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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST 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 LIVESY and JOHN DOES #4-10

Defendants

FACTUM OF DARRYL LEVITT
(Motion Pursuant to s. 137.1 of the *Courts of Justice Act*)

Date: May 5, 2021

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PART I - OVERVIEW

1. The Catalyst Group Inc. and Callidus Capital Corporation (the "Catalyst Parties") have sued Darryl Levitt ("Levitt"), and others, for discussing the Catalyst Parties' illegal business practices, and reporting those practices to the OSC, SEC, Toronto Police Services and RCMP.

2. In essence, Levitt is being sued for compiling a well-sourced brief demonstrating the improper business practices of the Catalyst Parties, and discussing these improper business practices with other interested individuals. Although the Catalyst Parties are no doubt unhappy that their improper business practices have been brought to light, resulting in steps being taken against them by the OSC and SEC, that does not constitute an actionable claim against Levitt.

3. The plaintiffs' action against Levitt is meritless, and should be dismissed pursuant to s. 137.1 of the *Courts of Justice Act*.

PART II – FACTS

A. Levitt's Involvement with the Catalyst Parties

4. Levitt is a Toronto-based corporate lawyer, operating primarily in the areas of energy and mining areas.

5. Levitt's involvement with the Catalyst Parties arises from his investment in Fortress Resources ("Fortress"). Fortress had an agreement to purchase the rights to an

inactive coal mine in Kentucky. In order to finance the purchase, and obtain operating capital for the business, Fortress entered into a loan agreement with Callidus. The loan agreement provided that an initial loan was to be advanced to cover the purchase price of the mine and some initial operating expenses, and a further funding facility was to be delivered by Callidus 30 days later. Levitt and others provided limited guarantees for the loan, which were to be released once the steps leading to the second funding facility were complete, such as a valuation of the mine and a review of financial projections by Callidus.

Levitt Affidavit, paras 10-12, 38-50

6. The loan for the purchase price was delivered by Callidus. The second loan, which was to provide for the necessary working capital for the mine to carry on business and was to follow 30 days from the initial loan, was not provided by Callidus until many months later, due to its own delays.

Levitt Affidavit, paras 41-91

7. Further, when it came time for Levitt's limited guarantee to be discharged, which was to occur at the same time as the second round of funding, Callidus concocted justifications as to why it would not discharge the guarantee. Ultimately, the required discharge was not delivered.

Levitt Affidavit, para 52

8. Levitt later learned that Callidus never intended to act in good faith in its financing of Fortress. Instead, it intended to carry out what is referred to as a "loan to own" strategy, which Levitt learned was a common tactic taken by Callidus. Under its "loan to own" strategy, Callidus would take steps to delay funding or otherwise cause business stress for the borrower. Once this caused a borrower to default on its loan, and the business went bankrupt, Callidus would purchase the business (or its assets) through the bankruptcy at a greatly discounted price. Once it owned the business, Callidus would then attempt to sell it for a significant profit at its earliest opportunity.

> *Reuters – Special Report: Private equity's star's picks shine, until cash-out time* [Levitt Motion Record, p. 2453]
>
> *Levitt Affidavit, paras 16-21*

9. In the case of Fortress, Callidus caused Fortress to default on its initial loan by failing to advance the working capital required for Fortress to carry on business. Once Fortress declared bankruptcy, Callidus sought to buy the assets of Fortress for $100,000 (a fraction of the value the assets had been purchased for just months earlier). The State of Kentucky intervened, blocking Callidus from purchasing the mine. Callidus then turned to suing Levitt and others on their guarantees.

> *Levitt Affidavit, paras 91-94*

B. Levitt's Investigations of the Catalyst Parties' Business Practices

10. Once Callidus' deceptive practices came to light, Levitt began investigating Callidus. Through his investigations, Levitt learned that Callidus' tactics with Fortress were not an isolated incident.

11. Levitt obtained and reviewed extensive documentation related to Callidus, such as bankruptcy, receivership and court documents, PPSA/UCC lien filings, and Callidus' public financial disclosure.

Levitt Affidavit, para 147

12. Levitt also discovered a number of other individuals who had been similarly impacted by Callidus' improper conduct, such as Jeff McFarlane, Andrew Levy, Kevin Baumann and Gerald Duhamel. Levitt discussed the experiences of these individuals, and learned that many of his experiences with Callidus were similar to theirs.

13. Through these discussions, and his review of publicly available information related to Callidus, Levitt identified a number of common Callidus business practices:

a) Callidus would make pre-loan representations to a potential borrower that it could close deals quickly, with very few covenants, that it was not interested in personal guarantees from principals of the borrower, and that its loans were non-dilutive.

b) After the initial funding of the loan (which would establish Callidus' rights on default of the loan), Callidus would delay or withhold subsequent advances.

c) With the borrower in a precarious position due to delayed advances, Callidus would insist on materially changing the terms of the loan, including changing requirements regarding personal guarantees from principals of the borrower, and refusing to release personal guarantees once conditions requiring them to do so were met.

d) Callidus would obtain asset appraisals at the outset of a deal from an appraisal firm called Hillco which would show substantial asset values. Subsequent valuations after a deal was in place would show significantly less value in these same assets. Hillco would often later purchase assets from borrowers through the bankruptcy proceedings, as co-owner with Callidus.

e) Once the borrower was in financial distress, Callidus would displace or attempt to displace management, in order to install Callidus friendly management.

f) Once forced into bankruptcy by Callidus' failure to advance funds, Callidus would acquire or attempt to acquire the assets of the borrower at substantially discounted values through the bankruptcy process.

Callidus Capital Lending Pattern Summary [Levitt Record, Ex. O]

14. In addition, Levitt (and others) identified significant issues with the financial reporting of the Catalyst Parties:

a) Callidus artificially inflated its profitability by way of "yield enhancements". The term "yield enhancements" is a term of art used by Callidus to describe its practice of reporting higher returns on loans than provided for in its loan agreements, based on Callidus' expectation that the loan will go into default, and it will be able to extract more "value" from the transaction. For example, where Callidus provided a loan to a borrower at an interest rate of 18%, Callidus might report an anticipated 40% return on this loan on the basis that Callidus expected it would be able to restructure the deal later on, when the borrower experienced "structural changes".

Levitt Supplementary Affidavit, paras 18-20

b) Catalyst used the various entities controlled by it to transfer losses between entities to generate artificially positive returns. For example, non-arm's length loan agreements between Catalyst and Callidus

included guarantees which required Catalyst to fully guarantee the principal of loans to borrowers. Interest was left accruing on loans, with Callidus then claiming the accrued interest from Catalyst on the guarantee. When a borrower defaulted on a loan, in circumstances where much of the loan was unrecoverable by Callidus against the borrower, Catalyst would make Callidus whole by way of the guarantee, transferring the loss to Catalyst's books. Callidus would show a significant profit, having been paid 100% of the principal and interest by Catalyst.

Whistleblower Report, p. 8 [Levitt Record, Tab D]

c) Serious conflicts existed regarding cross-ownership of various entities, such as Callidus and other funds controlled by Catalyst. This resulted in, for example, a fund controlled by Catalyst (its Catalyst III fund) bailing out another notionally separate fund (the Catalyst II fund).

Whistleblower Report, p. 19-22 [Levitt Record, Tab D]

15. Levitt reported some of what he discovered through an anonymous twitter account, through which he came into contact with Nathan Anderson.

16. Based on the information that Levitt, and others affected by Callidus' conduct, had learned, they sought to jointly bring a claim against Callidus under the U.S. Racketeer Influence and Corrupt Organizations Act ("RICO"). The Borrowers engaged legal counsel in the US to commence a civil RICO action, but were unable to proceed due to a lack of finances.

Levitt Affidavit, paras 132-134

C. <u>Levitt Reports the Plaintiff's Misconduct to the Appropriate Authorities</u>

17. Using the information he had compiled, as well as information provided to him by other individuals affected by Callidus' business practices, Levitt contacted the relevant authorities to report Callidus' fraudulent practices:

a) Levitt met with senior investigators at the Ontario Securities Commission. Levitt provided detailed information to the OSC during these meetings, and filed a detailed whistleblower report, along with Nathan Anderson, with both the OSC and the United States Securities and Exchange Commission.

Levitt Affidavit, paras 142-144

b) Levitt met with the Commercial Crimes Unit of the Toronto Police Services, on his own behalf and on behalf of other affected individuals who were not located in Toronto. Levitt's understanding is that the Toronto Polices Services referred the matter to the RCMP's Joint Serious

Offences Team. Levitt provided the documentation that had been compiled by other affected individuals to both the Toronto Police Services and RCMP.

Levitt Affidavit, paras 135-138

18. With respect to the OSC whistleblower filing by Levitt, the information provided by Levitt was fully sourced from publicly available information, including court filings and the Catalyst Parties' own public records. For example, Levitt's 28-page OSC whistleblower submission contained 73 exhibits, and 169 footnotes, setting out the basis for the complaints in great detail.

Whistleblower Report [Levitt Record, Tab D]

D. <u>Enforcement Steps Taken by OSC and SEC</u>

19. After the whistleblower report was delivered to the OSC, the OSC investigated Callidus regarding a number of issues, including, for example, Callidus' use of "yield enhancements".

July 16, 2018 Letter from OSC to Callidus [West Face Second Supplementary Motion Record, Tab 46]

20. As a result of the OSC investigations, Callidus stopped reporting unrecognised yield enhancements as of 2018. Callidus provided the following statement in its Second Quarter 2018 Results:

> The Company has discontinued disclosure of unrecognized yield enhancements in light of comments expressed by the Ontario Securities Commission. The Ontario Securities Commission has advised the Company that it will continue to name the Company on its Refilings and Errors List for the next following three years.

Callidus Second Quarter 2018 Results Report [Levitt Record, Tab L]

21. The OSC did, in fact, place Callidus on its Refilings and Errors List.

OSC Refilngs and Errors List [Levitt Supplementary Record, Tab 7]

22. Through this motion,[1] it has also been learned that the SEC made findings that Catalyst was not in compliance with US federal securities laws. The issues raised by the SEC were substantially similar to the issues raised in the whistleblower reports filed by Levitt and others. This included issues related to conflicts regarding Callidus and other related funds, as well as regarding false and misleading statements to investors.

May 11, 2018 SEC Letter

E. <u>Callidus Itself Alleges Dishonest Conduct of its own Underwriter</u>

23. In 2017, Callidus' former chief underwriter, Craig Boyer ("Boyer"), sued Callidus for wrongful dismissal. Boyer was responsible for the Fortress loan, as well as the loans to the other individual guarantors who are defendants in this action. Callidus counterclaimed against Boyer, alleging that he had among other things, failed to

[1] And only after hotly contested refusals motions

properly monitor loans in his portfolio and had been involved in fraudulent conduct related to loans.

> *Callidus Statement of Defence and Counterclaim* [Levitt Motion Record, Tab M]

24. Boyer defended the counterclaim, alleging that "Callidus is subject to multiple complaints and regulatory investigations" regarding its business practices. This dispute was covered by the press prior to the Wall Street Journal article complained of by the Catalyst Parties.

> *Boyer Reply and Defence to Counterclaim* [Levitt Motion Record, Tab N]
> *February 28, 2017 Article "Callidus hits back at former executive in legal dispute* [Levitt Motion Record, Tab P, p. 2347]

F. <u>Callidus Fails as a Public Company</u>

25. After a number of poor performing quarters, Callidus ceased as a publicly traded company, with it being taken private in a transaction involving Catalyst. According to an internal report by Callidus' CEO, Patrick Dalton, dated February 25, 2019, the business decline was "driven by weakening loan portfolio performance and a series of dilutive corporate activities". Further, although the Catalyst Parties allege that the Wall Street Journal reporting in 2017 harmed its ability to originate new loans, this is contradicted by the Dalton report, which states that "New deal Origination was

virtually halted in 2016 and capital was used to repurchase stock (above book value) and pay Dividends".

> *Strategic Review and Remediation Plan* [West Face Second Supplementary Motion Record, Tab 47]
> *Riley Conspiracy Affidavit, para 351*

G. <u>The Catalyst Parties' Improper Conduct</u>

26. Callidus has brought an action against Levitt on his Fortress guarantee. That action remains outstanding.

27. Callidus brought a summary judgment motion against Levitt in that guarantee action. In the course of cross-examining Levitt on that motion, Callidus sought extensive production of correspondence between Levitt and other defendants in this action, on the pretext that those documents were relevant to the guarantee action.

28. It is now apparent that the production requests in the guarantee action were for the purpose of collecting evidence for this proceeding, including obtaining privileged information from Levitt that would be otherwise unavailable to the Catalyst Parties. Upon receiving Levitt's compelled productions in the guarantee action, the Catalyst Parties amended their Statement of Claim to explicitly reference the information contained in those productions, in the hope that it would support their conspiracy allegations. They have continually sought additional productions of correspondence

with other defendants in this action, in an apparent fishing expedition, including having Levitt's computers imaged and searched.

Notice of Motion

29. Further, in the course of that proceeding, Callidus showed Levitt a short email that Levitt had sent to Marc Cohodes, who the Catalyst Parties have an apparent interest in. That email appears to have been surreptitiously obtained by the Catalyst Parties through illegal means.

Levitt Affidavit, paras 205-219

30. Riley, in his evidence, alleges that it was a private investigator named Derrick Snowdy, who had been hired by an individual named Danny Guy, who provided the Catalyst Parties with that email. The documents produced by the Catalyst Parties (produced pursuant to Justice Boswell's order) show that this is false. Instead, when Snowdy provided a copy of the email to the Catalyst Parties, at the request of Danny Guy, Glassman's response was that "We knew about it and way more btwn Levitt and cohodes. Email nice but not worth much".

Riley Conspiracy Affidavit, paras 441-444
Danny Guy Text Messages [West Face Second Supplementary Motion Record, Tab 37, p. 1088]

PART III – ISSUES & LAW

31. As set out in the separately filed joint factum, the Catalyst Parties' claims ought to be dismissed under s. 137.1 of the *Courts of Justice Act*, as proceedings that tend to limit expression on matters of public interest. Levitt relies upon the submissions in the joint factum, and provides the following specific submissions related to the claim against him.

A. This Proceeding Arises from Expressions on Matters of Public Interest

32. Levitt bears the initial onus of demonstrating that this proceeding "arises from an expression made by the person that relates to a matter of public interest" pursuant to s. 137.1(3). Given the broad definition of "expression" in the statute (which is defined to include any communication, whether public or private), and the Supreme Court's direction that the term "arises from" should be given a "broad and liberal interpretation", there should be no dispute that Levitt has met his initial onus.

> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para 28

33. The underlying claim in this proceeding against Levitt relates to Levitt's complaints made to the police and the OSC, as well as Levitt purportedly conspiring to cause negative reporting of Callidus in the press. Further, the underlying damage alleged by the Catalyst Parties is the loss of value arising from public disclosure of its improper conduct. Without these communications to the police, regulators and public, there would be no claim in this proceeding.

34. As described in paragraphs 15 to 18 of the joint factum, these communications relate to a matter of public interest. Expressions regarding the operation of publicly traded companies, particularly companies such as the Catalyst Parties which have a controversial and well publicized history, is a subject matter on which the public has a genuine interest in receiving information. This is regardless of what the motives are behind the expression.

> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at paras 27-28
>
> *Thompson v. Cohodes*, 2017 ONSC 2590 at para 12

35. As a result, s.137.(3) has been satisfied, which shifts the onus to the plaintiffs to satisfy the requirements of s. 137(4).

B. The Plaintiffs' Claims are Meritless

36. Under the s. 137.1(4)(a) Merits-Based Hurdle, the plaintiffs bear the onus of satisfying the court as to the merits of its claims. As summarized by the Supreme Court of Canada, the question under this provision is:

> whether the motion judge concludes from his or her assessment of the record that there is a basis in fact and in law — taking into account the context of the proceeding — to support a finding that the plaintiff's claim has substantial merit and that the defendant has no valid defence to the claim.
>
> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para 42

37. As the questions of "substantial merit" and "no valid defence" overlap substantially in the claim against Levitt, they will be addressed together.

38. The Catalyst Parties have advanced a cavalcade of causes of action, many of dubious applicability. With respect to Levitt, the substance of the claim appears to be an allegation that he is liable for a predominant purpose conspiracy for his criticisms of the Catalyst Parties, and his filing of a whistleblower complaint against them which was indirectly referenced in the Wall Street Journal.[2] This claim, along with all other claims by the Catalyst Parties, is simply without merit.

39. The test for a claim of predominant purpose conspiracy is described in more detail in paragraphs 38-40 of the joint factum, and requires proof that the predominant purpose of the conspiracy was to harm the plaintiffs, that the parties agreed to, and did in fact, act in concert, and that this conduct caused the plaintiffs to suffer a loss. The plaintiffs' claim is lacking in every aspect of the test. For the purposes of this factum, the claim against Levitt suffers from the following primary fundamental flaws.

40. First, the evidence of the Catalyst Parties as to the defendants' agreement to act in concert to harm the Catalyst Parties, and the existence of any real overt steps taken in connection with that agreement, is lacking. Discussions between certain defendants as to their experiences with the Catalyst Parties, and their mutual dislike of the Catalyst Parties, does not rise to the high level of an actual agreement designed on harming the

[2] The balance of the causes of action have also been dealt with in the joint factum, as well as in the companion facta filed by other defendants, which Levitt relies upon.

Catalyst Parties. The only agreement demonstrated by the Catalyst Parties is an agreement to collaborate on regulatory filings (the contents of which were substantially true and well sourced, and are covered by absolute privilege[3]), which is far from an agreement to specifically cause harm to the plaintiffs.

41. Second, there is simply no evidence that the purpose of the actions of Levitt, and the other defendants, were for the predominant purpose of inflicting harm on the Catalyst Parties. A party advancing their own interests, even where that has an adverse economic impact on others, does not constitute a predominant purpose of harming the plaintiff.

Gould v. Western Coal Corp, 2012 ONSC 5184 at para 298

42. Instead, Levitt's purpose in taking the steps that he did was to defend himself against Callidus' claims against him, and to bring conduct, which Levitt firmly believed was illegal, to the attention of the authorities.

43. The Catalyst Parties' own evidence confirms that Levitt's conduct in speaking to other similarly situated individuals was to assist in his defence to the guarantee claim against him by Callidus. As Riley himself describes it, "in or around mid-2015 [Levitt and others] began contacting each other to discuss and coordinate *their responses to the*

[3] See *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2019 ONSC 128 at para 49

guarantee actions and their claims of fraudulent inducement against Callidus" [emphasis added].

Riley Conspiracy Affidavit, para 105(b)

44. Even at its highest, the Catalyst Parties' own evidence is that the actions taken by Levitt, particularly related to the filing of a whistleblower complaint, were for his own self-interest, rather than for the purpose of inflicting harm on the Catalyst Parties. As the Catalyst Parties note, an agreement was entered into between Levitt and others as to how any whistleblower reward would be shared between them. This supports the whistleblowers' belief as to the accuracy of the report, given that they spent considerable time anticipating how to deal with a reward, which would only arise if the whistleblower report were to be validated and successfully pursued by the OSC. Even if considered most favourably to the Catalyst Parties' in respect of this motion, this shows a self-interest on the part of the whistleblowers in seeking a commercial benefit.

Riley Conspiracy Affidavit, paras 172-175

45. Third, the cause of the Catalyst Parties' purported loss is the publishing of the Wall Street Journal article, for which there is no evidence of any agreement between the parties to cause harm to the Catalyst Parties. All other alleged acts were done in private (or, at a minimum, not broadly known to the investing community), and were not the cause of any loss to the plaintiffs. As a result, unless this specific overt act is found to be

part of the alleged agreement between the defendants, then the plaintiffs cannot establish causation, and their claims fail.

46. Ultimately, and in any event, the plaintiffs' most substantial failing in their claim against Levitt is that Levitt's statements in his whistleblower report and in his statements to the TPS and RCMP are substantially true. Beyond this, the plaintiffs are left with bald, unsupported and absurd assertions such as that Levitt was spreading false rumours through the "Bay Street rumour mill".

47. Detailed affidavits have been filed by the parties on this motion, which have been tested by way of extensive cross-examinations. Affidavits of Documents have been exchanged, and the completeness of those Affidavits of Documents have been litigated thoroughly. In Levitt's case, the Catalyst Parties have also had the benefit of extensive productions in the guarantee action against Levitt, including a forensic review of his electronic records for correspondence with other guarantors. Although the court should consider the stage in the proceeding and the potential that future evidence will arise when assessing the merits, the detailed record in the present case minimizes these concerns.

> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para 37

48. It is therefore submitted that the plaintiffs cannot meet their onus on the Merits Based Hurdle, and the claim must be dismissed.

C. The Value of Levitt's Expressions Greatly Outweighs any Purported Harm

49. If the plaintiffs meet their onus under the Merits Based Hurdle, the final step of the analysis, under s. 137.1(4)(b), is to weigh the any harm that the plaintiffs can prove, on a balance of probabilities, that they have likely suffered or will suffer, and the corresponding public interest in permitting the action to continue, outweighs the deleterious effects on expression and public participation.

> *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para 82

50. As discussed in other facta filed by the defendants, the evidence regarding whether the Catalyst Parties actually suffered harm from the actions of the defendants is questionable. The plaintiffs' evidence of any business loss rests, in large part, on bald assertions by Riley, contradicted by Callidus' own internal report by its CEO.

> *Strategic Review and Remediation Plan* [West Face Second Supplementary Motion Record, Tab 47]

51. In any event, even if damages are shown to have been caused by the defendants' conduct, the deleterious effect of this action on expression and public participation is substantial, and outweighs any purported harm suffered by the plaintiff.

52. The Catalyst Parties have, in effect, sued a number of whistleblowers, including Levitt, for reporting concerns regarding their business practices. Those concerns were well founded, having resulted in steps being taken by the OSC and SEC. At a minimum, the concerns reported by Levitt were done with a genuine belief in their accuracy and a genuine belief that the Catalyst Parties were acting inappropriately.

53. There is no doubt that the Catalyst Parties are extremely litigious – their history with West Face being the prime example. They also have no qualms about taking whatever steps they deem necessary, regardless of the legality of those steps, ranging from their "sting" of Justice Newbould, to surreptitiously obtaining Levitt's personal email (including an email between Levitt and Marc Cohodes, which was not provided to them by either Levitt or Cohodes).[4]

54. Ultimately, this is, in many ways, a stereotypical SLAPP proceeding. A large company, with substantial resources, brings an action against an individual whistleblower for exorbitant amounts, with no limits on the cost or harm done by their litigation. Although Levitt is not required to prove that the plaintiff's purpose is to silence him in order to succeed under s. 137.1, it is clear that this is a goal of the Catalyst Parties. The negative effects on future whistleblowers if this action is allowed to proceed is significant.

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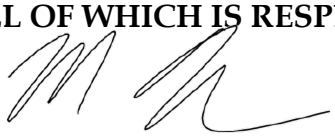
[4] Although the email was only shown during the course of a settlement meeting, it was not itself directly connected with an offer to settle. In any event, it would fall within an exception to settlement privilege as it is evidence of wrongdoing by the Catalyst Parties related to their illegal interception of emails from Levitt – see the analogous case of R. v. Delchev, 2015 ONCA 381 at paras 33-37

PART IV – ORDER REQUESTED

55. Levitt therefore seeks an order dismissing the action against him, with costs on a substantial indemnity basis, as well as general damages to be assessed pursuant to s. 137.1(9) of the *Courts of Justice Act*.

Dated at Toronto this 5th day of May, 2021

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Mark Wiffen
Lawyer for Darryl Levitt

SCHEDULE "A" – List of Authorities Referenced

1. *1704604 Ontario Ltd. v. Pointes Protection Association,* 2020 SCC 22

2. *Thompson v. Cohodes,* 2017 ONSC 2590

3. *Gould v. Western Coal Corp,* 2012 ONSC 5184

4. *Catalyst Capital Group Inc. v. West Face Capital Inc.,* 2019 ONSC 128

5. *R. v. Delchev,* 2015 ONCA 381

SCHEDULE "B" – Relevant Statutes, Regulations and By-Laws

Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

Dismissal of proceeding that limits debate
Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression. 2015, c. 23, s. 3.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of. 2015, c. 23, s. 3.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding. 2015, c. 23, s. 3.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate. 2015, c. 23, s. 3.

Procedural matters
Commencement

137.2 (1) A motion to dismiss a proceeding under section 137.1 shall be made in accordance with the rules of court, subject to the rules set out in this section, and may be made at any time after the proceeding has commenced. 2015, c. 23, s. 3.

Motion to be heard within 60 days

(2) A motion under section 137.1 shall be heard no later than 60 days after notice of the motion is filed with the court. 2015, c. 23, s. 3.

Hearing date to be obtained in advance

(3) The moving party shall obtain the hearing date for the motion from the court before notice of the motion is served. 2015, c. 23, s. 3.

Limit on cross-examinations

(4) Subject to subsection (5), cross-examination on any documentary evidence filed by the parties shall not exceed a total of seven hours for all plaintiffs in the proceeding and seven hours for all defendants. 2015, c. 23, s. 3.

Same, extension of time

(5) A judge may extend the time permitted for cross-examination on documentary evidence if it is necessary to do so in the interests of justice.

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

THE CATALYST CAPITAL GROUP INC. et al	- and -	**WEST FACE CAPITAL INC. et al**
Plaintiffs		Defendants

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST
Proceeding commenced at Toronto

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