COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Tietz v. BLOK Technologies Inc.*,
2026 BCCA 45

Date: 20260206
Docket: CA50041

Between:

Michael Tietz, Duane Loewen, Robin Lee, Mike Dotto, Grant Greenwood, Malcolm Runkee, Americo Morlani, Greg Lomnes and Stacy Dionne

Appellants/
Respondents by Cross Appeal
(Plaintiffs)

And

BLOK Technologies Inc., Cryptobloc Technologies Corp., Green 2 Blue Energy Corp., Citation Growth Inc. formerly known as Marapharm Ventures Inc., KOPR Point Ventures Inc. formerly known as New Point Exploration Corp., David Alexander, Brian Biles, Bryn Gardener-Evans, James Hyland, Glenn Little, Kenneth Clifford Phillippe, Slawomir Smulewicz, Neil William Stevenson-Moore, Michael Young, 1053345 B.C. Ltd., 10X Capital, 1140258 B.C. Ltd., 1153307 B.C. Ltd., 727 Capital, Asahi Capital Corp., Detona Capital Corp., Natasha Jon Emami, Escher Invest SA, Saman Eskarandi, Essos Corporate Services Inc., Simran Singh Gill, Haight-Ashbury Media Consultants Ltd., Hunton Advisory Ltd., International Canyon Holding Ltd., Jarman Capital Inc., JCN Capital Corp., Kendl Capital Limited, Keir Paul Macpherson, Northwest Marketing and Management Inc., Cameron Robert Paddock, Rockshore Advisors Ltd., Danilen Villanueva, Viral Stocks Inc., Robert Abenante, Arlene Victoria Alexander, Jatinder Singh Bal, John Bevilacqua, David Raymond Duggan, Scott Jason Jarman, Ali Babu Mawji, Ashkan Shahrokhi, Wilson Su, Von Rowell Torres, Denise Trainor, Russell Grant Van Skiver and Randy White

Respondents
(Defendants)

And

Tavistock Capital Corp., Robert John Lawrence, Sway Capital Corp., Robert William Boswell and Bertho Holdings Ltd.

Respondents/
Appellants by Cross Appeal
(Defendants)

Before: The Honourable Mr. Justice Groberman
The Honourable Mr. Justice Willcock
The Honourable Justice Donegan

On appeal from: An order of the Supreme Court of British Columbia, dated July 2, 2024 (*Tietz v. Bridgemark Financial Corp.*, 2024 BCSC 1166, Vancouver Docket S197731

Counsel for the Appellants/Respondents by Cross Appeal:	P. Bennett N.J. Kovak N. Baker
Counsel for the Respondents/Appellants by Cross Appeal Sway Capital Corp., Robert William Boswell and Bertho Holdings Ltd.	D.L.R. Yaverbaum
Place and Date of Hearing:	Vancouver, British Columbia January 21, 2025
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2026

Written Reasons by:
The Honourable Mr. Justice Groberman

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Justice Donegan

Summary:

The plaintiffs in this class proceeding invested in shares in ten publicly-traded companies and suffered losses. They allege the companies deceived the investing public by stating that private placements they had issued were fully subscribed at the issue price without disclosing that the subscribers had received substantial repayments from the companies through sham consulting contracts. They sue the companies, their directors, and the purported consultants for conspiracy to defraud capital markets. They also allege fraudulent or negligent misrepresentation against the companies, their officers and directors, and make a statutory claim against those persons for secondary market misrepresentation.

The chambers judge certified the class proceeding but excluded from the plaintiff class those investors who disposed of their shares before suspicions of the scheme became public through an announcement by the Securities Commission. She also divided the class into two subclasses depending on whether plaintiffs purchased shares through a Canadian exchange or a non-Canadian one. The plaintiffs appeal, contending that the exclusion of those who disposed of their shares early was inappropriate, and that the class should not have been divided into subclasses.

Three purported consultants cross appeal, asking that the certification be sent back for reconsideration on the basis that the judge did not adequately analyse the adequacy of the pleadings of conspiracy. They also contend that, in determining that a class proceeding was the preferable procedure, the judge failed to consider the possibility that the allegations might disclose several conspiracies rather than a single one.

Held: Appeal allowed; Cross appeal dismissed. The early sellers ought not to have been excluded from the class as they clearly articulated a basis for finding that they had suffered a loss. The judge also erred in dividing the class into two subclasses. The legislation at issue in this case is not directed at regulating specific exchanges, but rather at regulating issuers that are subject to British Columbia law. The judge did not err in finding the pleading of civil conspiracy to be adequate. While the argument of multiple conspiracies may add complexity to the proceeding, it does not cast any doubt on the chambers judge's conclusion that a class proceeding is the preferable procedure.

Reasons for Judgment of the Honourable Mr. Justice Groberman:

[1] In this class proceeding, the plaintiffs allege the defendants participated in a conspiracy to defraud capital markets using deceptive private placements. The plaintiffs say that they, as investors not connected to the conspiracy who purchased shares after the companies made the private placements, suffered financial losses due to the fall in share prices that was a consequence of the scheme. They also say

they are entitled to recover for secondary market misrepresentation, a statutory cause of action established by s. 140.3 of the *Securities Act*, R.S.B.C. 1996, c. 418.

[2] The scheme alleged in the further amended notice of civil claim is complex. Ten publicly listed companies (the “Issuers”) issued private placements and reported that the placements were fully subscribed. While the placements were fully subscribed, the companies did not disclose that the subscribers (or associated individuals) received substantial kickbacks on their investments in the form of payments on sham consulting contracts. The plaintiffs describe those who received such payments as “Purported Consultants”.

[3] The chambers judge certified the class proceeding but with two limitations. First, she excluded from the class those investors who sold their shares prior to November 26, 2018, the date on which the B.C. Securities Commission announced it was investigating the private placements.

[4] Second, she divided the plaintiff class into two subclasses: those who purchased their shares through a Canadian stock exchange, and those who purchased their shares through a non-Canadian exchange. She did so after holding that only those who purchased shares through a Canadian exchange could benefit from the statutory cause of action set out in the *Securities Act*.

Overview of the Issues

[5] The appellants appeal from the exclusion of early sellers from the class and from the division of the class into subclasses. They contend that the early sellers have claims that belong in the class proceeding, and that the statutory cause of action applies equally to those who purchased shares through a non-Canadian stock exchange.

[6] The three respondents who have appeared on this appeal are persons who are alleged to have participated in the conspiracy as Purported Consultants. They say the certification judge failed to properly analyse the adequacy of the pleadings of conspiracy. In particular, they say that she erred in construing the further amended

notice of civil claim as alleging a single conspiracy involving all of the defendants. In their view, the claim must be construed as alleging several separate agreements. They seek guidance from this Court on the issue and ask that the matter be returned to the trial court to reconsider whether a class proceeding is the preferable mode for the resolution of the claims. They also seek an order that the court below reconsider the statement of common issues in light of the argument of multiple conspiracies.

[7] For reasons that follow, I would allow the appeal in respect of the early sellers. In my view, the chambers judge misapprehended the law in excluding them from the class.

[8] I would also allow the appeal in respect of the division of the plaintiff class into two subclasses. The chambers judge erred in finding that the statutory cause of action only applies to shares purchased through a Canadian stock exchange. The legislation at issue in this case is directed at companies subject to the *Securities Act* and not to specific avenues for marketing shares.

[9] I would dismiss the cross appeal. The pleadings are, at least at this juncture, adequate to disclose a cause of action for conspiracy. While it is conceivable that, after hearing evidence at trial, the court will find that the scheme was made up of several distinct conspiracies rather than a single overarching agreement, there is no reason to anticipate that the court will be unable to deal with such a finding. Further, the possibility of a finding of multiple conspiracies would not affect the judge's conclusion that a class proceeding is the preferable procedure.

[10] I recognize that the multiple conspiracies issue may result in procedural challenges for the trial court. In managing the case, the judge may find it necessary to amend the statement of common issues and to make procedural rulings to deal with emergent problems. The trial court has the power to make appropriate orders, however, and the possibility of complications does not demonstrate the class proceeding is inappropriate. The certification order made by the trial judge has not been shown to be inappropriate.

The Scheme

[11] The further amended notice of civil claim was filed in the Supreme Court on February 23, 2023. It is a detailed document describing a complex scheme. For the purposes of this appeal, however, it is not necessary to examine the scheme in minute detail, nor is it necessary to precisely delineate the role of each individual defendant. It is sufficient to describe the general outline of the scheme, and the fundamental roles of the different types of defendants.

[12] The plaintiffs allege four individuals — Anthony Jackson, Justin Edgar Liu, Cameron Robert Paddock, and Ali (also referred to as “Aly”) Babu Mawji conceived the scheme in January 2018. Under the scheme, the ten Issuers issued shares by way of private placements between February 2018 and the fall of that year. The Issuers, and the dates of their first private placements are as follows:

a) Kootenay Zinc Corp. (later part of Peakbirch Logic Inc.) — January 30, 2018

b) Affinor Growers Inc. — March 5, 2018

c) PreveCeutical Medical Inc. — April 9, 2018

d) Green 2 Blue Energy Corp. (subsequently known as G2 Technologies Corp. and G2 Energy Corp.) — April 12, 2018

e) Beleave Inc. — April 24, 2018

f) Marapharm Ventures Inc. (subsequently known Liht Cannabis Corp., as Citation Growth Corp. and as Fiore Cannabis Ltd.) — May 17, 2018

g) Cryptoblock Technologies Corp. (subsequently known as Global Elsimate Capital Corp., Extreme Vehicle Battery Technologies Corp. and Cryptoblox Technologies Inc.) — May 18, 2018

h) BLOK Technologies Inc. — June 1, 2018

i) Speakeasy Cannabis Club Ltd. — July 24, 2018

j) New Point Exploration Corp. (subsequently known as KOPR Point Ventures Inc., as Bam Bam Resources Ltd. and as Majuba Hill Copper Corp.) — July 25, 2018.

[13] Beleave Inc. and Marapharm Ventures Inc. also engaged in second private placements prior to November 2018.

[14] Several Purported Consultants subscribed for the private placement shares. In exchange for doing so, they (or companies associated with them) were given substantial lump-sum payments as “consulting fees”, although they did not, in fact, provide any consulting services and were not expected to do so.

[15] The consulting fees represented a significant portion of the amount paid for the shares. The fees were not disclosed to the investing public. They were, in effect, a kickback. The result is that the net amount of capital raised by the private placements was far less than was announced by the companies, and the net amount paid by the subscribers was substantially less than the disclosed share purchase price.

[16] The plaintiffs assert that most of the private placement subscribers sold their shares within a short time of acquiring them. Indeed, some short sold shares, effectively disposing of them before they were acquired. The shares were sold for prices that were lower than the disclosed issuing price, but greater than the net amount paid by the subscribers. The subscribers profited in the result, but the net amount of capital raised by the companies was much less than announced, and the market prices for the shares fell.

[17] The plaintiffs, who were unaware of the scheme when they purchased shares, say they overpaid for their shares and suffered financial losses when they disposed of them. They characterize the scheme as a conspiracy to defraud capital markets.

[18] Suspicions concerning the scheme became public on November 26, 2018, when the B.C. Securities Commission announced that it was investigating, and made certain orders.

[19] The plaintiffs' claim is founded on the following causes of action:

- unlawful means conspiracy;
- fraudulent (or, in the alternative, negligent) misrepresentation; and
- secondary market misrepresentation under the *Securities Act*.

[20] The defendants are persons alleged to have concocted the scheme, Issuers, Purported Consultants, and people who directed or worked for those parties. The action has been settled and discontinued against several persons who were originally defendants. It should be noted that most of the defendants have chosen not to participate in this appeal. Only three defendants (all of whom are Purported Consultants) have attended on this appeal.

[21] On the application for certification, the judge found each of the alleged causes of action to be reasonably set out in the further amended notice of civil claim and was not bound to fail. She also held that the statutory requirements for a class proceeding were met, including the requirement that a class proceeding was the preferable procedure for resolving the claims.

The Appeal

The Early Sellers

[22] The judge held that investors who sold their shares prior to the B.C. Securities Commission's announcement that it was investigating should be excluded from the plaintiff class. In coming to that conclusion, she relied primarily on the judgment of this Court in *Pearson v. Boliden Ltd.*, 2002 BCCA 624.

[23] *Pearson* was a class proceeding brought against a company for its failure to provide full and accurate disclosure in a prospectus. The company described the

mining operations of a Spanish subsidiary but failed to disclose emerging problems with one of the subsidiary's tailings dams.

[24] The prospectus was issued in June 1997. The plaintiffs purchased their shares shortly after the prospectus was issued. In April 1998, the tailings dam collapsed causing serious environmental problems and financial losses for the company. A class proceeding was commenced against the company based on its inadequate prospectus.

[25] One of the questions before the Court in *Pearson* was whether shareholders who disposed of their shares prior to the collapse of the tailings dam should be part of the plaintiff class. The defendant argued that any loss suffered by such shareholders could not be attributed to a misrepresentation in the prospectus, because share prices were not affected by the dam's condition until it collapsed.

[26] Justice Newbury, speaking for a unanimous Court, agreed with that proposition, concluding that it could not be said that any "'depreciation' of [the] shares 'resulted from' the misrepresentation" (*Pearson*, at para. 92). Rather, the fall in share prices resulted not from the misrepresentation, but from the failure of the tailings dam. Those who sold prior to the failure did not suffer a loss. While they may have "paid too much for their shares", they were able to recover the overpayment, because they also "sold their shares for 'too much'".

[27] After referring to *Pearson*, the judge in the court below acknowledged that in other cases, early sellers were not excluded from the certified class:

> [140] … "[E]arly sellers" are not universally excluded from securities class actions. For example, in *McKenna v. Gammon Gold Inc.*, 2010 ONSC 1591, rev'd on other grounds 2011 ONSC 3782 (Div. Ct.), Justice Strathy opined that, while it may be appropriate, as a general rule, to exclude "early sellers" from the class, it was not appropriate to exclude them in the case before him because the defendants alleged that there had been partially corrective disclosures during the class period. He noted that in such circumstances, the onus of proving that the "early sellers" could not have suffered a loss should be on the defendants at trial: at para. 122. The Ontario Superior Court of Justice also, for example, decided to keep "early sellers" in the class in *Green* [*Green v. Canadian Imperial Bank of Commerce*, 2012 ONSC 3637, rev'd. on other grounds 2014 ONCA 90, aff'd. 2015 SCC 60] at paras. 580–583 and in

> *Dobbie v. Arctic Glacier Income Fund et al*, 2011 ONSC 25 at paras. 203–207, leave to appeal granted, 2012 ONSC 25.

[28] She considered, however, that *Pearson* was controlling:

> [141] Of these cases, I am bound only by *Pearson*. In any event, I do not see the facts in the present case as being complicated—in that there were no alleged partially corrective disclosures during the Class Periods—nor do I see facts pleaded to support a claim that an early seller suffered a loss.

[29] In contrast to the situation in *Pearson*, the allegations in the case before us do support a claim that early sellers suffered a loss. This is not a case where share prices were unaffected by a misrepresentation until the occurrence of a "triggering event". Rather, it is alleged that very shortly after acquiring their shares (and, in some cases, even before acquiring their shares), the Purported Consultants resold them at a significant discount from the purported issue price. The Purported Consultants' shares were free-trading shares, and their sale allegedly had an immediate effect on the market. While the early sellers may not have fully appreciated *why* the value of their shares was falling (given that they did not know about the alleged conspiracy), they nonetheless can show a loss directly attributable to the fraud on capital markets.

[30] The principle for which *Pearson* stands is that a party who has suffered no loss from a misrepresentation cannot properly pursue a claim. Often, early sellers will be in that position, because share prices may remain elevated until the misrepresentation is publicly disclosed. In the case before us, however, that is not the situation. The fall in share prices was attributable (at least in part) to the Purported Consultants dumping their shares on the market at a price that was lower than the nominal issue price. It also may have been attributable, in part, to the fact that the companies raised far less capital in the private placements than they purported to have received. The losses, then, were attributable to the misrepresentation, and not to a "triggering event" analogous to the failure of the tailings dam in *Pearson*.

[31] Counsel for the appellants also notes that individual plaintiffs have deposed that, had they been apprised of the true state of affairs with respect to the private placements, they would not have purchased shares. He argues that, in the circumstances, any loss suffered on the disposition of those shares should be recoverable. Given the apparent relationship between the disposition of shares by the Purported Consultants and market price, it is unnecessary to opine on the strength of this alternative argument.

[32] Equally, as there appears to be evidence that is reasonably capable of establishing both a genuine loss and causation, it is unnecessary to consider whether the specific statutory language of ss. 140.3 and 140.5 of the *Securities Act* render proof of causation unnecessary.

[33] The chambers judge misapprehended the law in treating *Pearson* as establishing a general proposition that early sellers should be excluded from class proceedings and in erroneously finding that early sellers could not possibly demonstrate compensable loss.

The Division of the Class into Subclasses

[34] All of the Issuers were reporting issuers under the *Securities Act*, and, except for Beleave Inc., all had their registered offices in the province. It is not disputed, on this appeal, that there is a real and substantial connection between British Columbia and the facts on which the proceeding is based.

[35] All of the Issuers were listed on a Canadian stock exchange. Almost all were also listed on the Frankfurt stock exchange, as well. Their shares were also available through OTC markets in the United States. As I understand it, it is undisputed that some class members acquired their shares through non-Canadian stock exchanges.

[36] The chambers judge accepted that a global class was appropriate for the common law claims brought against the defendants, including civil conspiracy and fraudulent and negligent misrepresentation. She held, however, that the statutory

cause of action established in s. 140.3 of the *Securities Act* applies only to persons who acquired their shares through a Canadian stock exchange. Accordingly, she divided the plaintiff class into two subclasses: one for those who acquired their shares through a Canadian stock exchange and a second for those who acquired their shares through a non-Canadian exchange. She considered that those who acquired their shares through non-Canadian exchanges did not have rights under s. 140.3 of the *Securities Act*.

[37] Unfortunately, we have not had the benefit of argument from the respondents on this issue. The only respondents who have filed a factum and appeared on this appeal are three Purported Consultants. The statutory cause of action does not apply to them, and they have not addressed it. The respondents who are Issuers have not made representations on the appeal.

[38] We also have only limited reasons from the chambers judge on this issue:

> [133] Defendants challenge the appropriateness of a global class. They submit that in a securities class action, it is inappropriate to certify a class that includes purchasers of shares from exchanges that are outside of Canada. That was the result in the proposed class in the statutory claim brought in *Pearson v. Boliden Ltd.*, 2002 BCCA 624. Madam Justice Newbury explained that the requirements for disclosure in provincial securities legislation did not apply to distributions outside of Canada:
>
> > [70] Outside Purchasers: Similar reasoning applies to exclude those (the "outside purchasers") who bought their shares pursuant to distributions occurring in the Territories of Canada or outside of Canada, where no provincial *Securities Act* has application and where no prospectus (as defined in any of the *Acts*) was or could be required to be circulated. Instead, the laws of those jurisdictions must be looked to establish disclosure and filing requirements and the consequences of non-compliance. As submitted by counsel for Nesbitt Burns, the Acts of the provinces do not attach civil consequences to offering documents prepared in and pursuant to the laws of a foreign state.
> >
> > [Emphasis in original.]
>
> [134] As such, they submit, the statutory provisions relied on have no application to shares that were distributed on the Frankfurt Stock Exchange or through the OTC Markets Group in the United States: see *Kaynes v. BP, PLC*, 2014 ONCA 580 at paras. 47–48, leave to appeal to SCC ref'd, 36127(26 March 2015). I agree.

[39] In *Pearson*, as I have indicated, the issue was the adequacy of the company's prospectus, a document required before a company can market or distribute its shares to the public in British Columbia. It is not at all surprising that this Court found that the legislative intention was that the provisions with respect to a prospectus applied only where the marketing and distribution of shares was occurring on a stock exchange over which the province had legislative authority.

[40] This is consistent with Justice Paul M. Purell's discussion of parallel legislation in Ontario:

> The statutory claims for misrepresentation in the primary market …impose liability on an issuer for a misrepresentation in a prospectus … that is tied to the distribution of the particular prospectus …. [These statutory claims have] a duration and place of trading requirement.
>
> Paul M. Perell, "Misrepresentation Claims against Issuers in the Primary and Secondary Market for Securities", published as Part G in Todd L. Archibald, ed., *Annual Review of Civil Litigation 2019,* (Toronto: Thomson Carswell, 2019) ["Perell"], at §III.1.

[41] The secondary market misrepresentation cause of action established by s. 140.3 of the *Securities Act* (a copy of which is an appendix to this judgment) is directed not to the distribution of shares but to the duties of issuers when they release information. In contrast to the primary market legislation at issue in *Pearson*, s. 140.3 is not tied to a specific stock exchange. This secondary market misrepresentation provision deals with the release of a "document", a term that is defined in s. 140.1 to include all written communications, "the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer". It is not specifically directed at the requirements for a prospectus or tied to the initial marketing of shares.

[42] Justice Perell, dealing with parallel legislation in Ontario, recognized this crucial difference between the statutory causes of action for primary market misrepresentation and those for secondary market misrepresentation:

> In contrast to the causes of action for the primary market, the statutory claim in the secondary market … does not have a place of trading requirement and rather imposes liability on the responsible issuer, who will be either (a) a

> reporting issuer; or (b) an issuer that has a real and substantial connection with Ontario.
>
> Perell, at §IV.2

[43] The same can be said of the British Columbia legislation. Unlike the provision at issue in *Pearson*, there does not appear to be any reason to restrict s. 140.3 to communications attached to specific exchanges. The text of the provision is broad and does not include any language suggesting that it is related only to transactions taking place locally. Rather, it is focussed on written statements that those following a company might be expected to rely on.

[44] The text of a statutory provision is "the anchor of the interpretive exercise" (*Quebec (Commission des droits de la personne et des droits de la jeunesse) v. Directrice de la protection de la jeunesse du CISSS A*, 2024 SCC 43, at para. 24). Here, that anchor does not point to the sort of restricted application that the chambers judge accepted. Rather, the text, context, and purpose all point to the legislation being applicable to all consequential written communications by Issuers with a real and substantial connection to British Columbia.

[45] I note, as well, that legislation similar to s. 140.3 of the *Securities Act* has generally been found to create a statutory cause of action for a shareholder regardless of whether the shareholder acquired their shares through a stock exchange in the jurisdiction.

[46] The chambers judge erred in characterizing *Kaynes v. BP, PLC*, 2014 ONCA 580, as a case supporting the contrary proposition. In *Kaynes*, Ontario shareholders who had acquired their shares through an exchange in the State of New York brought an action in Ontario based on a provision in Ontario legislation analogous to s. 140.3 of the B.C. *Securities Act*. The Ontario courts did not doubt that they had jurisdiction to hear the case but considered the courts of the United States to be the more appropriate forum. The Ontario Court of Appeal determined that Ontario courts had jurisdiction over the action but directed that the matter should proceed, instead, before an American court on the basis of forum preferability.

[47] The subsequent history of the *Kaynes* litigation is complicated. The District Court for the Southern District of Texas considered the statutory claim for misrepresentation under the Ontario *Securities Act*, but dismissed the claim for several reasons, including that it had been commenced after the expiry of the limitation period. The case returned to the courts of Ontario (2016 ONCA 601). Ultimately, those courts also concluded that the statutory claim was time-barred (see *Kaynes v. BP p.l.c.*, 2021 ONCA 36).

[48] Other cases under the Ontario *Securities Act* also recognize that the statutory cause of action for secondary market misrepresentation is not limited by the location of the exchange through which a shareholder acquired their shares: *Longair v. Akumin Inc.*, 2024 ONSC 3675 (see, in particular, para. 159, as well as the cases cited at para. 163).

[49] In my view, the statutory cause of action under s. 140.3 of the B.C. *Securities Act* is not restricted to investors who acquire shares in B.C. companies through Canadian stock exchanges. Accordingly, the judge's decision to create two subclasses of plaintiffs was not justifiable.

Conclusions on the Appeal

[50] I would allow the appeal by including the early sellers in the class. In terms of the formal order in the Court below, this will be accomplished by:

a) replacing the semicolon and the word "and" at the end of subparagraph "d" of para. 3 of the formal order with a period; and

b) eliminating subparagraph "e."

[51] I would also eliminate the division of the class into two subclasses by removing para. 4 of the order in the court below.

[52] Some consequential changes are necessary, as well, in paras. 5, 7(ii), and 9 of the order in the court below. I would leave it to counsel to work out appropriate wording for the formal order. I am not aware of any consequential changes that

might be needed to the schedules to the order, but, again, counsel should thoroughly review them.

The Cross Appeal

[53] The cross appeal in this matter is concerned primarily with the question of whether the further amended notice of civil claim should be interpreted as alleging a single conspiracy or rather several separate conspiracies that have some similarities to one another. The challenges that arise in trying to analyse whether a set of facts discloses a single conspiracy or more than one conspiracy is typically referred to as the "multiple conspiracies problem".

The "Multiple Conspiracies Problem": *R. v. Cotroni*

[54] The multiple conspiracies problem arises most frequently in criminal prosecutions. The essence of a criminal conspiracy is an agreement among the participants to commit a crime. Criminal procedure requires that each count in an indictment can charge only a single offence. If several accused are the subject of a conspiracy count, the court must identify, with precision, the conspiracy that is charged. Only those who participated in that specific conspiracy may be convicted.

[55] The problem is well illustrated by the leading Canadian case dealing with the multiple conspiracies problem: *R. v. Cotroni; Papalia v. The Queen*, [1979] 2 S.C.R. 256. In that case, four individuals — Swartz, Papalia, Cotroni and Violi were jointly charged with conspiracy to possess proceeds of crime. The proceeds were in the amount of $300,000 and were obtained through extortion. The evidence showed that the four men all attempted to possess the funds, and they were convicted at trial.

[56] The detailed facts, however, showed that there was no agreement encompassing all four individuals. Swartz and Papalia were involved in organized crime in southwestern Ontario, while Cotroni and Violi were part of a separate crime group operating in Montreal. Swartz and Papalia successfully extorted $300,000 from victims in Toronto by implying that they had been sent by mafia members in Montreal who lost money in a stock fraud. In fact, Swartz and Papalia were acting on

their own, and not as agents for the Montreal crime organization. When word of the extortion reached Cotroni and Violi, they threatened Swartz and Papalia with death unless they delivered the $300,000 to them.

[57] There was no agreement among the four men, and they were not engaged in a common enterprise. While all four were guilty of conspiracy to possess money obtained by crime, there were two conspiracies rather than one. Far from being a joint enterprise, the two conspiracies were at odds with one another.

[58] The Ontario Court of Appeal affirmed the convictions of Swartz and Papalia and overturned the convictions of Cotroni and Violi (*R. v. Swartz* (1977), 37 C.C.C. (2d) 409) on the basis that the conspiracy charged in the indictment extended only to the efforts of Swartz and Papalia, and not to the separate conspiracy engaged in by Cotroni and Violi. Papalia appealed unsuccessfully to the Supreme Court of Canada (Swartz did not join in the appeal). The Crown appealed from the acquittals of Cotroni and Violi, but Violi was murdered before the appeal was heard. The Supreme Court of Canada dismissed both Papalia's appeal and the Crown appeal against Cotroni.

[59] In the case before us, the fundamental contention of the appellants by cross appeal is that the amended notice of civil claim discloses not a single conspiracy, but rather twelve separate ones — one for each of the private placements.

The Multiple Conspiracies Problem in a Civil Context

[60] The principles that apply in the law of civil conspiracy resemble, but are not identical, to those that apply in the law of criminal conspiracy. A criminal conspiracy, for example, is complete where there is agreement to commit a crime, even if the planned crime is not actually committed. In contrast, damages must be suffered before a cause of action in civil conspiracy is made out, so the tort is not completely analogous to an inchoate crime (*Bank of Montreal v. Tortorai*, 2010 BCCA 139, at paras. 43–44); *H.M.B. Holdings Limited. v. Replay Resorts Inc.*, 2021 BCCA 142).

[61] There are also significant procedural differences between criminal and civil cases. While a count in an indictment can only charge a single crime, there is no principle requiring a civil claim to relate to a single tort and no principle precluding more than one conspiracy from being pursued in a civil action.

[62] If, for example, the victims of the extortion in *Cotroni* had brought an action (perhaps in restitution) against all four individuals, no principle of law would have precluded findings against all of them, even though Swartz and Papalia were involved in a conspiracy that was different from the one Cotroni and Violi perpetrated.

[63] The multiple conspiracies problem is less troublesome in civil cases than in criminal ones for another reason, as well. Jury instructions in criminal conspiracy cases can be extremely complex and are particularly daunting when a jury must be asked to determine whether criminal enterprises constitute one or several conspiracies. A jury's "decision tree" may be very complex. While this problem can occur, as well, in a civil case, it is rare. Civil juries are much less common than are criminal juries, and judges in civil cases can determine that a case is unsuitable for a jury trial. Such an option is not available in a criminal trial.

[64] This does not mean the multiple conspiracies problem has no implications for civil conspiracy claims. Because those who perpetrate a civil conspiracy may be jointly and severally liable for all damages resulting from the conspiracy, it can be important to identify the bounds of each conspiracy with precision. It is also the case that evidentiary rulings (particularly in respect of the co-conspirators exception to the hearsay rule) may depend on defining the boundaries of a conspiracy.

Adequacy of Pleadings

[65] In the case before us, the appellants by cross appeal contend that the allegations in the further amended notice of civil claim are insufficient to allege a single conspiracy. They say the claim does not concentrate on a common agreement or a dominant overall plan. In the result, they characterize the claim as one alleging twelve separate conspiracies, each one concerned with a single private

placement. While the allegations in respect of each are similar, the similarities do not suffice to transform the situation into one involving a single conspiracy.

[66] In particular, the appellants by cross appeal say that the claim does not adequately describe any common agreement or dominant overall plan. They take issue with particular statements made by the chambers judge in her reasons:

> [33] [The] allegations assert an overarching conspiracy across the private placements, at least in respect of the four defendants who are alleged to have conceived of the scheme and arranged for its implementation in the various private placements.
>
> [34] The fact that the scheme ultimately involved 12 different private placements, with some involving different participants, does not change the nature of the alleged overarching conspiracy into 12 separate conspiracies. As alleged, the scheme expanded as the series of steps were carried out over and over again in the various private placements, sometimes picking up and sometimes leaving participants as it rolled from Issuer to Issuer. Despite these changes in participants, the plaintiffs claim the predominant purpose of the scheme, as described above, remained the same throughout its implementation across Issuers.
>
> [35] The Purported Consultants and Issuers are linked in the facts as pleaded through their concerted action to carry out the private placement in which they agreed to participate in accordance with the terms of the scheme.
>
> [36] Despite the position of defendants to the contrary, it is not necessary for the plaintiffs to allege and prove that all of the participants knew each other or were aware of all of the details as to how the conspiracy was carried out with other Issuers or were involved in the scheme with all of the Issuers. It is sufficient that each participant was aware of the general nature of the common design and adhered to it: *R. v. Barra*, 2021 ONCA 568 at paras. 179–181.
>
> [37] With regard to the consequences of such participation, it is a settled principle that "[all] participants in a conspiracy are jointly liable for the damages resulting from the conspiracy, regardless of the degree of their participation or the date on which they joined the conspiracy": *Mancinelli v. Royal Bank of Canada*, 2020 ONSC 1646 at para. 141. Whether this principle is somehow circumscribed by a defendant's participation in one or more but not all private placements carried out in the scheme is not an issue that can be resolved on the pleadings, as it cannot be said that it is plain and obvious that the principle expressed in *Mancinelli* does not apply to the conspiracy as it is alleged in the [further amended notice of civil claim].

[67] In my opinion, the judge made no error in holding that the further amended notice of civil claim contains sufficient detail to establish a claim that all the defendants were part of a single overarching conspiracy. It alleges the conspiracy

scheme was created in January 2017, by four individuals, and that the other defendants joined and participated in the ongoing scheme over the succeeding months.

[68] I accept that much of the concentration of the claim is on the overt acts evidencing conspiracy — the subscription for shares in the private placements and the entry into sham consulting contracts. Those overt acts relate to specific private placements and are as consistent with separate conspiracies as they are with a single conspiracy.

[69] The question of whether there is an overarching conspiracy encompassing all the participants is one that will have to be determined on the detailed evidence in this case. The contention of the appellants by cross appeal that it should be determined at the pleadings stage is, in my view, without merit. It is enough, at this stage, to say that the pleadings allege a single conspiracy, and that the allegation that there is one enterprise is not bound to fail.

[70] It is important to appreciate that the efficacy of the proceedings will not be destroyed if the evidence is ultimately found to establish not a single conspiracy, but several. The judge will be in a position to give judgment and to assess damages even if unconvinced, in the final analysis, that all defendants acted in concert in a single enterprise.

[71] I am not persuaded that the pleadings in this case are inadequate to allow it to proceed as a class proceeding.

[72] The appellants by cross appeal also cite an article that I wrote some 45 years ago for the proposition that it is inappropriate for minor participants in a conspiracy to face trial alongside those who formed the core of the conspiracy:

> A typical wheel conspiracy consists of a central figure (or group of figures) who is involved in similar agreements with each of several individuals. The central figure or figures may be referred to as the “hub” of the wheel, and the various agreements may be seen as “spokes” emanating from the hub. The analogy to a wheel may be somewhat deceptive, in that there is no

> connection between the spokes except at the hub. Therefore, the wheel is rimless.
>
> Viewed from the hub, the wheel conspiracy is a single scheme. However, from the point of view of each spoke, the enterprise is made up of several distinct (although similar) schemes, albeit schemes with one party in common
>
> …
>
> The reason that a wheel conspiracy cannot generally be considered to be a single conspiracy is that the enterprise is not a single agreement. To bring each spoke to trial on the entire enterprise would be manifestly unfair.
>
> …
>
> The spoke conspirator is not culpable in the entire enterprise and therefore should not be faced with either a trial on, or a conviction for, the entire scheme. From the point of view of the spoke, then, there should not be a single count relating to the entire scheme. If such a count were charged, the accused would suffer substantial prejudice if the multiple conspiracies defence were not open to him. In the case of the spoke, then, the defence of multiple conspiracies is not simply a technicality; it is vital for ensuring the fair trial of an alleged conspirator.
>
> [Emphasis added in appellants by cross appeal factum.]
>
> Harvey Groberman, "The Multiple Conspiracies Problem in Canada" (1982), 40 *U.T. Fac. L. Rev.* 1 at 18, 19 and 20.

[73] The appellants say the conspiracy in issue in the current case is a rimless wheel conspiracy and contend the judge ought not to have allowed the Purported Consultants to be included in an action alleging a grand conspiracy.

[74] It must be recognized that the cited article was concerned with criminal procedures, and particularly with criminal jury trials. The comments about the supposed unfairness in being faced with a trial on the entire scheme must be assessed in that context. It should also be recognized that the paragraph quoted has not been wholly adopted in the law.

[75] E.G. Ewaschuk, K.C. refers to my article in his book *Criminal Pleadings & Practice in Canada* (3rd Edition) [Current to Release No. 9, December 2025] at §19:99:

> A conspiracy may involve a "*general* scheme by 'core participants' in a criminal enterprise to commit 'numerous crimes'" on an *ongoing* basis. Various metaphors have been devised to describe the *nature* of these conspiracies, *i.e.*, the straight-line conspiracy; the wheel conspiracy, rimmed or unrimmed; the phased conspiracy; the chain conspiracy, forked *or*

> unforked; *and* the pyramid conspiracy. In his article, Groberman propounds the thesis that "*only* the core participants" common to all agreements should be charged with a "general conspiracy". The "secondary participants" should therefore be charged "*only* in separate counts" with others common to the secondary agreements. The law at present does *not* support Mr. Groberman's thesis. As long as a party has knowledge of the general nature of the overall scheme, intends to adhere to it, *and agrees* to participate in it even in a secondary role, the party thereby "joins the *general* conspiracy".
>
> [Footnotes omitted.]

[76] I agree with Mr. Ewaschuk's assessment of the law as it has developed. There is no bar, even in a criminal jury trial, to charging the "spoke" participants in a rimless wheel conspiracy in the same count as the "hub participants".

[77] I do not say the appellants by cross appeal are wrong in suggesting that the chambers judge was entitled to consider the overall fairness of including all participants in a single action. The judge, however, did take fairness into account:

> [20] The certification test places the court in the role of a gatekeeper. The court must screen out claims that are not appropriate for resolution as class proceedings, recognizing that the goal of the [*Class Proceedings Act*] is to be fair to both plaintiffs and defendants and that "it is imperative to have a scrupulous and effective screening process, so that the court does not sacrifice the ultimate goal of a just determination between the parties on the altar of expediency": *Thorburn v. British Columbia (Public Safety and Attorney General*), 2012 BCSC 1585 at para. 117, aff'd 2013 BCCA 480. See also *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 31 and *Pro-Sys* [*Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57] at para. 103.
>
> [21] Class proceedings can impose unnecessary burdens on the parties and the courts, and "the process may be seen as an extortion through the exercise of the power of strength in numbers": *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2010 BCSC 922 at para. 18, rev'd on other grounds 2011 BCCA 187, rev'd in part 2013 SCC 58.

[78] I am not persuaded that the judge made any error in determining that the certification of the class proceeding was consistent with fair treatment of the lesser participants in the conspiracy.

[79] Although the class proceeding has been certified on the basis that it alleges a single overarching conspiracy, I would note that the appellants by cross appeal are

not correct in their assertion that a finding of multiple conspiracies would leave them without liability. While a defendant can only be liable for damages associated with a conspiracy that they were part of, nothing would preclude a judge at trial from finding different defendants were involved only in separate conspiracies (see *I.C.B.C. v. Sun*, 2003 BCSC 1059, at para. 32).

The Common Issues

[80] On the theory that the allegations in this case should be interpreted as alleging twelve separate conspiracies, the appellants by cross appeal contend that there are no true “common issues”, merely issues with some similarity that arise in respect of the different conspiracies. They say such issues ought not to be certified as common issues.

[81] They cite *MacKinnon v. National Money Mart Company*, 2005 BCSC 271, where the court concluded that issues that had a superficial appearance of commonality were, in fact, not common issues at all:

> [27] The common issues have an appearance of commonality because of the generality with which they are stated. If the common issue is restated in the manner in which it must be addressed, it becomes apparent that it is not a common issue. For example, common issue 1 would be (for only one fee of one lender in one type of loan): does the documentation fee charged by Instaloans in its inheritance loan standard form agreement constitute interest?
>
> [28] While each claimant will require that each of the questions is answered, the answer to each for one claimant will not answer the questions for the next claimant, or for the same claimant against a different defendant.

[82] Similar conclusions were reached in *Kett v. Mitsubishi Materials Corporation*, 2020 BCSC 1879.

[83] In contrast, the chambers judge in this case found the issues set out in the statement of common issues were legitimately common:

> [159] … [T]he evidentiary record establishes some basis in fact that overlapping groups of the same Purported Consultants employed the same actions at each private placement. Most of the Purported Consultants participated in multiple private placements and, for most of those private placements, there is some evidence that the Purported Consultants, together

> with each Issuer, followed the same pattern of conduct. This "striking similarity" in the participants and the steps taken at each private placement provides a strong basis in fact that the proposed issues on conspiracy meet the requirements for certification as common issues, because trying the conspiracy issues on a common basis, across the Issuers, will avoid substantial duplication of fact-finding and legal analysis. If the present action were, as some of the defendants appear to be advocating, divided into separate actions for each Issuer, the court in each of those actions would have to ascertain whether many of the same Purported Consultants engaged in the same alleged conduct and determine, in each proceeding, whether that conduct constituted a conspiracy at law. Each of those separate proceedings would be considering essentially the same body of evidence, because evidence of how the same Purported Consultants engaged in the same alleged conduct at other private placements would be highly relevant to each proceeding.

[84] In my view, the judge gave cogent reasons for finding common issues and for determining that a class proceeding was the preferable procedure for resolving them.

Conclusion on the Cross Appeal

[85] In my view, the cross appeal does not disclose any errors in the judge's approach. I would dismiss the cross appeal.

Ongoing Case Management

[86] I would emphasize the judge's order was made on certification, and that, as with any piece of complex litigation, unexpected issues may arise as the case proceeds toward trial. The case may develop in such a way that the judge's finding that there are common issues, or her finding that the proceeding is fair to all participants, needs to be revisited. The Supreme Court has plenary case management powers. It can, where necessary, sever parties or issues, or amend the common issues. The chambers judge was conscious of the fact that the certification stage is an early stage of a class proceeding, and that it is inappropriate (and, indeed, impossible) to resolve most substantive issues at that stage.

Conclusion

[87] I would allow the appeal and dismiss the cross appeal.

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Justice Donegan"

Appendix

Securities Act, R.S.B.C. 1996, c. 418

Liability for secondary market disclosure

140.3 (1) Where a responsible issuer or a person with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against

(a) the responsible issuer,

(b) each director of the responsible issuer at the time the document was released,

(c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document,

(d) each influential person, and each director and officer of an influential person, who knowingly influenced

(i) the responsible issuer or any person acting on behalf of the responsible issuer to release the document, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document, and

(e) each expert where

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

(2) If a person with actual, implied or apparent authority to speak on behalf of a responsible issuer makes a public oral statement that relates to the business or affairs of the responsible issuer and that contains a misrepresentation, a person who acquires or disposes of the issuer's security during the period between the time when the public oral statement was made and the time when the misrepresentation contained in the public oral statement was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against

(a) the responsible issuer,

(b) the person who made the public oral statement,

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the making of the public oral statement,

(d) each influential person, and each director and officer of the influential person, who knowingly influenced

(i) the person who made the public oral statement to make the public oral statement, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the making of the public oral statement, and

(e) each expert where

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the person making the public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the public oral statement.

(3) If an influential person or a person with actual, implied or apparent authority to act or speak on behalf of the influential person releases a document or makes a public oral statement that relates to a responsible issuer and that contains a misrepresentation, a person who acquires or disposes of the issuer's security during the period between the time when the document was released or the public oral statement was made and the time when the misrepresentation contained in the document or public oral statement was publicly corrected has, without regard to whether the person relied on the misrepresentation, a right of action for damages against

(a) the responsible issuer if a director or officer of the responsible issuer, or where the responsible issuer is an investment fund, the investment fund manager, authorized, permitted or acquiesced in the release of the document or the making of the public oral statement,

(b) the person who made the public oral statement,

(c) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement,

(d) the influential person,

(e) each director and officer of the influential person who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement, and

(f) each expert where

(i) the misrepresentation is also contained in a report, statement or opinion made by the expert,

(ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and

(iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

(4) Where a responsible issuer fails to make a timely disclosure, a person who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act and the subsequent disclosure of the material change has, without regard to whether the person relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against

(a) the responsible issuer,

(b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure, and

(c) each influential person, and each director and officer of an influential person, who knowingly influenced

(i) the responsible issuer or any person acting on behalf of the responsible issuer in the failure to make timely disclosure, or

(ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

(5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.

(6) In an action under this section,

(a) multiple misrepresentations having common subject matter or content may, in the discretion of the court, be treated as a single misrepresentation, and

(b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.

(7) In an action under subsection (2) or (3), if the person who made the public oral statement had apparent authority, but not implied or actual authority, to speak on behalf of the issuer, no other person is liable with respect to any of the responsible issuer's

securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation.