore, Kenneth Clifford Phillippe, Brian Biles, Bryn Gardener-Evans, 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 (Respondents) And between Bam Bam Resources Corp. (formerly known as Kopr Point Ventures Inc. and New Point Exploration Corp.), Appellant (Respondent), and Michael Tietz and Duane Loewen, Respondents/Appellants on Cross Appeal (Petitioners), and Cryptobloc Technologies 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 Parland, Marc Geen, Mervyn Geen, Jeremy Ross, and Alexander Kaulins, Respondents (Respondents)

(158 paras.)

Case Summary

Court Summary:

Appeals and cross appeals arising from orders made in relation to a statutory claim for secondary market misrepresentation in a proposed class action. Held: Appeals allowed in part, some evidence admitted, leave to bring secondary market misrepresentation claim granted, all other appeals and cross appeals dismissed. The petitioners in the underlying class action alleged that various parties entered into a scheme, in which purported consultants purchased shares issued by private placement. These private placements were conditional upon consulting fees, substantially equivalent to the purchase price, being paid back to the consultants without them actually providing any consulting services. The petitioners alleged that this effectively misrepresented the purchase

price of the shares and the working capital available to the issuers. They sought to commence a statutory action in addition to the common law claims pleaded in the class proceedings.

In support of their application, the petitioners sought to adduce various affidavits, some of which were late filed. The judge refused to admit this evidence or struck references to various respondents. She reasoned that this amounted to case splitting and that some evidence was inadmissible as hearsay or for lack of probative value. While the judge did not err in finding that the rule against case splitting applied, or in stating the test for late-filed evidence, some of the affidavits were both admissible and probative. They were admissions against interest and in any event, hearsay evidence was admissible on the leave application, as it would not result in a final order. Once properly admitted, there was sufficient evidence that the petitioners could establish a reasonable possibility that they would be successful at trial, such that leave should be granted to bring a claim against the one set of parties where leave had originally been denied.

Appeal From:

On appeal from: Orders of the Supreme Court of British Columbia, dated February 5, 2021 (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 187*, Vancouver Docket S202110); March 23, 2021 (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 680*, Vancouver Docket S202110); April 9, 2021 (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 810*, Vancouver Docket S202110); and November 22, 2021 (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 2275*, Vancouver Docket S202110).

Counsel

Counsel for the Appellants in CA47311, CA47314, CA47395, CA47396 and CA47459 (Respondents and Cross Appellants in CA47975, CA47977 and CA47978) Michael Tietz and Duane Loewen and for the Appellant in CA47974 Mike Dotto and for the Cross Appellant in CA47975 and CA47977, Robin Lee: P. Bennett, R. Mogerman, K.C., N. Baker.

Counsel for the Appellant in CA47975, (Respondent in CA47311, CA47314, CA47395, CA47396, CA47459, CA47974, CA47977 and CA47978) Von Rowell Torres: D.C. Lysak.

Counsel for the Appellants in CA47977, (Respondents in CA47311, CA47314, CA47395, CA47396, CA47459, CA47974, CA47975 and CA47978) Kootenay Zinc Corp., Anthony Jackson and Robert Tindall: P.J. Sullivan, J. Cytrynbaum.

Counsel for the Appellant in CA47978, (Respondent in CA47311, CA47314, CA47395, CA47396, CA47459, CA47974, CA47975 and CA47977) Bam Bam Resources Corp. (formerly known as Kopr Point Ventures Inc. and New Point Exploration Corp.): D.L.R. Yaverbaum, K.F. Alibhai.

Counsel for the Respondent Sam Chaudhry: D.W. Gibbons, E.S. Bohm.

Counsel for the Respondent Affinor Growers Inc.: J.M. Young, M.J. Harmer.

Counsel for the Respondent Nicholas Brusatore: A. Dosanjh, N.E. John.

Reasons for Judgment

The judgment of the Court was delivered by

P.M. WILLCOCK J.A.

Introduction

1 Section 140.3 of the *Securities Act*, *R.S.B.C. 1996, c. 418* [*Securities Act*], establishes the statutory liability of issuers of securities to persons who suffer certain losses in the secondary market for those securities. It provides that a person who acquires or disposes of securities has a right of action against the issuer, its officers and directors, and certain experts and influential persons for a misrepresentation in a document or public oral statement, without regard to whether the person relied upon the misrepresentation. Leave to bring an action under this provision must be sought pursuant to s. 140.8 of the *Securities Act* and may be granted only where the court 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.

2 These are appeals from orders made by a judge on a petition for leave to commence secondary market claims in a proposed class action. Some of the appeals arise from orders striking evidence or refusing leave to adduce evidence on the applications for leave (the "Evidentiary Appeals"). Other appeals arise from the substantive judgment on the leave applications (the "Substantive Appeals").

The Underlying Class Action

3 The orders appealed are made in an action initially brought by Michael Tietz and Duane Loewen against the respondents under the *Class Proceedings Act*, *R.S.B.C. 1996, c. 50*, on behalf of persons who acquired securities issued by certain of the respondent corporations between January 2018 and November 2018.

4 The notice of civil claim alleges that between January 2018 and August 2018, respondents identified as "Purported Consultants" participated in a scheme with respondents identified as "Issuers". Pursuant to that scheme, the Purported Consultants were alleged to have agreed to buy shares issued by private placement at a publicly disclosed share price on the condition that the Issuers would pay them or related entities lump-sum consulting fees on the closing of the placements or shortly thereafter. It is alleged that the total amounts paid to the Purported Consultants under the consulting agreements consisted of a significant portion (in some cases, substantially all) of the proceeds of the private placements.

5 The pleadings contain allegations that the consulting agreements were a "scam and false [pretense]", that neither the Issuers nor the Purported Consultants had any *bona fide* expectation that services of any real value would be provided, and that no services were in fact provided. As a result, the plaintiffs allege, the Issuers misrepresented the price at which the shares were acquired and the proceeds available to the Issuers as working capital.

6 The plaintiffs allege there was no public disclosure of the nature of the scheme until November 26, 2018, when the British Columbia Securities Commission (the "Commission"), as a result of its investigation, issued a temporary order against the Issuers and Purported Consultants prohibiting trading or distribution of the Issuers' shares.

7 The plaintiffs allege they suffered losses as a result of the purchase of shares at a price higher than they would have paid but for the scheme, and as a result of erosion in the value of their shares after disclosure of the scheme.

8 The notice of civil claim identifies what it characterizes as misleading statements by the Issuers, including representations in documents consisting largely of news releases and notices of proposed issuance of listed securities ("Form 9s"):

By Kootenay Zinc Corp. ("Kootenay"):

February 2, 2018 news release announcing closing of private placement

February 8, 2018 news release on market activity

March 19, 2018 Form 9

By Affinor Growers Inc. ("Affinor"):

March 5, 2018 news release announcing private placement

March 8, 2018 news release announcing closing of private placement

March 8, 2018 Form 9

March 16, 2018 news release on market activity

By Global Estimate Capital Corp., formerly known as Cryptobloc Technologies Corp. ("Cryptobloc"):

May 18, 2018 news release announcing private placement

June 5, 2018 Form 9

June 6, 2018 news release announcing closing of private placement

June 8, 2018 material change report

June 14, 2018 news release on market activity

By BLOK Technologies Inc. ("BLOK"):

June 1, 2018 news release announcing private placement

June 1, 2018 Form 9

June 8, 2018 news release announcing closing of private placement

September 26, 2018 further Form 9

By PreveCeutical Medical Inc. ("PreveCeutical"):

April 9, 2018 news release announcing private placement

June 25, 2018 news release announcing oversubscription of private placement

June 29, 2018 news release announcing closing of private placement

June 29, 2018 Form 9

September 18, 2018 news release on market activity

By Bam Resources Corp., formerly known as KOPR Point Ventures Inc., and New Point Exploration Corp. ("New Point"):

July 25, 2018 news release announcing private placement

August 8, 2018 Form 9

August 9, 2018 news release announcing closing of private placement

9 The notice of civil claim identified similar statements made in documents released in the same period by other Issuers: Green 2 Blue Energy Corp ("Green"), Beleave Inc. ("Beleave"), Citation Growth Corp. ("Citation"), Abbatis Bioceuticals Corp. ("Abbatis") and Speakeasy Cannabis Club Ltd. ("Speakeasy").

10 The pleadings set out the relationships amongst the Purported Consultants, and between them and the Issuers. Many Purported Consultants participated in multiple private placements, including:

a) Detona Corp. ("Detona"), said to have purchased shares in the private placements of Kootenay, Affinor, Green, Beleave, Citation, Cryptobloc, BLOK, and PreveCeutical;

b) Cameron Paddock, a director of Rockshore Advisors Ltd. (then known as Cam Paddock Enterprises Inc.) ("Rockshore"), said to have purchased shares in the private placements of Kootenay, Citation, and PreveCeutical;

c) Northwest Marketing Inc. ("Northwest"), said to have purchased shares in the private placements of Kootenay, Affinor, Beleave, Citation, PreveCeutical, and Speakeasy;

d) Rockshore, said to have purchased shares in the private placements of Affinor, Green, Beleave, Cryptobloc, and Speakeasy;

e) JCN Corp. ("JCN"), said to have purchased shares in the private placements of Affinor, Citation, Cryptobloc, and BLOK;

f) Hunton Ltd., said to have purchased shares in the private placements of Green, Citation, BLOK, and New Point;

g) Kendl Ltd., said to have purchased shares in the private placements of Green, Citation, and BLOK;

h) Sway Corp., said to have purchased shares in the private placements of Beleave, Citation, and Cryptobloc; and

i) Tavistock Corp., said to have purchased shares in the private placements of Citation, BLOK, and New Point.

11 I will refer to Detona, Northwest, Rockshore and JCN collectively as the "Affinor Subscribers".

12 Many Purported Consultants participated in two private placements:

a) Justin Liu, a director of Lukor Corp., said to have purchased shares in Kootenay and Speakeasy;

b) Tollstam & Co., said to have purchased shares in Green and Beleave;

c) Jarman Corp., said to have purchased shares in PreveCeutical and New Point;

d) Kier MacPherson, said to have purchased shares in Beleave and BLOK;

e) Escher Invest S.A., said to have purchased shares in Citation and New Point; and

f) Simran Gill, the sole director of BridgeMark Management Ltd. ("BridgeMark"), said to have purchased shares in Citation and Cryptobloc.

13 Some persons or corporations that only purchased shares in one private placement were related to others alleged to have participated in the scheme described in the notice of civil claim:

a) BridgeMark (owned by Mr. Gill), said to have purchased shares in Beleave;

b) Danilen Villanueva (sole director, president and beneficial owner of Detona), said to have purchased shares in Citation;

c) Lukor Corp. (of which Mr. Liu was a director), said to have purchased shares in New Point;

d) Anthony Jackson (a director of Kootenay and the sole director of BridgeMark), said to have purchased shares in Kootenay; and

e) Konstantin Lichtenwald (associated in business with BridgeMark), said to have purchased shares in Kootenay.

14 Mr. Paddock was also a director, at some material times, of Abbatis and Cryptobloc.

15 Escher Invest S.A. and Hunton Ltd. are alleged to be beneficially owned by the respondent, Randy White.

16 The relief sought includes damages or disgorgement of proceeds on the following grounds:

a) Unlawful Conspiracy

The plaintiffs allege that the scheme described in the pleadings constituted a fraud on the market for the Issuers' shares, contrary to ss. 380(1)(a) and 380(2) of the *Criminal Code*, *R.S.C. 1985, c. C-46*, and conduct resulting in or contributing to a misleading appearance of trading activity in the Issuers' shares, contrary to s. 57 of the *Securities Act*. They allege that the scheme was conceived and agreed to by Mr. Jackson, Mr. Liu, Mr. Paddock, and Aly Babu Mawji (said to be a *de facto* officer of Northwest) in or around January 2018, and implemented by them with respect to a private placement by Kootenay. They claim the Issuers became parties to the unlawful conspiracy when each Issuer agreed to undertake their respective private placements in accordance with the terms of the scheme.

b) Waiver of Tort

In the alternative, the plaintiffs waive the tort of unlawful conspiracy against the Purported Consultants who sold some or all of the shares they acquired under the private placements. Instead, they seek to recover the benefit accrued to the Purported Consultants as a result of their tortious conduct.

c) Statutory Damages

The plaintiffs claim, on behalf of both themselves and the proposed class members, a right of action for secondary market misrepresentation under s. 140.3 of the *Securities Act* in respect of the news releases and the Form 9s released or filed by the Issuers in respect of the private placements, subject to leave to do so being granted under s. 140.8 of the *Securities Act.* Mr. Tietz pleads a right of action for damages in respect of his purchase of Cryptobloc shares. Mr. Loewen pleads a right of action in respect of his purchase of New Point shares. The prospective class members are said to have a similar right of action for damages in respect of their purchase of shares in the remaining Issuers.

d) Fraudulent or Negligent Misrepresentation

The claim for misrepresentation is founded upon the allegation that, when the news releases and Form 9s were released or filed, the Issuers' officers and directors knew they contained misrepresentations or acted with reckless disregard to whether to the representations were true, with the intention of inducing the plaintiffs and the prospective class members to purchase shares. In the alternative, they allege each of the Issuers' officers and directors knew that the press releases and Form 9s would reasonably be relied upon by the class members, including the plaintiffs, in making their decision to purchase shares in the Issuer. It is alleged the Issuers' officers and directors breached their duty of care by failing to take reasonable steps to ensure that the material information in the news releases and the Form 9s was fair and accurate.

The Application For Leave

17 On February 24, 2020, Mr. Tietz and Mr. Loewen filed a petition seeking leave to advance the secondary market claims described in the notice of civil claim. In support of the application, they relied upon three affidavits:

a) affidavit #1 of Michael Tietz;

b) affidavit #1 of Duane Loewen; and

c) affidavit #1 of Stephanie Chan, a paralegal for Bennett Mounteer LLP, the solicitors for the petitioners.

18 On March 13, 2020, the petitioners applied for leave to add eight plaintiffs to the action and to amend the pleadings so as to refer to those additional plaintiffs and to describe additional representations made by respondents. The additional plaintiffs were purchasers of shares issued by the respondent Issuers other than Cryptobloc and New Point. The additional representations were, in particular, Management Discussion and Analysis documents ("MD&As") released by Affinor, Beleave and PreveCeutical, and material change reports released by Cryptobloc, PreveCeutical, Abbatis and New Point. In support of that motion, they relied upon the previously filed affidavits and affidavit #2 of Stephanie Chan.

19 After filing the petition, the petitioners settled and discontinued their statutory claims against Beleave. After the

leave hearing in April and May 2021, but before the November 22, 2021 judgment, the petitioners also entered into a settlement with PreveCeutical.

Evidentiary Applications

20 A case management conference was heard before Justice Wilkinson on November 3, 2020, and from that date forward until the leave hearing, she addressed the evidentiary and case management issues.

21 A series of applications brought by the parties to address evidentiary issues were filed in late 2020 and heard in December 2020. Judgment was reserved until the judge issued three judgments on February 5, 2021.

22 Two further applications were heard in March 2021.

The PreveCeutical Application (*Tietz v. Cryptobloc Technologies Corp., 2021 BCSC 186*)

23 In October 2020, after the respondents had filed response materials and after the deadline set by the case management judge for service of reply affidavits, the petitioners served affidavit #3 of Ms. Chan ("Chan Affidavit #3") and the affidavits of Cyrus Khory (the "Khory Affidavit") and Adam Werner (the "Werner Affidavit") on the respondents. Chan Affidavit #3 contained numerous exhibits, all but one created in 2018 and 2019, including PreveCeutical's 2018 financial statements. Both the Khory Affidavit and the Werner Affidavit expressed expert opinion, and each appended an expert report as an exhibit. Mr. Khory opined on whether the financial statements of five Issuers -- including Cryptobloc, Affinor, and Blok -- complied with applicable accounting standards. The petitioners asserted that this was appropriate reply to the evidence of PreveCeutical and associated individuals (the "PreveCeutical Respondents"), anticipating that they would assert compliance with standards. However, they conceded that the Khory Affidavit did not directly address the misrepresentation claims asserted.

24 The PreveCeutical Respondents applied for an order striking references to PreveCeutical in all three of the affidavits served in October 2020. The case management judge, for reasons indexed as *Tietz v. Cryptobloc Technologies Corp., 2021 BCSC 186* [*PreveCeutical Application*], found that the new material appended to Chan Affidavit #3 and most of the expert opinions of Mr. Khory and Mr. Werner were not proper reply evidence, and granted the order sought by PreveCeutical. She did so, in part, because she was of the view that the rule against case splitting is applicable to applications for leave under s. 140.8 of the *Securities Act*:

> [46] The rule against case splitting has ... been applied to applications for leave to commence secondary market liability claims. In this context, the Court in *Johnson v. North American Palladium Ltd.*, *2018 ONSC 4496*, struck a reply affidavit that was being used to correct deficiencies in the plaintiffs' case in chief. ...

25 She referred to a trial court decision in British Columbia to the same effect, *C.N. Railway v. H.M.T.Q. in Right of Canada et al*, *2002 BCSC 1669*, which in turn, cited *Allcock Laight & Westwood Ltd. v. Patten* (1966), *[1967] 1 O.R. 18*, 1966 CanLII 282 (C.A.). The judge addressed the argument that a more discretionary standard should be applied, in the following terms:

> [54] The petitioners submit that a more discretionary standard has been applied in Ontario and British Columbia on certification applications: *Cannon v. Funds for Canada Foundation*, *2011 ONSC 2960* at paras. 16-18, and *Cantlie v. Canadian Heating Products Inc.*, *2014 BCSC 2029* at para. 11. In both of these cases, the Court emphasized that the test for the admissibility of reply affidavits is a "balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party": *Cantlie* at para. 12, citing *Cannon* at para. 18. The test for case splitting as it applies to certification applications can be differentiated from the test as it applies to applications for leave under the *Act*. However, the Court in *Cantlie* when deciding whether to refuse to admit late expert evidence, highlighted the fact that the proceedings were case managed and subject to a timetable which should focus the parties on making decisions on what evidence to lead. The following language from *Cannon* was endorsed in *Cantlie* at para. 12:

> [17] That being said, class proceedings are case managed and important motions like certification or summary judgment are invariably subject to a timetable that requires each party to think carefully about the evidence it will produce. It can be unfair, inefficient and expensive for one party - whether through inadvertence, lack of foresight or deliberate tactics - to introduce new and unanticipated evidence at a late stage in the proceedings.

26 She noted that in *Round v. MacDonald, Dettwiler and Associates Ltd.,* 2011 BCSC 1416, aff'd 2012 BCCA 456, class action certification applications had been distinguished from leave applications under the *Securities Act*, and concluded:

> [58] The traditional rule against case splitting should apply to leave applications to bring secondary market claims under the [*Securities Act*]. These applications are final in nature and merits-based. They are not primarily procedural. The threshold is not minimal. The legislative scheme provides a gatekeeper function which is not only in place to protect the investing public but also protect the capital markets from undue disruption and issuers from claims that do not have a reasonable possibility of success.
>
> ...
>
> [63] I agree with the PreveCeutical Respondents that the evidence now sought to be adduced which they oppose will cause prejudice to them. They have prepared their submissions and collected evidence to meet the case advanced against them through an extensive petition response and three affidavits, including an expert affidavit.
>
> [64] It cannot be said the petition response and affidavits would have been prepared in the same form had the PreveCeutical Respondents been provided with the petitioners' new affidavit material in chief. They will incur additional expenses if they are required to respond to the Werner and Khory Affidavits, expenses that may not have been necessary nor to the same degree if these affidavits were presented as part of the plaintiffs' evidence in chief. The delivery of the new affidavits has delayed the hearing of the petition. That delay is prejudicial for a public company, particularly a junior public company that depends on private placements to raise funds required for its operations and one that is likely negatively affected by ongoing litigation. The new affidavits, if admitted, will increase the length and the cost of the petition hearing.
>
> [65] In this case, I find it is no answer to this unfairness to suggest that the respondents can be compensated through costs.

27 While the claim against PreveCeutical has been settled, such that there is no appeal from that order, these reasons served as the foundation of other orders that have been appealed.

The Affinor Application (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 187*)

28 The second judgment issued on February 5, 2021, addressed the application of Affinor and Sam Chaudhry (the "Affinor Respondents") for orders of the same nature as those obtained by the PreveCeutical Respondents. For reasons indexed as *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 187 [*Affinor Application*], references to the Affinor Respondents in Chan Affidavit #3 (in particular Affinor's Audited Consolidated Financial Statements for the financial years ending May 31, 2018 and 2019, dated October 2, 2019) and portions of the Khory Affidavit and the Werner Affidavit were also struck.

29 The petitioners had argued that the first audited financial statements issued by Affinor subsequent to the Commission's announcement of its investigation were evidence that a large portion of the financing raised under the March 8, 2018 private placement was paid out in the form of consulting fees: 14 three-month contracts for consulting services totaling $3.5 million. They argued this was an acknowledgement that directly linked the funds raised by the private placement to the consulting agreements.

30 The judge held that admission of this material in reply would amount to case splitting:

> [33] Chan Affidavit No. 3 contains material which is available to the petitioners when they filed their supportive materials.... [I]t is not responsive to the evidence of the Affinor Respondents. The evidence

> appears to be submitted in an attempt to buttress their case, waiting to submit this evidence in the form of reply is inappropriate and leads to inefficiencies. There are also hearsay and reliability issues in connection with some of the evidence in the manner in which it is submitted.
>
> [34] The Khory Affidavit raises new issues regarding non-compliance with IFRS [International Financial Reporting Standards] as a material misrepresentation. Mr. Khory presents opinions on non-compliance with accounting standards which is an entirely new matter, not evident from the materials filed in support of the petition. This is fresh evidence raising novel claims.
>
> [35] The petitioners are attempting to split their case with this evidence.
>
> [36] The prejudice to the Affinor Respondents is similar to that found in [*2021 BCSC 186*], at paras. 63-64. As in that decision, I find it is insufficient to redress the unfairness of allowing the material objected to in Chan Affidavit No. 3 and the Khory Affidavit to be considered on the leave application through a costs order. It is also not an appropriate case to allow sur-reply or impose terms given the time it has already taken to proceed with the application for leave.

The Petitioners' Application to File Chan Affidavit #5 (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 190*)

31 The third judgment issued on February 5, 2021 addressed the petitioners' application to file affidavit #5 of Stephanie Chan ("Chan Affidavit #5"), sworn November 20, 2020, which attached:

a) a copy of an affidavit of the respondent, Nicholas Brusatore, sworn on September 22, 2020, but not filed (the "Brusatore Affidavit");

b) additional documents issued by the respondents, including MD&As and financial statements; and

c) the June 12, 2020 decision of the Commission in *Re BridgeMark Financial*, *2020 BCSECCOM 188* [*Commission Decision*].

32 The petitioners had submitted that Mr. Brusatore, Affinor's former CEO, had attested under oath to the fact that consulting payments were an integral part of the private placements. His evidence was that, in or about February 2018, he met with Mr. Liu and Mr. Jackson at the offices of BridgeMark, and they offered to make two purchases of Affinor shares, the first of which would be a $4 million purchase, conditional upon the payment of consulting fees. The petitioners' position was that they understood that they had received a draft response to petition from Mr. Brusatore's counsel attaching a copy of this affidavit, and assumed it would be filed in due course. They argued that Mr. Brusatore would suffer no prejudice if the petitioners filed a copy of his affidavit because its contents could not come as a surprise to him.

33 For reasons indexed at *2021 BCSC 190* [*Chan #5 Application*], the judge held that most of the evidence in Chan Affidavit #5, other than the Brusatore Affidavit, was available when the original affidavits were filed, and that evidence was not necessary to establish an essential element of the case in any event:

> [29] The petitioners do not allege that there will be a substantial injustice if the Chan Affidavit No. 5 is not permitted to be filed. They advance arguments that the content of the affidavit is relevant or plainly relevant to the issues to be determined at the hearing of the petition. Relevance is the minimal requirement for admission of any evidence, but more is required to be able to admit evidence late in proceedings.
>
> [30] In [*First National Financial GP Corporation v. 0734763 B.C. Ltd.*, *2020 BCSC 1349*], at para. 62, the Court denied leave to file a late affidavit under R. 8-1(14) where "it would not change [the Court's] conclusion".
>
> [31] All parties cite *Servatius v. Alberni School District No. 70*, *2020 BCSC 15* at paras. 111-112, for the premise that the discretion under the R. 16-1(7) [of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009*] should be exercised where the affidavit is important to the petitioner's case and "necessary" to establish proof of one of the requisite elements of the case. However, the petitioners in this application before me do

not assert the affidavit material is necessary for them to establish the elements as required under the test for leave.

[32] The petitioners have not proven to me that the affidavit material is essential or otherwise necessary for success on their petition, nor have they provided an adequate explanation for why they could not have included the material, apart from the Brusatore Affidavit, with their original affidavits in support of the petition. Furthermore, to submit that a party has not responded or has responded in a *pro forma* manner does not justify granting leave to file a supplemental affidavit.

34 The Brusatore Affidavit was dealt with as follows:

[33] With respect to the Brusatore Affidavit, its content is not very probative, and its admissibility, being a copy and attached to another person's affidavit, would likely be inadmissible hearsay at the hearing of the application.

35 She concluded that the petitioners had shown neither the necessity of permitting the late filing nor the injustice that would result if she did not admit the affidavit, which was a discretionary decision. She therefore dismissed the application to file Chan Affidavit #5.

The BLOK Application (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 522*)

36 The first of the two March 2021 orders addressed an application by BLOK for an order of the same nature as those obtained by the PreveCeutical Respondents and the Affinor Respondents. On March 23, 2021, for reasons indexed as *Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 522* [*BLOK Application*], the judge struck references to BLOK in Chan Affidavit #3 and the Khory Affidavit.

37 The judge dismissed the petitioners' submission that they should be allowed to adduce material evidence that had been omitted by oversight. She held:

[29] In their defence, the petitioners submit that counsel's judgment or oversight should not be used as a reason to deny substantive justice to the petitioners. They refer me to *First Capital Realty Inc. v. Centrecorp Management Services Ltd.*, *[2009] O.J. No. 4492* for the proposition that "An overly rigid interpretation [of the rules] can lead to unfairness by punishing a litigant for an oversight by counsel" at para. 14. However, this is not simply an instance of oversight. Counsel clearly made a strategic decision not to file this evidence once identified, and instead to lie in wait to see if they somehow actually needed it. Now they submit it is necessary.

[30] They cannot have it both ways. The necessary elements required in support of the petition for leave would have been known to counsel when framing their petition for leave and presenting their case in chief. Counsel confirm they put their minds to this when making the decision to hold back on filing the additional documents.

...

[32] This is a clear instance of case splitting and I do not find that it would result in an injustice to strike the evidence now sought to buttress the petitioners' claim. BLOK played no role in the petitioners' delay in discovering the documents. BLOK is entitled to base its response upon the petitioners' evidence as set out in chief when BLOK made its determination of what evidence it would rely upon in response.

The Petitioners' Application to File the Krasic Affidavit (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 680*)

38 At the same time as the BLOK application in March 2021, the petitioners applied under R. 16-1(7) of the *Supreme Court Civil Rules*, *B.C. Reg. 168/2009* [*SCCR*], for leave to file a late affidavit, affirmed on February 22, 2021 by Bojan Krasic (the "Krasic Affidavit"). Mr. Krasic was the former Chief Financial Officer of Beleave. That affidavit had been obtained by the petitioners pursuant to the cooperation provisions of a settlement agreement entered into with Beleave Inc. and its two former officers, Mr. Krasic and Andrew Wnek. In his affidavit, Mr. Krasic

confirmed the truth of the facts set out in the Beleave settlement agreement with the Commission: details of the consulting agreements into which Beleave entered, the fees paid, and the contemporaneous and conditional nature of some of the agreements with subscription of shares in Beleave's private placements in April and June 2018. The petitioners argued that the Krasic Affidavit was direct evidence that three of the four Affinor Subscribers participated in one or both of the Beleave private placements, where they entered into consulting agreements contemporaneously with, and as a condition of, those private placements; consulting fees under those agreements were prepaid from the private placement financing; and no services were ever provided pursuant to those consulting agreements. The petitioners' position was that evidence of the Beleave scheme, employed by consultants -- nearly all of whom were parties who also participated as subscribers or consultants in private placements at issue in the petition during a similar period of time -- was probative of their case.

39 In her reasons for judgment, reserved to March 23, 2021 and indexed at *2021 BCSC 680* [*Krasic Application*], the judge accepted that the Krasic Affidavit contained evidence unavailable to the petitioners prior to the settlement agreement. It was not, therefore, inadmissible because its late admission would permit the petitioners to split their case. However, she held:

> [22] It would be too speculative, at the leave application stage or otherwise, to infer that it is likely possible for the petitioners, based on this evidence, to show that the consultants linked to the Beleave facts as set out in a limited fashion by Mr. Krasic somehow behaved in the same or similar way with the other issuers. Evidence of other transactions involving third parties to the petition is not probative of the conduct of the issuer respondents. That some or all of the respondent issuers had a relationship with some of the third parties involved with Beleave is not sufficient to impugn the conduct of the respondents.
>
> [23] The Krasic Affidavit provides no similar fact evidence with respect to the conduct of the respondent issuers. I do not see how the Krasic Affidavit can prove or disprove any of the elements of the petitioners' misrepresentation claims against the respondent issuers.
>
> [Emphasis added.]

The Petitioners' Application to File the Hung Affidavit (*Tietz v. Cryptobloc Technologies Corp.*, *2021 BCSC 810*)

40 At the same hearing in March 2021, the judge had permitted the petitioners to withdraw an application to file an affidavit of Mark Mounteer sworn on February 23, 2021 and an additional affidavit sworn by Ms. Chan, and instead apply to substitute for them what they considered to be more reliable evidence to the same effect. On March 24, 2021, the petitioners applied under R. 16-1(7) of the *SCCR* for leave to file:

a) Affidavit #1 of Amal Scratch (the "Scratch Affidavit"), a corporate development analyst with the Canadian Securities Exchange, to which were attached Canadian Stock Exchange listed securities trade reports; and

b) Affidavit #1 of Joanne Hung (the "Hung Affidavit"), to which were attached redacted copies of affidavits sworn on November 21, 2018, November 26, 2018 and March 22, 2019 by Alan Costin, a lead investigator with the Commission (collectively, the "Costin Affidavits"). The affidavits were sworn in the Commission proceedings and received by the petitioners following protracted litigation on March 11, 2021. Mr. Costin's first affidavit refers to electronic trading records he obtained, showing that between March 6, 2018 (the day after the private placement closed), and April 19, 2018, the Affinor Subscribers sold all the shares they had acquired in the private placement. Ms. Hung deposed that counsel for the Commission had informed the petitioners that an affidavit from Mr. Costin in these proceedings would not be provided to the petitioners.

41 For reasons indexed at *2021 BCSC 810* [*Hung Application*], the judge considered the securities trade reports exhibited to the Scratch Affidavit to be direct evidence of the trading information used by Mr. Mounteer to create charts that had previously been filed (as exhibits to Ms. Chan's first affidavit). That evidence was found to be admissible.

42 Admission of the exhibits to the Hung Affidavit would not permit the petitioners to split their case. However, the judge held that the Costin Affidavits, as attached to the Hung Affidavit, were hearsay. Further, they were "replete with hearsay and double hearsay in that they contain representations of conversations with other investigators, information provided by legal counsel for, or directly from, subjects of the investigation along with interview notes and documents obtained from third parties including banking and trading records" (at para. 21). They were also thought to contain a significant amount of material irrelevant to the petitioners' secondary market leave application. The application to file the Hung Affidavit was dismissed.

The Costs Order

43 The judge awarded costs to the respondents who appeared and made submissions on the application, on the following terms, without expressly addressing the basis for the order:

> [35] After argument on the two prior affidavits, that of Mr. Mounteer and Ms. Chan, the petitioners, at their request, were provided with an opportunity to withdraw those applications and substitute more reliable evidence in their leave to file application. I have admitted the more reliable evidence otherwise sought through hearsay in the Mounteer affidavit. I have not admitted the subsequent Costin related evidence.
>
> [36] The respondents who appeared and made submissions on the application to file Mounteer and Chan affidavits will have their costs on that aspect of the prior application, as costs thrown away and as special costs, in any event of the cause.

Substantive Judgment and Orders

44 The leave application was heard over ten days in April and three days in May, 2021. Judgment was reserved to November 22, 2021. For reasons indexed at *2021 BCSC 2275* [*Leave Application*], the judge made the following orders:

a) Leave was granted to file the amended petition and to add the proposed plaintiffs (with the exception of the appellant, Mike Dotto, whose application to be added as a representative plaintiff in respect of secondary market claims against Affinor was denied - see (c) below);

b) Leave was granted to bring the secondary market claims set out in the amended notice of civil claim, under s. 140.08 of the *Securities Act*, *nunc pro tunc* to July 11, 2019, against:

i) Kootenay, Anthony Jackson, Robert Tindall, and Von Rowell Torres (the "Kootenay Respondents");

ii) Cryptobloc, Brian Biles, Kenneth Clifford Phillippe, and Neil William Stevenson-Moore (the "Cryptobloc Respondents");

iii) BLOK, David Alexander, Robert Dawson, and James Hyland (the "BLOK Respondents"); and

iv) New Point and Bryn Gardener-Evans (the "New Point Respondents").

c) Leave to bring the secondary market claims under s. 140.08 of the *Securities Act* against the Affinor Respondents was denied. The petition judge concluded that the evidence relating to Affinor was insufficient to establish a reasonable possibility the appellants would be able to prove, at trial, that the 14 three-month consulting agreements for $3.5 million in consulting fees, concluded four days before Affinor's announcement of the $4 million private placement, were entered into as a condition of the Affinor Subscribers' participation in the private placement;

45 While the entered order is silent in this respect, the petition judge made it clear that leave was granted only to advance secondary market claims founded upon the allegations that the Issuers had misrepresented the effective purchase price per share and the proceeds from the share issuance that were available to each issuer as working capital. The judge noted that, in prior decisions, she had held that the pleadings setting out the statutory claims with respect to the respondents did not include allegations of conspiracy or that the consulting agreements were a sham:

PreveCeutical Application at para. 60; *Affinor Application* at para. 30; *Tietz v. Cryptobloc Technologies Corp.*, 2021 BCSC 189, and *BLOK Application* at para. 34.

46 She held (at para. 61):

> ... [T]he 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.... 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 [*Securities 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.
>
> [Emphasis added.]

47 She also dismissed the argument that the disclosure regarding the price paid by the consulting subscribers under the private placements was misleading or untrue. The petitioners had argued that the consulting agreements, even if they were legitimate agreements for future services, could not stand as part of the consideration for the shares, or constitute part of the "proceeds" received from their issuance, because s. 64 of the *Business Corporations Act*, *S.B.C. 2002, c. 57* [*BCA*], and s. 25 of the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 [*CBCA*], provide that shares cannot be issued for future services. She held:

> [62] ... 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.

Grounds of Appeal: the Evidentiary Orders and the Costs Order

48 The petitioners submit that the petition judge erred in law and principle and was clearly wrong in:

a) concluding that the audited financial statements of Affinor and BLOK, the BLOK consulting agreements, and the BLOK news release the petitioners sought to file, were not proper reply evidence;

b) applying the rule against case splitting in effectively the same manner as it would be applied after a full trial on the merits, and requiring the petitioners to show that a substantial injustice would occur if the petitioners were not granted leave to file evidence which was available to them before the respondents filed their response materials;

c) refusing to admit a copy of the Brusatore Affidavit on the basis that it was not very probative and would likely be inadmissible hearsay;

d) denying leave to file the Krasic Affidavit on the basis that it did not constitute relevant similar fact evidence;

e) refusing to admit copies of the Costin Affidavits on the basis that that they constituted inadmissible hearsay and were too unreliable to permit a fair hearing; and

f) awarding costs thrown away as special costs against the petitioners where there was no finding of reprehensible conduct sufficient to support an award of special costs, and no foundation at all in the record for such a finding or for an award of costs thrown away.

Grounds of Appeal and Cross Appeal: the Substantive Leave Orders

49 The appellants, Mr. Tietz, Mr. Loewen and Mr. Dotto, appeal the order dismissing the application for leave to bring secondary market claims against the Affinor Respondents (CA47974). They say the petition judge erred in law in finding that any rule of evidence prevented her from considering evidence regarding the Affinor Subscribers' conduct in other private placements. Further, they contend the petition judge erred in law and committed a palpable and overriding error in finding that that there was no reasonable possibility the misrepresentations could be proven at trial and, as a result, denying the application for leave.

50 Mr. Tietz and Mr. Loewen, together with Robin Lee (the representative plaintiff for the Kootenay claim), cross appeal the order granting leave to advance the secondary market claim against the Kootenay Respondents and the New Point Respondents on the grounds that the order inappropriately limited the claim (cross appeals in CA47975, CA47977 and CA47978). They say the petition judge was clearly wrong or erred in law in concluding the following: (1) the secondary market claim identified in the notice of civil claim did not include the allegation that the consulting agreements were a sham and a false pretense; (2) the allegations that the consulting agreements entered into were a sham were too speculative and were not supported by the evidence; and (3) the petitioners could not advance a claim that s. 64 of the *BCA* precluded the Issuers from treating future considerations as part of the price paid for shares, in support of the price and proceeds misrepresentation claim.

51 The Kootenay Respondents appeal the order granting leave to advance secondary market claims against them (Von Rowell Torres as appellant in CA47975, and Kootenay, Jackson and Tindall as appellants in CA47977) on the grounds that the chambers judge erred in law in her assessment of the materiality of the misrepresentations. In particular, they say she failed to assess materiality in the context of the regulated regime that governed disclosure and "industry practices informing continuous disclosure for early stage mining companies".

52 The New Point Respondents appeal the order granting leave to advance secondary market claims against them (as appellants in CA47978) on the grounds that the judge erred in law by granting leave with respect to a claim that was not pleaded.

53 Neither the Cryptobloc Respondents nor the BLOK Respondents appeal the leave order.

Discussion and Analysis

Overview

54 In addressing both the evidentiary and the substantive appeals, it must be borne in mind that the orders appealed were all made in the context of an application for leave to advance the statutory misrepresentation claims established by the *Securities Act*. The orders do not limit or affect the claims other than those identified in the pleadings as secondary market claims. Nor do the orders with respect to the admissibility of evidence in support of the motion for leave limit the evidence that may be led or arguments that may be made in relation to other claims that may be certified as class proceedings, either at the certification stage or thereafter.

55 As noted above (at para. 16), the petitioners seek to have certified as class actions the claims founded upon allegations of unlawful conspiracy, waiver of tort, and fraudulent or negligent misrepresentation, in addition to their claims for statutory damages.

56 The statutory damages claim must be founded upon a misrepresentation made in the form of a document or public oral statement as described in the *Securities Act.* The statutory cause of action affords relief to persons who suffer losses in the secondary market, and relieves them of the obligation to establish the reliance that might otherwise be necessary in an action for misrepresentation.

57 It is important to note that the *Securities Act* provides:

> 140.93 The right of action for damages and the defences to an action under section 140.3 are in addition to, and without derogation from, any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.
>
> [Emphasis added.]

58 Seen in that light, the petition judge's task in this case was two-fold. First, she had to determine what evidence was admissible and material to the application for leave to bring the statutory misrepresentation claims described in the pleadings. Second, she had to determine whether, based on that evidence, there was a reasonable possibility that the claims so identified would be resolved at trial in favour of the petitioners.

59 The statutory claim was identified by the petitioners as a right of action for secondary market misrepresentation in respect of the news releases and the Form 9s released or filed by the Issuers in respect of the private placements (and other specific documents later identified).

60 Some evidence the petitioners sought to adduce in reply on the application for leave was excluded on the basis that it ought to have been filed in chief. Rule 16-1(3) of the *SCCR* requires petitioners to file and serve the affidavits upon which they intend to rely with their petition. It further provides for the filing of affidavits in response and in reply (R. 16-1(4)). Rule 16-1 continues:

> (6) A petitioner may file affidavits in response to any document served on the petitioner ... and, in that event, must serve copies of those filed responding affidavits on each petition respondent no later than the date on which the notice of hearing is served on that petition respondent....
>
> (7) Unless all parties of record consent or the court otherwise orders, a party must not serve any affidavits additional to those served under subrules (3), (4) and (6).
>
> [Emphasis added.]

61 In my view, the petition judge did not err in law in concluding that the *SCCR* are drafted in a manner that is intended to prevent case splitting. Rule 16 applies to both final and procedural orders sought by petition. Its applicability does not depend upon the nature of the order sought.

62 Nor, in my view, did she err in law in her application of the test that should be applied in determining whether to admit late-filed evidence on the hearing of a petition (pursuant to R. 16-1(7)).

63 I am of the view, however, that she erred in law in excluding all of the evidence of Mr. Brusatore, Mr. Krasic and Mr. Costin as inadmissible hearsay or for lack of probative value. In my view, at least some of that evidence was admissible and relevant to the questions before the judge on the leave application.

64 I am also of the opinion that the judge erred in concluding that there was insufficient evidence to support a secondary market claim against the Affinor Respondents. I would grant leave to bring that claim on the same terms as the other secondary market claims for which leave was granted.

65 I can see no error, however, in the judge's conclusion that all the statutory misrepresentation claims were founded solely upon allegations that the price of the shares issued and the proceeds received were misrepresented in the documents referred to in the pleadings. While there is no doubt the petitioners alleged misrepresentations were made to effect a fraud on the market (and as part of a sham or a fraud), the sham or fraud was only the context of the misrepresentation -- not the substance of the misrepresentation identified in the pleadings.

66 In my view, it is neither appropriate nor necessary for us to address the judge's ruling that the petitioners could not argue that s. 64 of the *BCA* precludes the Issuers from treating future considerations as part of the price paid for shares. First, that ruling is not incorporated in the orders that are before us on appeal. The entered orders, said to inappropriately limit the scope of the statutory appeals, simply grant leave to the appellants to advance the claims pleaded. The ruling had no material effect upon the leave application.

67 Further, however, I cannot say the judge erred in concluding that the statutory misrepresentation claim pleaded did not include an allegation that the Issuers falsely represented that the consulting agreements were valuable consideration for the shares issued. The plaintiffs alleged that it was a misrepresentation for the Issuers to fail to disclose the existence of the consulting agreements and that the placements were conditional upon the consulting agreements. No representation was alleged to have been made in a document or public oral statement to the effect that the consulting agreements were valuable consideration for the shares issued.

68 The ruling does not limit the arguments that may be made in relation to the non-statutory claims, including the fraudulent misrepresentation claims pleaded. I would not accede to the petitioners' submission that the petition judge erred in law in restricting the legal arguments the petitioners could make at trial. In my view, the argument is only restricted insofar as the statutory claim has been limited to that set out in the pleadings.

69 I would dismiss the other substantive appeals. In my view, there is no error in the judge's consideration of materiality of the Kootenay misrepresentations or her identification of the causes of action pleaded against New Point.

70 Last, I would set aside the special costs order in relation to the abandoned application to introduce late affidavits. There is no suggestion that those applications were not brought in good faith, or were brought in an abusive manner. They were wisely abandoned for good reason, and the affidavits substituted for those abandoned were, in my view, admissible and relevant.

The Evidentiary Appeals

Application of the Rule Against Case Splitting

71 There is no doubt that the *SCCR* are drafted in a manner that is intended to preclude case splitting. That is consistent with the drafters' intention to establish a regime that will see disputes resolved in a just, speedy and inexpensive manner on their merits. There is also no doubt that a case management judge may exercise their discretion to permit evidence to be adduced at the hearing of a petition, even where its admission would result in case splitting or it is adduced in breach of a case management order. Of all the imperatives in the rules of civil procedure, none carries more weight than the objective of attaining a just result.

72 The Affinor Respondents, citing *McPhee v. British Columbia (Ministry of Transportation and Highways*, *2005 BCCA 139* at para. 55; *Lost Lake Properties Ltd. v. Sunshine Ridge Properties Ltd.*, *2009 BCSC 938* at para. 67, aff'd *2011 BCCA 473*; and *Slaughter v. Ximen Mining Corp.*, *2018 BCSC 573* at paras. 56-7, submit that the traditional rule against case splitting is fully applicable to petition proceedings.

73 The petitioners, for their part, do not claim that there is no applicable rule against case splitting. They argue, rather, that the judge erred in applying the rule "in effectively the same manner as it would be applied after a full trial on the merits, and requiring the [petitioners] to show that a substantial injustice would occur if [they] were not granted leave to file evidence which was available to them before the respondents filed their response materials". This submission reflects a flexible application of the rule, recognizing that case splitting -- while generally to be discouraged -- is more prejudicial late in the day, when it more significantly affects a party's right to fully respond to the split case.

74 The judge considered *Johnson v. North American Palladium Ltd.*, *2018 ONSC 4496*, to be authority for the proposition that a reply affidavit should not be used to correct deficiencies in the plaintiffs' case in chief. In response to the argument that the rule should be applied more flexibly in relation to petitions than the manner in which it is applied at trial, she appeared to recognize that the test for the admissibility of reply affidavits is a "balancing exercise, with the goal of ensuring that each party has a fair opportunity to present its case and to respond to the case put forward by the other party" (*PreveCeutical Application* at para. 54, citing *Cantlie v. Canadian Heating Products Inc.*, *2014 BCSC 2029* at para. 12, and *Cannon v. Funds for Canada Foundation*, *2011 ONSC 2960* at para. 18). She noted that the fact that the proceedings were case managed and subject to a timetable must be

weighed in that balancing exercise. In addressing the applications to adduce late-filed affidavits, she expressly considered fairness, efficiency and prejudice to the respondents.

75 As discussed below, in most of the cases where the judge refused to permit the late introduction of evidence, she pointed to what she considered to be problems with the evidence -- such as its lack of probative weight, its hearsay nature or its unreliability. No significant evidence was excluded simply because it was not proper reply evidence. While in some cases, in my view, the judge erred in finding evidence to be inadmissible, I would not accede to the argument that she erred in the description of the test to be applied when considering the admissibility of late-filed evidence that is not proper reply evidence. The balancing exercise requires the judge to give effect to the underlying rationale for the rule: permitting the petition to be heard fairly and efficiently, and resolved on its merits. The weight of the proposed evidence must be weighed against the prejudice that may result from its admission.

76 In some cases, the balancing exercise has led judges to consider whether the exclusion of the late-proffered evidence will result in "substantial injustice". The petitioners submit that test, as developed and applied after a trial has concluded or an application has been fully argued (as in *Mandzuk v. Vieira* (1983), 43 B.C.L.R 347, 1983 CanLII 448 (S.C.); *Iverson v. Lloyd's M.J. Oppenheim Attorney In Fact In Canada for Lloyd's Underwriters et al.*, 2002 BCSC 1627; and *First National Financial GP Corp. v. 0734763 BC Ltd.*, 2020 BCSC 1349), was inappropriately applied by the petition judge. After a trial or the conclusion of argument on an application, they say, the court is in a position to assess the impact of the evidence and whether its exclusion will result in a substantial injustice. That is not the case on an interlocutory application, before an application or petition is heard on the merits.

77 While the judge did note that the petitioners had not established that "substantial injustice" would result from the exclusion of the Brusatore Affidavit, that question was not determinative of the application to adduce late-filed affidavits in this case (*Chan #5 Application* at para. 29). After discussing the absence of an allegation of "substantial injustice", she considered not just whether the material was essential for success, but also whether it was "otherwise necessary for success", and the reason for the omission of the material from the evidence in chief:

> [32] The petitioners have not proven to me that the affidavit material is essential or otherwise necessary for success on their petition, nor have they provided an adequate explanation for why they could not have included the material, apart from the Brusatore Affidavit, with their original affidavits in support of the petition. Furthermore, to submit that a party has not responded or has responded in a *pro forma* manner does not justify granting leave to file a supplemental affidavit.

78 In many cases, on an application to exclude evidence, it is appropriate to not rule on objections to admissibility until all of the evidence has been heard and its impact may be assessed, as advocated by the petitioners and as demonstrated in *Achtymichuk v. Bayer Inc.*, 2020 BCSC 1601, leave to appeal granted, 2021 BCCA 147. It is frequently difficult to weigh evidence when assessing its admissibility as a preliminary question. Here, however, the petition judge was a case management judge, and she was very familiar with the context of the application. I cannot say she erred in the exercise of her discretion to address the admissibility of late-filed affidavits as a preliminary matter.

79 The petitioners argue that the judge erred in her assessment of the prejudice that would result from case splitting. They contend that, according to *Pollack v. Advanced Medical Optics*, 2011 ONSC 850, prejudice only results "if the additional evidence operates unfairly by, for example, taking advantage of a position taken or concession made" in the petition response. What was said in *Pollack*, however, does not support the petitioners' argument. Strathy J. (as he was) observed:

> [31] ... Not only does case-splitting cause unfairness, it causes expense, inefficiency and delay, as exemplified by this case. It is also unfair to the defendant, which has made appropriate concessions concerning the scope of the battle, only to be surprised by new evidence that seeks to open another front.

80 The petition judge here, familiar with the schedule for hearing the petition and the conduct of the parties, noted that the necessity of answering late evidence would cause delay and expense. The petitioners say the judge's approach leads to the unsatisfactory conclusion that the admission of any additional affidavits after the respondents

have delivered their response materials is inherently prejudicial. That is so, but that nominal prejudice alone will not necessarily lead to the exclusion of the evidence. It is but one factor to consider, and it was not an error of law to consider the prejudice described by the judge in this case.

81 There is some merit to the petitioners' argument that it was an error to find the Affinor Respondents would suffer prejudice as a result of the late admission of the Brusatore Affidavit, because prejudice was unlikely to be occasioned by the admission into evidence of the respondents' own documents. In my view, it is not necessary to address that argument. The judge was of the view that the petitioners had explained the late filing of that affidavit, and it was excluded primarily because it was considered to be inadmissible hearsay evidence. I address that conclusion below.

Admissibility of Audited Financial Statements of Affinor and BLOK, BLOK Consulting Agreements and the BLOK News Release

82 The petitioners contend the BLOK exhibits to Chan Affidavit #3 were proper reply to the petition response. In their response to petition, the BLOK Respondents had asserted that the petitioners' claim had no merit because investors should have known from prior disclosure that the hiring of marketing and business development personnel was part of BLOK's 12-month business plan.

83 In my view, it is not necessary to address the evidentiary rulings with respect to the case made out against BLOK. Leave was granted to pursue the secondary market claim against BLOK, founded upon the allegation that BLOK misrepresented the price paid for shares in the private placement or the capital available to BLOK as a result of the private placement. That order was not appealed, and the case against the Affinor Respondents (which is what is in issue here) is not strengthened by admission of further evidence in support of the case against BLOK.

84 The petitioners submit that the audited financial statements for fiscal year 2019 were proper evidence in reply to the Affinor response to petition. The Affinor Respondents had filed audited financial statements for the fiscal year ending May 31, 2018, but made no reference to those 2018 statements in their response. The petitioners argue here, as they did below, that they expected the Affinor Respondents to reply on the audit opinion and the disclosure made in those financial statements in support of the claim that there was no relationship between the private placement and the consulting agreements. However, it was open to the judge to conclude that this "reply" evidence ought to have been part of the case in chief and did not arise from the material filed by the Affinor Respondents. I agree with the submission of the Affinor Respondents that, in relation to this evidentiary ruling, no error of law is made out. Rather, the petitioners' complaints in this regard are with respect to how the case management judge exercised her discretion to admit late-filed evidence.

Admissibility of the Brusatore Affidavit

85 The petition judge excluded the Brusatore Affidavit when the petitioners sought to file it as an exhibit to Chan Affidavit #5 because "its content is not very probative, and its admissibility, being a copy and attached to another person's affidavit, would likely be inadmissible hearsay" (*Chan #5 Application* at para. 33).

86 The Affinor Respondents argue here, as they did below, that the leave order sought by the petition "is more akin to a final order" than an interlocutory order. As in an application for a final order, then, only evidence of direct knowledge is admissible in affidavits sworn in support of the application. They argue that the leave test requires scrutiny of the merits of the action based on the evidence advanced, and a weighing of the evidence itself.

87 The petition judge adopted that view, concluding that a leave application pursuant to s. 140.8 of the *Securities Act* is "final in nature and merits-based" and "not primarily procedural" (*PreveCeutical Application* at para. 58).

88 In my view, that conclusion is erroneous. First, any hearsay in the Brusatore Affidavit is arguably admissible as an admission by Mr. Brusatore against his interest. If it is so characterized, it may be received in evidence by simply showing that the admission was made. In my view, Young J. correctly addressed this question in *Cowichan Tribes v. Canada (Attorney General)*, *2020 BCSC 1968*, when she wrote:

> [10] Out-of-court statements made by a party to the proceedings are generally admissible at the instance of the opposing party. The Supreme Court of Canada in *R. v. Evans*, [1993] 3 S.C.R. 653 at para. 24 held that the rationale for admitting admissions is based on the theory of the adversarial system which does not permit a party to complain about the reliability of his or her own statements. ...

89 Further, I am of the view that hearsay evidence is not presumptively inadmissible on an application for leave to bring secondary market claims. The leave provision appears in Division 4 of Part 16.1 of the *Securities Act,* which addresses "Procedural Matters". The granting of leave does not determine the merits of the proposed secondary market claim. While the dismissal of an application for leave has final effect, the order sought is not final, and hearsay evidence may be submitted in support of the order sought.

90 This Court concluded, in *Primex Investments Ltd. v. Northwest Sports Entertainment Ltd.* (1995), 23 B.C.L.R. (3d) 251, 1995 CanLII 2383 (C.A.), that an order granting leave to bring a derivative action is not a final order. Under s. 225 of the *Company Act*, R.S.B.C. 1979, c. 59 (now s. 232 of the *BCA*), leave may be granted to commence a derivative action and permit *bona fide* and *prima facie* meritorious claims to proceed against corporations -- a very similar order to the one sought here.

91 *Primex* was relied upon by Verhoeven J. in *Jiang v. Piccolo*, 2020 BCSC 1584, to arrive at the following conclusions, with which I agree, in a case where leave was required to commence an action pursuant to s. 151 of the *Wills, Estates and Succession Act*, *S.B.C. 2009, c. 13*;

> [43] Rule 22-2(13) of the *Supreme Court Civil Rules, B.C. Reg. 168/2009* allows for the admission of hearsay evidence in an affidavit if the source of the information and belief of the person swearing the affidavit is given, and if the affidavit is made in respect of an application [that] does not seek a final order, or by leave of the court.
>
> [44] This application is similar to an application for leave to commence a derivative action. An order granting leave to commence a derivative action is an interlocutory order, as it does not finally dispose of the rights of the parties: [*Primex*]. Therefore, the affidavit relied upon is admissible.
>
> [45] While the affidavit is admissible, reliance on such evidence is obviously not ideal. In some circumstances such evidence could be given less weight, or perhaps even no weight at all. However in the circumstances of this case, the hearsay nature of the evidence relied upon by the petitioner does not significantly affect the weight I give to that evidence.
>
> [Emphasis added.]

92 The Affinor Respondents do not forcefully assert that the Brusatore Affidavit is hearsay. They contend that the judge's statement that the Brusatore Affidavit was "likely" hearsay was "but one concern" she had with the petitioners' attempt to introduce the evidence, and not the reason she made her decision. They emphasize the judge's conclusion that the Brusatore Affidavit was inessential to the petitioner's success. With respect, that conclusion is difficult to reconcile with the judge's description of the case against Affinor, without the Brusatore Affidavit, as "thin" (*Leave Application* at para. 178).

93 The petitioners sought to admit the Brusatore Affidavit in support of their claim that the $3.5 million of consulting agreements entered into four days before the Affinor private placement were a condition of the subscriptions to that private placement. That evidence went to whether there were misrepresentations as to the price paid for the Affinor shares, and to the net proceeds that Affinor expected to accumulate as a result of the placement. The petition judge on the *Leave Application* held:

> [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.
>
> [Emphasis added.]

94 In my opinion, the content of the Brusatore Affidavit was probative of the scheme the petitioners say was the root of the misrepresentation. It is, in fact, the evidence the judge considered to be missing on the application: some evidence that the consulting agreements were a condition to the subscriptions to the Affinor private placement -- the *quid pro quo*.

95 In the affidavit, Mr. Brusatore deposed to a February 2018 meeting with Mr. Liu and Mr. Jackson at the offices of BridgeMark, during which they offered to purchase $4 million of Affinor shares on the condition that consulting fees would be paid. Mr. Brusatore claimed to have been misled by Mr. Liu and Mr. Jackson with respect to the acceptability of the plan to regulators, and to have been unaware of the subscribers' intentions to re-sell the shares acquired through the placement. While the amount of the consulting fees was not specified in the affidavit, it was nonetheless clear evidence of a *quid pro quo*, and of Mr. Brusatore's conviction that he had been embroiled in a scheme by Mr. Lui and Mr. Jackson.

96 In my view, the judge erred in law in concluding that the Brusatore Affidavit was inadmissible as hearsay that was not probative. I would admit that affidavit, as an exhibit to the Chan Affidavit #5. Its contents may validly be considered in relation to the appeal of the dismissal of the application to bring a secondary market claim against the Affinor Respondents.

Admissibility of the Krasic Affidavit

97 The judge also excluded the Krasic Affidavit. She did so, in part, because it contained "no similar fact evidence with respect to the conduct of the ... issuers" and could not "prove or disprove any of the elements of the petitioners' misrepresentation claims against the ... issuers" (*Krasic Application* at para. 23).

98 There is some significant evidence in the Krasic Affidavit. For example, appended as Exhibit A is a copy of an email dated April 25, 2018, that Mr. Krasic received from Mr. Jackson (with earlier emails from the same and previous days attached). According to Mr. Krasic, these emails collectively concerned: (1) the delivery of subscription agreements and drafts for the acquisition of $5 million of units in Beleave under a private placement to be completed on April 27, 2018, and (2) cheques for the payment of lump-sum consulting fees pursuant to consulting agreements entered into with Beleave contemporaneously with, and as a condition of, the subscriptions for the $5 million in units under the private placement.

99 The judge concluded that this was merely evidence of a scheme engaged in by third party issuers that did not support the claim against any of the other issuers (including the Affinor Respondents). In my opinion, this fails to give any weight to the allegation in the notice of civil claim that the Purported Consultants enlisted the Issuers in a conspiracy. It was alleged that the scheme employed by all Issuers was conceived and agreed to by Mr. Jackson, Mr. Liu, Mr. Paddock, and Mr. Mawji in or around January 2018. It was further alleged that the scheme was first implemented by them with respect to a private placement by Kootenay, and then replicated when each of the Issuers arranged similar private placements at the initiative of the same or related subscribers.

100 The petitioners specifically pleaded and had adduced evidence that the following parties purchased shares in both the Beleave private placements and other impugned private placements: Detona, Northwest, Rockshore, Sway Corp., Tollstam & Co., and Mr. MacPherson.

101 There was evidence before the petition judge that Detona, Northwest and Rockshore purchased shares in the private placements of Affinor. While the Krasic Affidavit was evidence of the conduct of a third-party issuer, these three subscribers to the Beleave private placement were not third parties to Affinor's part in the alleged conspiracy.

102 In my opinion, the Krasic Affidavit should not have been considered to be "similar fact evidence". It was not tendered as bad character or propensity evidence but, rather, as evidence in support of an allegation that the respondents collectively conspired to effect a fraud on the market through a series of private placements. Unlike similar fact evidence, its admissibility did not hinge upon a balancing of its probative value against the prejudice it might cause.

103 In my view, the Krasic Affidavit ought to have been admitted as evidence with some probative value in relation to all the statutory misrepresentation claims.

104 I would not accede to the argument of the Affinor Respondents that the case management judge correctly determined that the Krasic Affidavit was not probative because it did not speak to the statutory misrepresentations described in the notice of civil claim. The alleged conspiracy was pleaded and while, as the judge found, there was no allegation in the secondary market claims that there were misrepresentations with respect to the legitimacy of the consulting contracts, evidence of a scheme to defraud investors is still some evidence that there was a misrepresentation as to price or the proceeds of the placement. It is also, indirectly, evidence of the materiality of the representations in the impugned press releases and Form 9s, demonstrating an intent to release documents or public oral statements that would affect the market and therefore be material. In short, evidence of the existence of a scheme or plan to manipulate the market was not irrelevant to the allegation that the Issuers misrepresented the price paid for the shares or the proceeds of the private placements.

Admissibility of the Costin Affidavits

105 The petition judge also excluded the Costin Affidavits on the basis that they constituted inadmissible hearsay. She rejected the petitioners' submission that there was a non-hearsay purpose for the Costin Affidavits (*Hung Application* at paras. 24-6), finding instead that the Costin Affidavits were "too unreliable to permit a fair hearing on the application" (at para. 33).

106 In addressing the relevance of the Costin Affidavits, it is important to restate the task of the judge on the leave application: to determine whether there was a reasonable possibility that the action founded upon the secondary market claim would be resolved at trial in favour of the plaintiff. In support of an application for leave, the petitioner may adduce evidence in support of its claim -- but it may also show that there is probative evidence that it will be able to obtain.

107 To that extent, I agree with the petitioners that the Hung Affidavit ought to have been admitted as evidence of the case they believed they could make out against the Issuers if leave was granted. They sought to adduce the evidence of Mr. Costin, not as proof of the facts recorded in the records upon which he relied, but rather as evidence of the availability of such records. Analogously, they could have obtained unsworn statements from witnesses and put them before the petition judge as evidence of the case they would lead, should leave be granted.

108 Mr. Costin's first affidavit is evidence that there are public records disclosing that Affinor distributed, through its private placement, approximately 25 million shares with a stated value of approximately $4 million to Northwest, Cam Paddock Enterprises (later known as Rockshore), Detona, and JCN.

109 It is also evidence that electronic trading records for Affinor may be obtained using a software program called Market Integrity through Computer Analysis ("MICA"). MICA ingests and organizes electronic trade records, then generates a report called the New Client Application Form with Trades ("NCAFT"). The NCAFT shows the buying and selling activity by clients of brokerage firms in the shares of an issuer over specific time periods. MICA also generates a report called Summary of Client Trading by Volume (the "Volume Report"). The Volume Report provides summary totals of buy and sell volume, net volume, summary buy value, summary sell value, and gross

value (sell value minus buy value) for individual accounts that traded shares in an issuer over specific periods of time.

110 Mr. Costin appended as exhibits to this affidavit what he described as "[t]rue copies of the NCAFT and Volume Report for [those who obtained shares of] Affinor's private placement from March 6, 2018 to April 19, 2018". These exhibits indicate that Northwest, Cam Paddock Enterprises, Detona, and JCN collectively sold a total of 24,997,916 Affinor shares from March 6, 2018 to April 19, 2018 for proceeds of $3,976,360.

111 Affinor's consolidated financial statements for the years ending May 31, 2018 and 2017 were attached as an exhibit to one of Mr. Costin's affidavits. Note 11 of those statements discloses that, on March 1, 2018, Affinor entered into "14 three-month contracts for consulting services totaling $3,500,000 for accounting, corporate and administrative services, internet marketing, investor relations, merger and acquisition consulting and cannabis consulting".

112 In my view, the availability of at least this information should have been considered in determining whether there was a reasonable possibility that the proposed action would be resolved at trial in favour of the plaintiffs. I would admit, and afford considerable weight to, the evidence that the records to which Mr. Costin referred exist. It is not disputed that the Costin Affidavits were obtained from the Commission and pursuant to the Commission's order, nor is it disputed that Mr. Costin swore to the truth of his affidavits for the purposes of the Commission proceedings.

Awarding Costs Thrown Away as Special Costs

113 In *Smithies Holdings Inc. v. RCV Holdings Ltd.,* 2017 BCCA 177, Goepel J.A. described the standard of review of costs orders as follows:

> [51] An award of costs involves the discretion of the trial judge. This Court should not interfere with that discretion unless the trial judge made an error in principle or the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9 at para. 27. ...

114 On occasion, this Court has set aside a special costs order on the ground that the judge making the order had not identified reprehensible conduct as the basis for making the award. In *Smithies,* the Court noted:

> [56] Special costs are typically awarded when there has been some form of reprehensible conduct on the part of one of the parties: *Young v. Young* , [1993] 4 S.C.R. 3 at 134-138. Special costs are not compensatory; they are punitive: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106. They are awarded when a court seeks to disassociate itself from some misconduct: *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 (C.A.) at para. 23. There are circumstances where special costs may be ordered where there has been no wrongdoing: *Gichuru v. Smith*, 2014 BCCA 414 at para. 90. These reasons are not concerned with such types of cases.
>
> [57] The leading authority on special costs is this Court's decision in *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the Court, set out that the threshold for special costs awards is "reprehensible conduct". He noted the continuum of circumstances in which special costs could be awarded, ranging from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct":
>
> > [17] Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui*, and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke", it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word

> reprehensible, taken in that sense, must represent a general and all encompassing expression of the applicable standard for the award of special costs.

115 In the exceptional case referred in this passage to where there was said to have been "no wrongdoing", *Gichuru v. Smith*, 2014 BCCA 414, the plaintiff had made allegations of serious misconduct against another in a civil lawsuit that could not be substantiated. Given the effect of those allegations on the respondent's reputation, some reproof was warranted.

116 In the case at bar, I can see no basis upon which the petition judge might have found the appellant's conduct -- seeking to have additional evidence admitted and withdrawing that application when better evidence became available -- to be deserving of rebuke. There was no description of the basis for the award in the reasons, and I can see none on the facts of the case. To appreciate the context in which the award was made, the reasons should be read together with the submissions with respect to costs -- and we have been referred to those submissions. In my view, even in light of those submissions, no basis is made out for this award. I would set it aside and substitute the order that would ordinarily have been made: an order requiring the appellants to pay the costs of the aborted motion.

The Substantive Appeals

The Petitioners' Appeal

117 The petitioners accept that the petition judge correctly reviewed the legal principles governing the statutory cause of action and the leave requirement. They contend, however, that the petition judge either committed an error of law by applying the wrong test, or erred in her application of the test. They say the evidence accepted by the petition judge was sufficient to support a finding that the petitioners had a reasonable possibility of success against the Affinor Respondents.

118 The petition judge applied the test described in *Theratechnologies Inc. v. 121851 Canada Inc.*, 2015 SCC 18. *Theratechnologies* required the applicant to satisfy the court that there is a "reasonable or realistic chance" the action will succeed, based upon "both a plausible analysis of the applicable legislative provisions and some credible evidence in support of the claim". It requires the court to conduct "a reasoned consideration of the evidence to ensure that the action has some merit" (at paras. 38-9).

119 That test was intended to resolve uncertainty with respect to the extent of the preliminary assessment of the merits required by the legislation. Abella J. wrote:

> [37] I am aware that there has been some discussion in the Ontario and British Columbia courts about what the threshold is, all seeking to find a balance between preventing cases without a realistic prospect of success but encouraging those with a likelihood of success. ...
>
> [38] In my view, as Belobaba J. suggested in [*Ironworkers Ontario Pension Fund (Trustee of) v. Manulife Financial Corp.*, 2013 ONSC 4083], the threshold should be more than a "speed bump" (para. 39), and the courts must undertake a reasoned consideration of the evidence to ensure that the action has some merit. In other words, to promote the legislative objective of a robust deterrent screening mechanism so that cases without merit are prevented from proceeding, the threshold requires that there be a reasonable or realistic chance that the action will succeed.
>
> [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 [of the *Securities Act,* C.Q.L.R., c. V-1.1] 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.
>
> [Italics original; citations omitted.]

120 However, there remains some uncertainty with respect to what is required of an applicant, because the application must be brought before discovery but the evidence is primarily documentary in nature. There is a very helpful review of the purpose and application of the leave requirement in the judgment of Strathy J. (as he was) in *Green v. Canadian Imperial Bank of Commerce*, *2012 ONSC 3637*, rev'd on other grounds, *2014 ONCA 90*. In *Green*, the defendant suggested that the standard previously described in two other cases was too low. The defendant submitted that a more appropriate test was described in *Round v. MacDonald, Dettwiler and Associates Ltd.*, *2011 BCSC 1416*, aff'd *2012 BCCA 456*.

121 The cases the defendant sought to distinguish in *Green* were *Silver v. Imax Corp.* *(2009), 66 B.L.R. (4th) 222*, *2009 CanLII 72342* (Ont. S.C.J.), aff'd *2014 ONCA 90*, and *Dobbie v. Arctic Glacier Income Fund*, *2011 ONSC 25*, leave to appeal ref'd, *2012 ONSC 773*. In *Silver*, van Rensburg J. (as she then was) had noted that the context of the inquiry, based on documents rather than live evidence, shapes the analysis. She wrote:

> [326] In undertaking this evaluation the court must keep in mind that there are limitations on the ability of the parties to fully address the merits because of the motion procedure. There is no exchange of affidavits of documents, no discovery (although affiants may be cross-examined) and witnesses cannot be summoned....
>
> [327] As a result, the court must evaluate and weigh the evidence at hand, keeping in mind the restrictions of the motions process and what may be available to the parties in a trial. This does not mean that the court should speculate about what better evidence a party may advance when the matter reaches trial, or fill obvious gaps in a party's case; it does however require the court to assess the evidence realistically, having regard to which party has the burden of proof and access to evidence that may be brought forward at the preliminary stage, and paying attention to conflicts in the evidence that may not be capable of being determined in a motion, without a full assessment of a witness' testimonial credibility.
>
> [Emphasis added.]

122 In *Round*, Harris J. (as he was) dismissed an application for leave on the ground that the facts giving rise to the cause of action took place before the legislation came into force. For that reason, what he wrote about the test for leave was *obiter*, and expressly subject to the caveat that a definitive decision on the nature of the test for granting of leave would await the case that called for it (at para. 13). He was clearly of the view, however, that the test involves "an assessment of the merits of the proposed action on the evidence" (at para. 73). He added:

> [73] ... The court must analyze the evidence to decide whether it is satisfied that the "reasonable possibility" test is satisfied.... [W]eighing and testing the evidence to determine whether there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff is different from the test involved in certification of class actions or the test for summary judgment....
>
> ...
>
> [76] Establishing a reasonable possibility of success at trial involves more than merely raising a triable issue or articulating a cause of action. Equally, it does not require a plaintiff to demonstrate that it is more likely than not that he or she will succeed trial. But it is clear, in my view, that the test is intended to do more than screen out clearly frivolous, scandalous or vexatious actions. An action may have some merit, and not be frivolous, scandalous or vexatious, without rising to the level of demonstrating that the plaintiff has a reasonable possibility of success.
>
> [77] Beyond this I do not intend to venture. There are difficult questions embedded in the test and little existing guidance in the few cases in other jurisdictions that have considered the leave test in their equivalent statutes. In particular, although it is clear that the analysis involves a reasoned and significant assessment on the existing evidentiary record of both the plaintiff and defendants of the merits of the case

> and its prospects of succeeding at trial, this analysis necessarily occurs before any discovery. Although provision is made for cross-examination on affidavits, the application remains an initial hurdle and not a substitute for the trial. How one ought to weigh the potential of discovery to alter the prospects of success at trial or reshape the evidentiary landscape in the context of a leave application is a difficult question that does not need to be resolved here.

123 After considering these cases and *Justice v. Cairnie Estate* (1993), 105 D.L.R. (4th) 501, 1993 CanLII 4408 (Man. C.A.), leave to appeal and cross appeal to SCC dism'd, [1994] 1 S.C.R. v., Strathy J. concluded in *Green* that he did "not disagree at all with the proposition that the 'reasonable possibility of success' test sets a higher bar than 'frivolous, scandalous or vexatious'". Nor did he disagree with "the proposition that a preliminary merits-based assessment must be tempered by a recognition that there has been no discovery and that the analysis is conducted on a paper record with all its attendant limitations" (at para. 369). He held:

> [373] I respectfully agree with van Rensburg J. [in *Silver*]... that the leave requirement is a relatively low threshold. It is meant to screen out cases that, even though possibly brought in good faith, are so weak that they cannot possibly succeed. This is consistent with the purpose of the legislation - to screen out strike suits that are plainly unmeritorious. It is not meant to deprive *bona fide* litigants, with a difficult but not impossible case, from having their day in court. This interpretation is also consistent with the philosophy of our legal system that contentious issues of fact and law are generally decided after a full hearing on the merits.

124 On appeal, the most contentious issue was whether a claim described in pleadings filed before leave is granted has the effect of tolling the running of a limitation period. However, the Supreme Court of Canada was also asked to reject the approach described by Strathy J. and to require instead a more rigorous analysis of the evidence. The Court refused to do so, suggesting that Strathy J.'s approach was consistent with the established test: *Canadian Imperial Bank of Commerce v. Green*, 2015 SCC 60. Côté J. wrote:

> [118] In *CIBC*, the defendants challenged the threshold that must be met by a plaintiff applying for leave under s. 138.8 *OSA* [*Securities Act*, R.S.O. 1990, c. S.5]. One of the conditions that must be met to obtain leave is that the court must be satisfied that "there is a reasonable possibility that the action will be resolved at trial in favour of the plaintiff": s. 138.8(1)(b) *OSA*. Strathy J. interpreted this statutory language as establishing a relatively low threshold according to which leave will be denied only if, "having considered all the evidence adduced by the parties and having regard to the limitations of the motions process, the plaintiffs' case is so weak or has been so successfully rebutted by the defendant, that it has no reasonable possibility of success": para. 374. The Court of Appeal upheld this interpretation of s. 138.8(1)(b).
>
> [119] The defendants in *CIBC* argued in this Court that the threshold articulated by Strathy J. is too low.
>
> [120] I will address the point briefly, given the Court's recent decision in *Theratechnologies inc. v. 121851 Canada inc.*, 2015 SCC 18, [2015] 2 S.C.R. 106.
>
> [121] In *Theratechnologies*, the Court was asked to interpret s. 225.4 of the *Securities Act*, CQLR, c. V-1.1 ("*QSA*"), the Quebec counterpart to s. 138.8 *OSA*. That section, which introduces a leave requirement for a statutory claim based on a secondary market misrepresentation in Quebec, provides that there must be a "reasonable possibility that [the action] will be resolved in favour of the plaintiff" for leave to be granted. The Court stated that for an action to have a "reasonable possibility" of success under s. 225.4, there must be a "reasonable or realistic chance that [it] will succeed": *Theratechnologies*, at para. 38. Claimants must "offer both a plausible analysis of the applicable legislative provisions, and some credible evidence in support of the claim": *Theratechnologies*, at para. 39.
>
> [122] There is no difference between the language of s. 138.8 *OSA* and that of s. 225.4 *QSA*. Moreover, both provisions relate to leave applications for statutory claims based on secondary market misrepresentation, albeit in different jurisdictions. Accordingly, the threshold test under s. 225.4 *QSA* articulated in *Theratechnologies* applies in the context of s. 138.8 *OSA*.

125 Although Côté J. dissented in the result of two of the three appeals, her analysis of the applicable threshold was adopted by the Court (at paras. 130, 147 per Cromwell J., para. 212 per Karakatsanis J.).

126 I am of the view that this test was met in this case. The petitioners have discharged the onus of offering "some credible evidence in support of the claim", as required by *Theratechnologies*, against the Affinor Respondents. They established that there was evidence that they will adduce at trial that establishes the essential elements of the misrepresentation claim pleaded. The evidence that was erroneously excluded as hearsay or as immaterial to success, when considered with the affidavits filed with the petition, fills the gaps in the case against the Affinor Respondents described by the petition judge, and puts the case against Affinor on the same footing as that made out against the other Issuers.

127 As noted in *Godfrey v. Sony Corporation*, *2017 BCCA 302* at para. 49, aff'd 2019 SCC 42, this Court will not interfere with the exercise of the judge's discretion absent an error of law, an error in principle, or a clearly wrong exercise of discretion. However, as outlined above, the judge erred in law in refusing to admit the evidence of Mr. Brusatore, Mr. Krasic, and Mr. Costin. Accordingly, this Court may substitute an order granting leave to bring the action: see e.g., *Hldyk v. Adolph*, *2012 BCCA 37*; *Hoggan v. Silvey*, *2022 BCCA 176*.

128 As the petitioners note, there was evidence that Affinor:

a) only had working capital of $549,841 as of February 28, 2018, no revenue or near term prospects of revenue, and no disclosed credit facilities;

b) entered into 14 three-month contracts for consulting services totalling $3.5 million on March 1, 2018;

c) announced that it had arranged private placement financing for $4 million on March 5, 2018; and

d) announced that it had closed that financing for total proceeds of $3,999,667 on March 8, 2018.

129 Excluding the evidence of Mr. Brusatore, Mr. Krasic and Mr. Costin, there was before the petition judge only evidence that Affinor and the consultants entered into agreements with a value of $3.5 million, days before the $4 million private placement. The petition judge concluded that she was unable 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", and they "traded their shares quickly, because the Commission had evidence of them trading other shares while contemporaneously subscribing to other issuer shares" (*Leave Application* at para. 177). Her conclusion at para. 178, which I have noted above and reproduced here for convenience, was that:

> ... 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.

130 The petitioners submit (and I agree) that this significantly understates the probative force of the evidence of the participation by the four Affinor Subscribers in the other private placements. Rockshore, Detona, Northwest, and JCN (collectively or individually) subscribed to:

a) $3 million worth of shares in the Green private placement;

b) $2 million worth of shares in the first Beleave private placement;

c) $3 million worth of shares in the second Beleave private placement;

d) roughly $1.74 million worth of shares in the Cryptobloc private placement;

e) $3.5 million worth of shares in the PreveCeutical private placement;

f) approximately $1.3 million worth in shares in the Speakeasy private placement; and

g) $625,000 worth in shares in the New Point private placement.

131 In each case, there was evidence that the subscribers entered into consulting agreements with the Issuer, received significant cash payments from the Issuer, and then sold all or nearly all of the Issuer's shares at prices below the subscription price. There were admissions to this effect by Beleave. According to Mr. Gardener-Evans,

the CEO of New Point, New Point's subscription was conditional upon it entering into consulting agreements with a group of consultants, including both Northwest and Detona.

132 The petitioners say these facts alone are strong evidence that the consulting agreements and the financing agreements were tied to each other. They contend Affinor knew that the financing which funded the consulting agreements was either in place or could be arranged when Affinor entered into the consulting agreements on March 1, 2018. They say this evidence is sufficient to conclude there is a reasonable possibility of proving, at trial, that the Affinor Subscribers required Affinor to (1) enter into the 14 consulting agreements concluded on March 1, 2018, with them and/or their designated associates, and (2) pay $3.5 million in consulting fees pursuant to those agreements, as a condition of their participation in the Affinor private placement.

133 In addition, there was evidence before the petition judge that the Affinor Subscribers immediately sold most of their shares acquired in the private placements. The appellants say that the quick sale of the private placement shares is some evidence that the shares were acquired at an effective price below the publicly reported price. It follows, they argue, that the $3.5 million worth of prepaid consulting agreements entered into one week before the $4 million private placement were a condition of the Affinor Subscribers' participation in that private placement. They say the petition judge misstated the nature of the evidence concerning the quick sale of shares by the Affinor Subscribers, and the inferences they asked the court to draw from that evidence. The judge said, "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 issuers' shares" (at para. 177). The appellants say this was a misconception. Their argument was that the Commission was right to conclude that the quick sale by the subscribers reflected their desire to take immediate advantage of the discounted price they had paid for the shares, as a result of the "cash swap" (*Commission Decision* at paras. 31, 36).

134 In my view, that mischaracterization of the petitioners' argument may be a consequence of the judge's narrow view of the evidence that could be considered in support of the claim against the Affinor Respondents. The claim was that the Affinor Subscribers conspired with a series of Issuers, including the Affinor Respondents, to effect a fraud on the market. The secondary market claims were founded upon misrepresentations that were said to be a key to the success of the scheme, which entailed misstatement of the price paid for the shares in the private placement, misstatement of the capital raised by the Issuers, and the sale of the subscribers' shares while the misrepresentations affected the market.

135 The petition judge found that the evidence established or strongly supported the inference that the consulting agreements concluded contemporaneously with the other private placements were a condition of the subscribers' participation in the placements. The petitioners contend that it follows from this that it is at least reasonably possible that the same condition common to these eight private placements -- Cryptobloc, PreveCeutical, New Point, Green, BLOK, the first and second Beleave placements, and Speakeasy -- in which the Affinor Subscribers participated as either subscribers or consultants, was also a condition of the Affinor Subscribers' participation in the Affinor private placement. This is particularly so given that the Affinor Subscribers quickly sold the shares they acquired under the private placement, at or below the disclosed subscription price for those shares, in the same way that occurred with those other private placements.

136 There is, in my view, substantial merit to this argument. But, it need not be relied upon by the petitioners, given my conclusion with respect to the admissible evidence that was not weighed by the petition judge.

137 As the petitioners submit, the excluded evidence most material to the claims against Affinor is the sworn but unfiled affidavit of Mr. Brusatore, Affinor's CEO. The Brusatore Affidavit described the circumstances of the March 2018 private placement. Mr. Brusatore specifically acknowledged that BridgeMark's principals offered to purchase $4 million of Affinor shares, conditional upon the payment of consulting fees, and he and Affinor believed they were misled by BridgeMark.

138 In my view, the appellants are correct to say that there is a reasonable chance they will be able to prove at trial

that the Affinor Subscribers' purchase of the shares in the private placement was conditional upon Affinor agreeing to return, and then returning, most of the $4 million in private placement proceeds to the Affinor Subscribers and their designated associates as consulting fees.

139 Further, the Krasic Affidavit provided direct evidence of the facts set out in the Beleave settlement agreement. This lends some weight to the argument that the Affinor Subscribers engaged in a scheme to manipulate the market for the Issuers' shares by misrepresenting the substance of the private placement transactions. In light of the pleadings to that effect and the evidence supporting the allegation, the evidence of Mr. Krasic was not too remote to have some probative weight in support of the claims against the Affinor Respondents.

140 Last, the trading records gathered by Mr. Costin were evidence the petitioners would likely be able to tender at trial to establish that all of the Affinor Subscribers quickly sold all the Affinor shares they purchased. I agree with the petitioners that this evidence may be used to support the inference that the Affinor Subscribers had acquired the shares at a very low price, and were thus motivated to quickly sell the shares for a substantial profit.

141 For those reasons, I would allow the appeal and grant leave to Mr. Tietz, Mr. Loewen, and Mr. Dotto to bring the secondary market claim described in the pleadings against the Affinor Respondents.

The Kootenay Appeal

142 The Kootenay Respondents argue that the judge erred in finding that Kootenay failed to disclose that funds raised from the private placement would pay for consulting fees, thus diminishing the net proceeds available to the company. They argue that Kootenay's earlier public disclosure provided notice to investors that it did not have any revenue, had previously raised millions of dollars by way of private placements and spent most of those funds within months, and relied heavily on consultants.

143 The petition judge expressly considered that submission in the *Leave Application*, noting:

> [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.

144 She addressed it as follows:

> [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.
>
> ...
>
> [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.

145 Turning to the issue of materiality, she held:

> [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 [the mining property the development

of which was Kootenay's primary focus] at that time, the consulting fee obligation assumed by Kootenay, be it $459,001 or $733,958, was undeniably material.

...

[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.

[Emphasis added.]

146 The Kootenay Respondents say the petition judge failed to apply the objective test for materiality described by the Supreme Court of the United States in *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438 (1976), and adopted

by the Supreme Court of Canada in *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, *2011 SCC 23*, as follows:

> [48] The U.S. Supreme Court indicated that it was "universally agreed" that the question of materiality is objective (*TSC Industries*, at p. 445). Materiality is based on an examination of how the information would have been viewed by a "reasonable investor". The U.S. Supreme Court concluded that the objective standard formulated in *TSC Industries* "best comports with the policies" (p. 449) of the proxy disclosure rules -- the purposes of which were "not merely to ensure by judicial means that the transaction, when judged by its real terms, is fair and otherwise adequate, but to ensure disclosures by corporate management in order to enable the shareholders to make an informed choice" (p. 448).
>
> ...
>
> [52] Finally, the U.S. Supreme Court indicated that the importance of an omitted fact must be considered in the light of whether it would be viewed by a reasonable investor as having "significantly altered the 'total mix' of information made available". In certain situations, evidence of the information made available may be such that common sense inferences will be sufficient to establish materiality. In other cases, where there is evidence that supports competing inferences, a court may be required to carry out a more complex analysis to determine what the reasonable investor would have considered important. For the majority of cases, materiality is a contextual matter, involving the application of a legal standard to specific facts, that must be determined in light of all of the information that was made available to an investor. Canadian and American authorities and commentary on materiality indicate that assessing materiality is a "fact-specific inquiry" (*Basic Inc. v. Levinson*, 485 U.S. 224 (1988), at p. 240). Materiality is "to be determined on a case-by-case basis" (p. 250) in light of all of the relevant circumstances.
>
> [Emphasis added.]

147 They submit that in the case at bar a common-sense inference was insufficient to establish materiality. Instead, the petition judge should have engaged in the more complex analysis referred to in this passage. They submit that there are regulated disclosure obligations, and the statutory regime must be borne in mind in determining what omissions from disclosure are important. They say investors in Kootenay were aware of the extent to which the company employed consultants, and that the consulting agreements with subscribers in this case were not material.

148 I would not accede to that argument. At the leave stage, the petition judge is not required to make a finding that the impugned representations are material, but rather that there is a reasonable possibility that the statement will be found to have been material at trial. That question was fully and carefully addressed, and in my view, no error in law has been made out.

149 It was not necessary for the petition judge to have evidence that the disclosure made by Kootenay fell below a regulatory or industry standard. The question was whether she was satisfied that there was a reasonable chance of success at the eventual trial. In addressing that question, she was entitled to bear in mind the following direction in *Sharbern* (at para. 57):

> [T]he question of materiality involves the application of a legal standard to a given set of facts. Judges are not less expert than business managers when it comes to the application of a legal standard to a given set of facts; neither do managers' assessments of risk have anything to do with meeting their disclosure obligations. As Binnie J. observed, "[i]t is for the legislature and the courts, not business management, to set the legal disclosure requirements" ([*Kerr v. Danier Leather Inc.*, *2007 SCC 44*], at para. 55).

150 That approach to assessing materiality in the securities context is reflected in the judgment of Ducharme J. in *Cornish v. Ontario Securities Commission*, *2013 ONSC 1310*, cited by the petitioners, with which I agree:

> [99] ... [W]hile shareholder evidence or expert evidence may be relevant or useful, it is not necessary. This is not changed by the statement in *Sharbern* that, "except in those cases where common sense inferences are sufficient, the party alleging materiality must provide evidence in support of that contention."... First, *Sharbern* does not deal with specialized tribunals. Second, it calls for evidence, not a particular kind of

> evidence. Third, and most important in this case, such evidence need not be called where one can conclude on the basis of common sense inferences that a change is material.
>
> [Emphasis added.]

151 In my view, the conclusion that there was a reasonable prospect the petitioners would be able to establish materiality at trial was open to the petition judge, and I can see no error in her analysis.

The New Point Appeal

152 The petition judge made the following findings in the *Leave Application*:

> [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.

153 The New Point Respondents contend that the case pleaded against New Point was that the consulting agreements, which were entered into on July 31, 2018, should have been disclosed in the July 25 News Release. They say there was no claim that New Point was committed to paying consulting fees prior to the execution of the July 31 consulting agreements. They argue that leave ought not to have been granted to advance a claim not pleaded.

154 The petitioners submit that the notice of civil claim clearly alleges that the substance of the transaction was in place, and known by New Point, prior to July 25, 2018.

155 In my view, and on the evidence, it was open to the petition judge to find that there was a reasonable prospect the petitioner could establish that 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 was also open to her to read the pleadings as encompassing that claim.

Disposition

156 I would allow the appeal of the evidentiary orders to the extent that I would admit into evidence the Brusatore Affidavit, the Krasic Affidavit, and the portions of the Costin Affidavits to which I have referred.

157 I would allow the appeal of the order dismissing the application for leave to advance a secondary market claim against the Affinor Respondents, and substitute for that order an order granting leave to advance the claim for secondary market misrepresentation under s. 140.3 of the *Securities Act* that is described in the notice of civil claim, as amended.

158 I would dismiss all other appeals and cross appeals.

P.M. WILLCOCK J.A. P. ABRIOUX J.A.:— I agree.
L. MARCHAND J.A.:— I agree.