

Court File No. CV-18-593156-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL  
CORPORATION

Plaintiffs

and

DOW JONES AND COMPANY, ROB COPELAND, JACQUIE MCNISH and  
JEFFREY MCFARLANE

Defendants

Court File No. CV-17-587463-00CL

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. c.o.b.  
ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP,  
ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER  
FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ  
KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN  
ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY  
MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL,  
GEORGE WESLEY VOORHEIS, BRUCE LIVESEY AND JOHN DOES #4-10

Defendants  
(Respondents)

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**PLAINTIFFS' SUBMISSIONS REGARDING ISSUES RAISED BY JUSTICE  
MCEWEN'S DECEMBER 23, 2020 ENDORSEMENT  
(NATHAN ANDERSON'S JOURNALIST-SOURCE PRIVILEGE CLAIM)**

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Date: January 20, 2021

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## A. INTRODUCTION

1. The Case Management Endorsement issued by his Honour on December 23, 2020 requested Submissions regarding two issues:

- (i) could the Responding Defendants (Nathan Anderson/Clarity Spring Inc.) be, in law, considered publishers? This question was clarified during the January 4<sup>th</sup> Case Management Conference – could the Responding Defendants be considered “journalists”?
- (ii) what literature exists concerning the role of short-sellers/whistleblowers on the capital markets and how the literature treats persons such as the Responding Defendants?

## B. AT LAW, CAN THE RESPONDING DEFENDANTS BE CONSIDERED JOURNALISTS?

2. There is a major difference between persons who can be found to have “published” defamatory words under libel law and persons who are “journalists” seeking to assert a journalist – source privilege.

### (a) The “Publication” Element of a Libel Cause of Action

3. To succeed in an action for libel, the plaintiff must prove on a balance of probabilities that the defamatory words were published, that is, that they were communicated to at least one person other than the plaintiff.<sup>1</sup>

4. To prove the publication element of defamation, a plaintiff must establish that the defendant, by any act, conveyed defamatory meaning to a single third party who received it.<sup>2</sup>

5. A simple reference (like a hyperlink) to defamatory information is not the type of act that can constitute publication. Hyperlinks are essentially references. Referring to the existence

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<sup>1</sup> [Crookes v Newton](#), 2011 SCC 47, per Abella J at para 1. Emphasis added.

<sup>2</sup> [Crookes v Newton](#), 2011 SCC 47, per Abella J at para 16. Emphasis in the original.

and/or location of content by hyperlink or otherwise, without more, is not publication of that content.<sup>3</sup>

6. At libel law, Nathan Anderson (“**Anderson**”) “published” his defamatory whistleblower complaints about the Plaintiffs as soon as he provided those complaints to Reuters News reporters and *Wall Street Journal* reporters. However, the Responding Defendants are not “journalists” who can seek to assert a journalist-source privilege under the *Wigmore* test.

**(b) Who Is a “Journalist” Entitled to Assert a Journalist-Source Privilege?**

7. In *R v National Post*, Justice Binnie addressed the third criterion of the *Wigmore* test and held that in general, the relationship between professional journalists and their secret sources is a relationship that ought to be sedulously fostered. Justice Binnie noted:

[57] The third criterion (that the source-journalist relationship is one that should be sedulously fostered in the public good) introduces some flexibility in the court’s evaluation of different sources and different types of “journalists”. The relationship between the source and a blogger might be weighed differently than in the case of a professional journalist like Mr. McIntosh who is subject to much greater institutional accountability within his or her own news organization.<sup>4</sup>

8. The Supreme Court of Canada intentionally called the libel defence of responsible communication on matters of public interest, the “responsible communication” defence rather than the “responsible journalism” defence, so as to not restrict the availability of the defence to only “journalists”. In *Grant v Torstar Corp*, Chief Justice McLachlin held:

[96] A second preliminary question is what the new defence should be called. In arguments before us, the defence was referred to as the responsible journalism test. This has the value of capturing the essence of the defence in succinct style. However, the traditional media are rapidly being complemented by new ways of communicating on matters of public interest, many of them online, which do not involve journalists. These new disseminators of news and information should, absent good reasons for exclusion, be subject to the same laws as established

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<sup>3</sup> [Crookes v Newton](#), 2011 SCC 47, per Abella J for the majority, at paras 22, 25, 27, 42.

<sup>4</sup> [R v National Post](#), 2010 SCC 16 at para 57.

media outlets. I agree with Lord Hoffman that the new defence is available to anyone who publishes material of public interest in any medium ...

[97] ... For this reason, it is more accurate to refer to the new defence as responsible communication on matters of public interest.<sup>5</sup>

9. The *Canada Evidence Act* was amended in 2017 by the *Journalistic Sources Protection Act*, to protect the confidentiality of journalistic sources and defined a “journalist” as:

A person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person.<sup>6</sup>

10. In *Denis v Côté*, Chief Justice Wagner addressed the drastic difference between the common law scheme for protecting a journalist’s confidential sources (the *Wigmore* test) and the new legislative scheme under the *Journalistic Sources Protection Act*:

[33] The common law scheme included an exceptional privilege against disclosure. Journalists claiming this privilege had to show it applied on a case-by-case basis. There was a presumption in favour of disclosing the identity of a source that applied unless the journalist met the four criteria of the *Wigmore* test. Where the test under s. 39.1 *CEA* is concerned, on the other hand, the journalist’s only burden is to prove that he or she is a “journalist”, and his or her confidential source a “journalistic source”, as defined in s. 39.1 (1) ...<sup>7</sup>

11. As of the date of the publication of *The Wall Street Journal’s* Articles in August 2017, Anderson and ClaritySpring Inc. were not journalists. Anderson’s occupation is not that of a professional journalist subject to institutional controls within a news organization. Anderson is a professional short-seller and whistleblower. Rather than letting the securities regulators investigate the validity of his whistleblower complaints, Anderson shopped those complaints to the media so that his false fraud accusations would be published (to cause the share price of Callidus Capital to plummet, and subsequently profit from his short positions).

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<sup>5</sup> [Grant v Torstar Corp](#), 2009 SCC 61 at paras 96-97. Emphasis added.

<sup>6</sup> *Canada Evidence Act*, RSC, 1985, c C-5, s 39.1(1) *sub verbo* “journalist”, as amended by the *Journalistic Sources Protection Act*, SC 2017, c.22.

<sup>7</sup> [Denis v Côté](#), 2019 SCC 44 at para 33. Emphasis added.

12. The relationship at issue between Anderson and the investors he refuses to identify cannot be characterized as “journalistic”. Accordingly, the identities of those investors must be disclosed.

### **C. LITERATURE CONCERNING THE ROLES OF SHORT-SELLERS / WHISTLEBLOWERS ON THE CAPITAL MARKETS AND HOW THE LITERATURE TREATS PERSONS SUCH AS THE RESPONDING DEFENDANTS**

#### **(a) Short and Distort**

13. The literature draws a distinction between individuals who simply engage in the lawful activity of selling a stock short, and those who engage in unethical and illegal market manipulation known as a “short and distort”.

14. The following documents addressing the roles of short sellers in the capital markets, and raising concerns about the dangers of short and distort campaigns, were attached as exhibits to Jim Riley’s Conspiracy Action affidavit sworn on May 29, 2020:

- Exhibit 3 – The McMillan LLP report titled “An Analysis of the Short Selling Landscape in Canada: A New Path Forward is Needed to Improve Market Efficiency and Reduce Systemic Risk”, published in October 2019. In the report McMillan LLP states, *inter alia*, that “Canada is becoming a haven for those who wish to pursue short campaigns” and suggest that regulators need to review short selling in general;<sup>8</sup>
- Exhibit 4 – An op-ed by Paul Simon titled “Without regulation of short sellers, investors are left making assumptions”, published in *The Globe and Mail* on March 30, 2016. Simon describes the lack of regulations requiring short sellers to disclose their identities and the existence of their short positions, and how this jeopardizes capital markets;<sup>9</sup>
- Exhibit 5 – An article by Rick Wayman titled “The Short and Distort: Stock Manipulation in a Bear Market” published on Investopedia and last updated January 15, 2021. Wayman lists factors to consider when assessing the veracity of short reports;<sup>10</sup>
- Exhibit 6 – An article titled “Revealing stuff: A company’s battle to show it was a victim of abusive short-selling” published in *The Economist* on November 10, 2015. This article

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<sup>8</sup> Online at [McMillan LLP](#), Plaintiffs’ Supplementary Submission Brief (“PSSB”), Tab 1.

<sup>9</sup> Online at [The Globe and Mail](#), PSSB, Tab 2.

<sup>10</sup> Online at [Investopedia](#), PSSB, Tab 3.

describes the dangers of naked short selling and short and distort schemes in the context of the short attack on Overstock (the online retailer);<sup>11</sup>

- Exhibit 7 – An article by Larry Smith titled “Illegal Naked Short Selling Appears to Lie at the Heart of an Extensive Stock Manipulation Scheme” published on the SmithOnStocks blog on June 16, 2015. Smith describes the dangers of naked short selling in detail.<sup>12</sup>

15. Justice Perell in *Harrington Global v IIROC*, held that while short selling is a legitimate activity in the capital markets, the strategy of “short and distort” is illegal:

**There is a strategy of market manipulation known as ‘short and distort’ that uses short selling and naked short selling to manipulate the market.** The strategy is for false or misleading information about a public company to be disseminated and then traders conspire to steadily make offers and to trigger stop loss orders that “walk the stock down”. The stock’s apparent weakness gives legitimacy to the contrived negative analysis of the news of the company’s business in social media and in mainstream media. **Such strategies are illegal,** but they persist in the marketplace, particularly by hedge fund managers.<sup>13</sup>

**(b) Canadian Securities Regulators**

16. The Canadian Securities Administrators (“**CSA**”)<sup>14</sup> published CSA Consultation Paper 25-403 – Activist Short Selling, on December 3, 2020 (the “**CSA Paper**”). The CSA Paper describes the risks posed by short sellers who engage in “short and distort campaigns” to the Canadian securities markets:

Activist short selling campaigns can be understood as occurring on a spectrum and their utility to the market ultimately depends on whether the information being disseminated is material and neither false nor misleading. At one end of the spectrum, there are beneficial campaigns that can contribute to price discovery by producing research and analysis about issuers based on facts. **At the other end of the spectrum, there are campaigns that may involve either intentionally producing false information about the issuer or making misleading or untrue statements for which there is no factual foundation. These are often referred to as “short and distort” campaigns. ...**

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<sup>11</sup> Online at [The Economist](#), PSSB, Tab 4.

<sup>12</sup> Online at [SmithOnStocks](#), PSSB, Tab 5.

<sup>13</sup> [Harrington Global v IIROC](#), 2018 ONSC 7739 at para 14. Emphasis added.

<sup>14</sup> The Canadian Securities Administrators (CSA) is an umbrella organization of Canada’s provincial and territorial securities regulators. Its objective is to improve, coordinate and harmonize regulation of Canadian capital markets.

Exacerbating these concerns is the speed at which information spreads through social media and the constraints on the target of a campaign to respond or disprove allegations before the price of their stock is impacted.<sup>15</sup>

17. The Capital Markets Modernization Task Force was established by the Ontario Government to review and modernize Ontario's capital markets. The Task Force's Consultation Report (July 2020) proposed:

creating a new and specific prohibition on making misleading or untrue statements about public companies to make it easier for the OSC to effectively deter and combat abusive practices intended to affect share prices or influence investor decisions, such as 'short and distort' campaigns.<sup>16</sup>

18. Part 2 of the Task Force's Consultation Report sets out the key issues raised during the CMMT's consultation with stakeholders, and the Task Force's proposals for addressing these issues. Proposal #36 titled "Create a prohibition to effectively deter and prosecute misleading or untrue statements about public companies and attempts to make such statements:

There are cases where a series of unsubstantiated statements are made publicly for financial gain, and misleading or false information is introduced into the market to intentionally or recklessly affect the share price of public companies and influence the investment decisions of investors. Such schemes are sometimes referred to as "short and distort" campaigns that profit from falling share prices ...<sup>17</sup>

19. On October 1, 2020, the Ontario Securities Commission and the Investment Industry Regulatory Organization of Canada jointly published a Press Release and Whistleblower Guidance that encouraged the public to "submit tips on potential abusive trading in securities of Ontario reporting issuers, including abusive short selling."<sup>18</sup> The OSC and IIROC had reason to believe that certain market participants may be engaged in abusive short selling practices.

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<sup>15</sup> Online at [OSC](#), PSSB, Tab 6.

<sup>16</sup> Online at [Ministry of Finance](#), PSSB, Tab 7, p. 37.

<sup>17</sup> Online at [Ministry of Finance](#), PSSB, Tab 7, p. 37.

<sup>18</sup> Online at OSC: [Press Release](#) and [Guidance](#) PSSB, Tab 8.

**(c) Academic Comment about Short and Distort Campaigns**

20. On February 12, 2020, Professor Coffee and Professor Mitts of Columbia University sent a petition to the Securities Exchange Commission requesting “Rulemaking on Short and Distort” that describes negative activists’ danger to the market. A negative activist typically:

opens a large short position, disseminates sometimes aggressive negative opinion about a public company (often stopping just short of factual falsehoods) on Twitter and elsewhere, which induces a panic and run on the stock price; and rapidly closes that position for a profit, prior to the stock price partially or fully rebounding.<sup>19</sup>

In their petition, Professors Coffee and Mitts specifically ask the SEC to “clarify that rapidly closing a short position after publishing (or commissioning) a report, without having specifically disclosed an intent to do so, can constitute fraudulent scalping in violation of [SEC Rules].”<sup>20</sup>

21. On February 13, 2020, Professor Mitts published a working paper titled “Short and Distort” examining pseudonymous attacks on public companies between 2010 and 2017. Mitts identified over \$20.1 billion in mispriced shares that resulted from the attacks.<sup>21</sup>

22. Professor Mitts also published a blog post on December 3, 2019, titled “Long-Run Short Selling” on The Columbia Law School Blue Sky Blog. In this blog post, Professor Mitts proposed “distinguish[ing] between legitimate short selling and manipulative short-and-distort campaigns” based on “the duration of an activist’s short position.”<sup>22</sup>

**(d) Media Reports about Short Sellers**

23. On August 13, 2017, Perrie Weiner, Robert Weber, and Kirby Hsu of law firm DLA Piper published an article on Thompson Reuters’ Westlaw titled “The growing menace of ‘short and

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<sup>19</sup> Online at [SEC](#), PSSB, Tab 9, p. 1.

<sup>20</sup> Online at [SEC](#), PSSB, Tab 9, p. 3.

<sup>21</sup> Online at [SSRN](#), PSSB, Tab 10, p. 1.

<sup>22</sup> Online at [The CLS Blue Sky Blog](#), PSSB, Tab 11.

distort' campaigns".<sup>23</sup> The article explains the ways in which the perpetrator of a short and distort can manipulate the share price of a target company and describes "short and distort" schemes as illegal market manipulation that hurt both investors and the targeted company.

24. On November 30, 2020, Michelle Celarier authored an article published by *Institutional Investor* titled "The Dark Money Secretly Bankrolling Activist Short-Sellers — and the Insiders Trying to Expose It". The article examines the recent trend of activist short-selling that is characterized by the publication and sharing of short research on websites including Seeking Alpha and Twitter, and the hedge funds bankrolling such short sellers. Nathan Anderson is described as "this year's hot new short-seller", and his company Hindenburg is described as "the most prolific short activist this year, launching 21 campaigns".<sup>24</sup> Anderson admits to working with "balance-sheet partners" who are described as providing short-sellers with the financial backing, relationships with prime brokers, and legal support.

25. Adele Ferguson of *The Sydney Morning Herald* published an article on December 7, 2020 headlined "Caught in a bear trap: How 'short and distort' attacks are costing Australian investors billions", which reports:

a new, more aggressive form of short-selling has emerged in recent years that critics say is damaging market integrity by exploiting weaknesses in Australian regulation.

Dubbed the 'short and distort' gang, a group of largely foreign-based research houses issue highly damaging reports, designed to cause maximum damage to the companies they target.<sup>25</sup>

26. *The Wall Street Journal* published an article about Anderson and his shorting activities against Nikola Corp. on September 23, 2020, headlined "How Nikola Stock Got Torched by a

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<sup>23</sup> Online at [DLA Piper](#), PSSB, Tab 12.

<sup>24</sup> Online at [Institutional Investor](#), PSSB, Tab 13.

<sup>25</sup> Online at [The Sydney Morning Herald](#), PSSB, Tab 14.

Short Seller”. Anderson is quoted to say: “I know people can lose their jobs, their careers” and “people will lose money” as a result of his shorting activities. Anderson confirmed on cross-examination that he was accurately quoted in this article.<sup>26</sup>

27. At the same time that Nathan Anderson was shopping his false whistleblower complaints about Callidus Capital to *The Wall Street Journal*, he was also conducting a short campaign against Eros International plc (“**Eros**”). Anderson texted Rob Copeland on July 21, 2017: “Been a bit distracted beating up on \$EROS today”, “Sent out a couple of tweets about their accounting fraud and the thing ripped down 20% and has been nutty all day”.<sup>27</sup> Anderson continued: “Good for brand Nate ultimately,” “Helps keep the lights on in the interim”.<sup>28</sup> The next day Anderson texted Copeland about the effect of his short and distort attack on Eros: “... I crushed that stupid Eros company...”.<sup>29</sup>

28. Anderson provided his whistleblower complaints to the media so he could profit from his short positions in Callidus Capital after his false fraud accusations were published to the world at large. Anderson shorted 6,100 shares of Callidus Capital on the morning of August 9, 2017 (the date of publication of *The Wall Street Journal's* fraud article). Anderson closed his short positions in these shares six-hours later. Included at Tab 17 of the Plaintiffs’ Supplementary Submission Brief is a chart of Anderson’s trading activities which shows that he traded on dates that Rob Copeland tipped him about when he believed the fraud article would be published.

29. Readers of *The Wall Street Journal's* fraud articles did not know that Anderson, a key source, stood to financially gain from a decrease in Callidus Capital’s share-price caused by

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<sup>26</sup> Online at [The Wall Street Journal](#), PSSB, Tab 15.

<sup>27</sup> Anderson-Copeland Chronological Text Message Compendium (“Text Compendium”), PSSB, Tab 16, page 19.

<sup>28</sup> Text Compendium, PSSB, Tab 16, page 20.

<sup>29</sup> Text Compendium, PSSB, Tab 16, page 32.

the fraud article. Professor Coffee and Professor Mitts consider such conduct as manipulative of the capital markets.

30. The foregoing examples of judicial, regulatory, scholarly, and media commentary demonstrate the widespread concern that perpetrators of short and distort campaigns, such as Nathan Anderson and ClaritySpring Inc., pose a serious risk to the integrity of capital markets. Short and distort sellers are not “journalists” and have no claim to a journalist-source privilege.

Date: January 20, 2021



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## **SCHEDULE “A” – AUTHORITIES**

1. *Crookes v Newton*, 2011 SCC 47
2. *R v National Post*, 2010 SCC 16
3. *Grant v Torstar Corp*, 2009 SCC 61
4. *Denis v Côté*, 2019 SCC 44
5. *Harrington Global v IIROC*, 2018 ONSC 7739

## SCHEDULE “B” – STATUTES

*Canada Evidence Act*, RSC, 1985, c C-5, s 39.1(1)

### Definitions

**39.1(1)** The following definitions apply in this section.

***document*** has the same meaning as in section 487.011 of the *Criminal Code*. (*document*)

***journalist*** means a person whose main occupation is to contribute directly, either regularly or occasionally, for consideration, to the collection, writing or production of information for dissemination by the media, or anyone who assists such a person. (*journaliste*)

***journalistic source*** means a source that confidentially transmits information to a journalist on the journalist's undertaking not to divulge the identity of the source, whose anonymity is essential to the relationship between the journalist and the source. (*source journalistique*)

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