

**ONTARIO
SUPERIOR COURT OF JUSTICE
(Divisional Court)**

B E T W E E N :

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs
(Responding Parties)

- 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
(Moving Parties)

**NOTICE OF MOTION
(Motion for Leave to Appeal)**

The Defendants / Moving Parties, Nathan Anderson (“Anderson”) and ClaritySpring Inc. (“ClaritySpring”, and collectively with Anderson, the “Anderson Parties”), will make a motion to a panel of the Divisional Court for leave to appeal the interlocutory decision of Justice T. McEwen (the “Motion Judge”) dated March 2, 2021. The motion will be read at the court house at Osgoode Hall, 130 Queen St. West, Toronto, on a date to be fixed by the Registrar.

PROPOSED METHOD OF HEARING: The motion is to be heard in writing, pursuant to subrules 37.12.1(4) and 62.02(2).

THE MOTION IS FOR:

- (a) An Order granting Anderson and ClaritySpring leave to appeal the decision of Justice McEwen dated March 2, 2021;

- (b) Directions that this motion for leave to appeal be consolidated with and heard by the panel of the Divisional Court hearing pending motions for leave to appeal from a decision of Justice Boswell dated January 11, 2021 (Divisional Court File No. 095/21) and a decision of Justice McEwen dated February 12, 2021 (Divisional Court File No. 157/21);
- (c) In the event leave to appeal is granted, an Order that costs of this motion and the motion below be reserved to the panel hearing the appeal; and
- (d) Such further and other relief as to this Honourable Court may seem just.

THE GROUNDS FOR THE MOTION ARE:

Background and the Motion Below

- (a) In late 2016, the Anderson Parties began investigating the Plaintiffs / Responding Parties, The Catalyst Capital Group Inc. and Callidus Capital Corporation (collectively, the “Catalyst Parties”), and in particular, whether they had engaged in conduct in violation of securities laws. As a result of these investigations, which included review of extensive documentation and conversations with a number of sources, the Anderson Parties formed the view that the Catalyst Parties were engaging in a scheme to artificially inflate the value of their assets. Based on this conclusion, the Anderson Parties prepared two whistleblower submissions, which were submitted to the Ontario Securities Commission (the “OSC”) in May 2017 (the “Whistleblower Submissions”).
- (b) The Anderson Parties provided copies of the Whistleblower Submissions to Rob Copeland, a reporter at the Wall Street Journal (and another defendant in this proceeding). Copeland ultimately wrote an article on the Catalyst Parties, which was published in the Wall Street Journal on or about August 9, 2017.

- (c) The Catalyst Parties subsequently commenced this action in November 2017, making claims in conspiracy and defamation arising out of, *inter alia*, the Anderson Parties' preparation and submission of the Whistleblower Submissions.
- (d) In November 2019, the Anderson Parties, among other defendants, brought a motion seeking to dismiss this action based on s. 137.1 of the *Courts of Justice Act* (the "Anti-SLAPP Motion"). Anderson swore two affidavits in support of the Anderson Parties' position in the Anti-SLAPP Motion.
- (e) Anderson was cross-examined on those affidavits on November 20, 2020. During his cross-examination, Anderson refused to answer questions about the identities of certain individuals with whom he spoke in the preparation of the Whistleblower Submissions, on the basis of a case-by-case confidential source privilege. He did give evidence about the categories of individuals with whom he spoke, and what he said to those individuals during his conversations with them.
- (f) The Catalyst Parties moved to compel the Anderson Parties to answer the questions refused regarding the identities of their sources. The Motion Judge granted the motion and ordered the Anderson Parties to answer the questions refused. In particular, the Motion Judge found that no case-by-case privilege arose because:
 - (i) The source identities were relevant to the Anti-SLAPP Motion, even though they do not figure prominently in the Whistleblower Submissions; and
 - (ii) There was no public interest in fostering the relationship between the Anderson Parties and their sources, or in protecting the identity of the sources, because the Anderson Parties acted in pursuit of

financial profit and had provided copies of the Whistleblower Submissions to the media;

The Applicable Test

- (g) Leave to appeal may be granted (a) where there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is desirable that leave to appeal be granted, or (b) where there is good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that leave to appeal should be granted.
- (h) There is good reason to doubt the correctness of the Motion Judge's decision at issue. The proposed appeal involves matters of such importance that leave to appeal should be granted.

There is Good Reason to Doubt the Correctness of the Decision

- (i) The Motion Judge erred in ordering that the refused questions be answered, in the context of pending motions under s. 137.1 of the *Courts of Justice Act*. In determining that the identities of the Anderson Parties' sources were relevant to the Anti-SLAPP Motion, the Motion Judge took an overly broad view of relevance in the context of a motion under s. 137.1, in the face of a total lack of evidence proffered by the Catalyst Parties. The Motion Judge failed to consider the appropriate scope of relevance in the unique statutory context of an anti-SLAPP motion, and that relevance ought to be construed narrowly in light of the structure and policy objectives of that statutory context. In particular, the Motion Judge did not consider that, in an anti-SLAPP motion, the plaintiff is alleged to have used the litigation process for an abusive or illegitimate purpose, and applying an overly broad scope of relevance effectively rewards and empowers the plaintiff's improper and abusive use of the litigation process.

- (j) The Motion Judge's application of the test for recognizing case-by-case privilege (the "*Wigmore* test") also was flawed.
- (k) The Motion Judge improperly considered the question of whether the relationship between the Anderson Parties and their sources was one that ought to be sedulously fostered in the public good, under the third stage of the *Wigmore* test. The Motion Judge found that the relationship between the Anderson Parties and their sources might have been a relationship that ought to be sedulously fostered in the public good, had Anderson not provided a copy of the Whistleblower Submissions to a media outlet. This went beyond the appropriate scope of inquiry at this stage of the privilege analysis. The only question is whether the general relationship at issue (here, a whistleblower and a source) ought to be sedulously fostered; any conduct by a specific party to that relationship which may impact the desirability of imposing privilege in particular circumstances is properly considered at the "balance of interests" stage of the analysis. Due to the Motion Judge's consideration of inappropriate individual factors at this stage of the analysis, there is reason to doubt the correctness of the Motion Judge's conclusion that the relationship between the Anderson Parties and their sources was not one which ought to be sedulously fostered.
- (l) Further, the Motion Judge applied a definition of "public interest" or "public good" which is inconsistent with existing case law, which tainted his analysis of the third and fourth stages of the *Wigmore* test. The Motion Judge held that, because the Anderson Defendants were motivated by financial gain, their actions could not have been in the public interest or in furtherance of a public good. Public interest and financial motivation (or other forms of self-interest) are not mutually exclusive. The Motion Judge's approach is inconsistent with the extensive case law in which courts have held that assessing "public interest" is a substantive and results-oriented analysis, without regard to motive. As a result, the Motion

Judge failed to acknowledge the inherent public interest and public good in the bringing to light of fraudulent conduct by public companies.

- (m) The Motion Judge also misapplied the fourth stage of the *Wigmore* test. This stage requires a court to balance the privacy interests of the affected party against the fair trial interests of the party seeking disclosure. The Motion Judge failed to give requisite consideration to the privacy interests of the affected parties, i.e. the sources whose identities were being sought. Instead, the Motion Judge focused solely on Anderson's own motivations.

The Proposed Appeal Involves Matters of General Importance

- (n) The proposed appeal involves matters of general importance to the development of the law and the administration of justice in Ontario.
- (o) Issues regarding whether the anti-SLAPP motion statutory regime under s. 137.1 of the *Courts of Justice Act* is being applied in a manner consistent with its structure and purpose are of general importance to the public and to the administration of justice. The purpose of this statutory scheme is to permit the early termination of legal proceedings which are an abuse of process, so that members of the public are not put to great expense defending illegitimate claims and the court system's limited resources are not spent on abusive litigation. The Motion Judge's decision with respect to the scope of disclosure and/or production that is permissible in the context of a pending anti-SLAPP motion has the potential to undermine the intended purpose and effect of such motions.
- (p) Additionally, the Motion Judge's approach to the public interest, and resulting decision not to recognize a case-by-case privilege in respect of whistleblower-source communications, has the potential to undermine the effectiveness of the OSC's whistleblower program. If whistleblowers are unable to rely on a case-by-case confidential source privilege, potential

sources will be far less willing to provide information to whistleblowers, with the result that whistleblowers will be prevented from developing thorough, well-supported submissions to securities regulators. This, in turn, will make it more difficult for securities regulators to verify and extract value from whistleblower submissions, and hinder the OSC in uncovering and prosecuting improper or fraudulent practices in the capital markets – to the ultimate harm of members of the public.

- (q) The OSC has recognized the value of detailed and well-supported whistleblower submissions which are capable of leading to successful prosecutions, and determined that financial incentives promote the public interest in securing such results. The fact that a party may be motivated by potential financial incentives does not counteract the public benefits of their conduct. These issues are of general importance to the public.

Applicable Rules and Statutory Provisions

- (r) Sections 19(1)(b) and 106 of the *Courts of Justice Act*, RSO 1990, c C.43;
- (s) Rules 1.04, 2.01, 37, 61.03, 62.02, and 63.02(1)(b) of the *Rules of Civil Procedure*, RRO 1990, Reg 194; and
- (t) Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Order of Justice McEwen dated March 2, 2021, to be filed;
- (b) The Endorsement of Justice McEwen dated March 2, 2021;
- (c) The record that was before Justice McEwen on the motion below; and

- (d) Such further and other evidence as counsel may advise and this Honourable Court may permit.

March 8, 2021

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THE CATALYST CAPITAL GROUP
INC., et al. and
Plaintiffs

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Court File No.:

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