

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs (Appellants)

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

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PART I - ORDER UNDER APPEAL

1. The Catalyst Capital Group¹ and Callidus Capital Corporation² appeal from the Order of the Honourable Justice McEwen³ dated December 2, 2021.⁴ The Order granted motions made pursuant to s. 137.1 of the *Courts of Justice Act*⁵ and dismissed the Appellants' claims in the main action herein⁶ as against certain of the Defendants.⁷

2. The Motions Judge erred in his interpretation and application of the test under s. 137.1 of the *CJA*. Had the correct test been applied to the findings otherwise made by the Motions Judge, the Wolfpack Action ought not to have been dismissed. The Wolfpack Action is a valid attempt to vindicate the rights of the Appellants and the significant harm suffered by them as a result of a malicious and unlawful conspiracy involving the manipulation of the public capital markets with false statements not worthy of protection.

PART II – OVERVIEW

3. The Appellants were publicly accused of improper business practices and fraud in *The Wall Street Journal*,⁸ read by 2.4 million people. The share price of Callidus plummeted immediately post-publication and the reputations of Catalyst and Callidus were irreparably harmed. Experts provided a preliminary calculation of the harm of \$144-161 million to Callidus alone.

¹ “Catalyst”

² “Callidus”, or together with Catalyst, the “Appellants”

³ the “Motions Judge”

⁴ the “Order”

⁵ *Courts of Justice Act*, RSO 1990 c C43 (the “*CJA*”), Schedule “B” below

⁶ the “Wolfpack Action”. A “Wolfpack” is a term in the financial industry that refers to a group of people who join forces against another company: Reasons for Decision of McEwen J. dated December 2, 2021 (“Reasons”), para 4 footnote 1, [Appeal Book and Compendium \(“ABC”\) Vol 1 Tab 4](#)

⁷ the “Respondents”

⁸ the “WSJ Fraud Articles”

4. The publication of the WSJ Fraud Articles was the culmination of a conspiracy the predominant purpose of which was to harm the Appellants. The conspiracy deployed a classic “short and distort” scheme involving the spreading of false and negative statements with the intent of harming the target’s reputation and to artificially deflate its share price or destroy its business. It was an illegal scheme that undermined the integrity of the capital markets.

5. The Motions Judge found that the Appellants had a real prospect of success at trial of establishing the conspiracy, the illegal activity, and the harm suffered as a result of the impugned conduct and expressions. Significantly, the Motions Judge found that there was a real prospect of a conspiracy to violate securities laws against fraud and market manipulation. This is a substantive action with substantive damages.

6. The Motions Judge erred in dismissing the Wolfpack Action notwithstanding those findings. In this regard, the Motions Judge misapprehended and misapplied the test under s. 137.1(4)(b) of the *CJA* by failing to properly “tether” his analysis to the text of s. 137.1(4)(b), as mandated by the Supreme Court of Canada.⁹ He failed to properly weigh the harm to the Appellants, the corresponding public interest in allowing the proceeding to continue, and the public interest in protecting the expressions. Instead, in dismissing the Wolfpack Action against the Respondents, the Motions Judge conducted a review of the *Appellants’* “out-of-courtroom conduct”,¹⁰ rather than tether his analysis to the *Respondents’* motives for making the expressions from which this proceeding arises. In doing so, the Motions Judge absolved the Respondents from any accountability for their illegal activity and the harm they caused to the Appellants and others, based on considerations not recognized under the test required by s. 137.1 of the *CJA*.

⁹ *1704604 Ontario Limited v Pointes Protection Association*, 2020 SCC 22 (“*Pointes Protection*”) at para 79, Appellants’ [Book of Authorities \(“ABO”\) Tab 1](#)

¹⁰ [Reasons, para 20, ABC Vol 1 Tab 4](#)

PART III – SUMMARY OF FACTS

A. THE PARTIES

7. Callidus is a lender to companies whose credit risk is too high for traditional lenders.¹¹

Callidus was publicly traded on the TSX and owed fiduciary duties to protect its shareholders.¹²

8. Catalyst is a private equity firm that, among other things, manages investment funds¹³ that hold shares in Callidus.¹⁴ It too owed fiduciary duties to the Catalyst Fund unitholders,¹⁵ which include public institutions such as pension funds and academic endowment funds.¹⁶

9. Of the Defendants to the Wolfpack Action, only the Respondents sought to dismiss the proceeding as against them pursuant to the provisions of s. 137.1 of the *CJA*:

(a) Nathan Anderson is a professional short-seller and whistleblower.¹⁷ Anderson was a friend of Rob Copeland¹⁸ and a source for the WSJ Fraud Articles, which referred to a whistleblower report about the Appellants that Anderson had prepared and filed.¹⁹

(b) Rob Copeland is a reporter at *The Wall Street Journal* and a co-author of the WSJ Fraud Articles.²⁰ Copeland was made aware that his source Anderson held short positions in Callidus stock.²¹ Contrary to News Corporations'²² *Insider Trading and Confidentiality*

¹¹ [Reasons, para 12, ABC Vol 1 Tab 4; Affidavit of James A. Riley, sworn May 29, 2020 regarding The Conspiracy, \("Riley Conspiracy Affidavit"\), para 14-15, ABC Vol 4 Tab 45, p. 28](#)

¹² [Reasons, para 12, ABC Vol 1 Tab 4; Riley Conspiracy Affidavit para 19, ABC Vol 4 Tab 45, p. 29](#)

¹³ the "Catalyst Funds"

¹⁴ [Reasons, para 12, ABC Vol 1 Tab 4](#)

¹⁵ [Affidavit of James Riley sworn December 5, 2019 at para 21, ABC Vol 4 Tab 47, p. 317](#)

¹⁶ [Riley CXM on November 18, 2020, p. 789, q. 2271-2273, ABC Vol 3 Tab 37](#)

¹⁷ [Reasons, para 12, ABC Vol 1 Tab 4](#). Anderson is also the principal of the Respondent ClaritySpring Incorporated which carries on the business of filing whistleblower complaints and shorting stock for profit and reward. Anderson also operates an entity called Hindenberg Research that publishes negative articles on public companies, including the Anderson's Report referred in paragraph 9(b) below: [Riley Conspiracy Affidavit para 87, ABC Vol 4 Tab 45, p. 55](#)

¹⁸ [Affidavit of Nathan Anderson sworn November 8, 2019 \("Anderson Affidavit"\) para 16, ABC Vol 4 Tab 49, p. 4-6; Text messages exchanged between Copeland and Anderson \("Copeland Anderson Texts"\), ABC Vol 5 Tab 50](#)

¹⁹ [Reasons, para 12, ABC Vol 1 Tab 4](#)

²⁰ [Reasons, para 12, ABC Vol 1 Tab 4](#)

²¹ [Broken Bridge Report dated July 2017 \("Anderson's Report"\), ABC Vol 5 Tab 57; Transcript from the cross-examination of Rob Copeland on November 13, 2020 \("Copeland CXM"\), p. 68-73, q. 141-144, ABC Vol 3 Tab 36, p. 50-55](#)

²² Dow Jones and Company is a subsidiary of News Corporation

*Policy*²³ and the *Dow Jones' Code of Conduct*,²⁴ Copeland gave advance notice to Anderson of when the WSJ Fraud Articles would be published with specific instructions: “Don’t tell the conspiracy of short sellers”.²⁵ Immediately after Copeland provided him with advance notice of the publication date, Anderson shorted Callidus stock.²⁶

(c) West Face Capital Inc. and its CEO Greg Boland²⁷ are hedge fund operators and competitors of Catalyst.²⁸ West Face had been involved in litigation with Catalyst, including litigation relating to the acquisition of Wind Mobile Corporation.²⁹ Catalyst and Callidus commenced an action against West Face and an equity research firm relating to a prior short attack.³⁰ The Veritas Action, like this action, was case managed by Justice Hainey, who ordered productions in both actions just after the motions below were brought in late 2019. This Court has held that the Veritas Action is a “proceeding in good faith with a *prima facie* case”.³¹

(d) Jeffrey McFarlane, Kevin Baumann, and Darryl Levitt³² provided personal guarantees for loans advanced to their companies by Callidus. Each of their companies defaulted on the loans. In separate proceedings, Callidus took normal course enforcement actions on the loans and accompanying guarantees. In response, the Guarantors sought to harm the Appellants, including by way of the conspiracy that is the subject of this proceeding. In furtherance of that purpose, McFarlane and Levitt filed whistleblower

²³ [News Corp., “Insider Trading and Confidentiality Policy” \(October 2018\), ABC Vol 5 Tab 52](#)

²⁴ [Dow Jones, “Code of Conduct” \(January 2012\), at p. 5-6, ABC Tab Vol 5 Tab 53, p. 81-82](#)

²⁵ [Copeland Anderson Texts \(p. 16, texts of July 27, 2017\), ABC Vol 5 Tab 50, p. 26](#)

²⁶ [Reasons, para 51, ABC Vol 1 Tab 4; Interactive Brokers Activity Statement of Clarity Spring from June 21, 2017 to June 20, 2018, Exhibit A of Supplementary Affidavit of Nathan Anderson sworn August 20, 2020, p. 11 \(“Clarity Spring Trading Records”\), ABC Vol 5 Tab 54, p. 98; Copeland Anderson Texts, \(p. 16, texts of July 27, 2017\), ABC Vol 5 Tab 50, p. 26; Transcript from the cross-examination of Darryl Levitt, held November 26, 2020 \(“Levitt CXM”\), 2020, p. 194, q. 819 and p. 196-197, q. 828-834, ABC Vol 3 Tab 39, p. 175, 177-178; Transcript from the cross-examination of Nathan Anderson held November 20, 2020 \(“Anderson CXM”\), p. 193, q. 582-609, ABC Vol 3 Tab 38, p. 123-129](#)

²⁷ collectively “West Face”

²⁸ [Riley Conspiracy Affidavit para 79, ABC Vol 4 Tab 45, p. 52](#)

²⁹ “WIND”

³⁰ the “Veritas Action”

³¹ [The Catalyst Capital Group Incorporated v Veritas Investment Research Corporation, 2017 ONCA 85 at para 50, ABOA Tab 21](#)

³² the “Guarantors”

complaints against the Appellants with the predominant intent to provide them to the media, and were sources for the WSJ Fraud Articles.

(e) Bruce Livesey is a corporate investigative consultant and freelance journalist.³³ Livesey had been hired to investigate Callidus by the Defendant Wesley Voorheis.³⁴

10. A number of Defendants that participated in the conspiracy (including at least two that also shorted Callidus stock)³⁵ did not bring s. 137.1 motions. No evidence was filed by them as part of the motions below and the Wolfpack Action was not dismissed against them.

B. THE SCHEME TO MAKE AND PUBLISH A FALSE WHISTLEBLOWER COMPLAINT

11. The Motions Judge found that the Appellants had “met their burden of proving that there are grounds to believe” their conspiracy claims have “a real prospect of success”.³⁶ In finding so, the Motions Judge heard extensive argument and held there was evidence that, commencing in 2016, the Guarantors, West Face, Livesey, and Anderson³⁷ entered into a conspiracy to publicly discredit Catalyst and Callidus by publicizing whistleblower complaints³⁸ that accused them of fraud and improper business practices, and contended that the Appellants were engaged in a “shell game” to obscure asset impairments in order to mislead investors.³⁹

³³ [Reasons, para 12, ABC Vol 1 Tab 4](#); [Riley Conspiracy Affidavit para 96-99, ABC Vol 4 Tab 45, p. 56-57](#)

³⁴ [Riley Conspiracy Affidavit para 84, ABC Vol 4 Tab 45, p. 54](#); [Memorandum from Andrew Levy to Pete Marketos, Esq. dated August 14, 2015, ABC Vol 5 Tab 55](#)

³⁵ [Aside from Anderson, Callidus stock was shorted by \(#1\) Voorheis: Voorheis' portfolio records that he has produced, ABC Vol 5 Tab 56](#); [Call Option Agreement between Voorheis and CIBC dated August 8, 2017, ABC Vol 6 Tab 57](#); [VWK Fund: Callidus Capital Corp Profit & Loss: 1/01/15 to 4/11/17, ABC Vol 6 Tab 58](#); and (#2) the Defendants 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, and Sunny Puri (“Anson”): [Email correspondence between N. Anderson and B. Tudose ending July 18, 2017, ABC Vol 6 Tab 59](#); [Email from A. Strgacic to M. Kassam et al. dated July 20, 2017, ABC Vol 6 Tab 60](#); [Emails from Canaccord Genuity Corp to A. Spears re Anson's trading records and short positions, ABC Vol 6 Tab 61](#); [Email correspondence between M. Kassam and N. Anderson ending August 11, 2017, ABC Vol 6 Tab 62](#)

³⁶ [Reasons, para 349 and 386, ABC Vol 1 Tab 4](#)

³⁷ The phrase “**Acknowledged Conspirators**” herein is used to refer to these “Wolfpack Defendants” (as defined in the Reasons) who were found to have joined in the common design to harm the Appellants, i.e. the Respondents other than Copeland

³⁸ the “**Whistleblower Complaints**”

³⁹ [Reasons, paras 42-49, ABC Vol 1 Tab 4](#)

12. The Acknowledged Conspirators' scheme to publicize their false allegations in the mainstream media was part of an unlawful conspiracy and short and distort attack, the predominant purpose of which was to harm the Appellants. The allegations in the Whistleblower Complaints were repeated in interviews Copeland conducted with McFarlane,⁴⁰ to become the basis of the WSJ Fraud Articles.⁴¹ Similar to the Whistleblower Complaints, the Copeland Defamation included allegations that the Appellants "were engaged in improper business practices",⁴² "not to be trusted",⁴³ and "operating their business in an inappropriate fashion".⁴⁴ The WSJ Fraud Articles were released "to an international audience of over 2.4 millions readers".⁴⁵ As intended by the Defendants, the WSJ Fraud Articles severely damaged the Appellants' reputations and immediately caused an irreversible decline in Callidus' share price.

13. Among other things, these activities:

- (a) violated s. 126.1 of the *Securities Act*,⁴⁶ which prohibits participating in an act or course of conduct that the person knows, or reasonably ought to know, results in or contributes to an artificial price for a security;⁴⁷
- (b) violated s. 126.2 of the *Securities Act*,⁴⁸ which prohibits statements that are misleading or untrue and would reasonably be expected to have a significant effect on the market price of a security;⁴⁹ and
- (c) were made with malice and with the intention to cause harm to the Appellants.⁵⁰

⁴⁰ the "Copeland Defamation"

⁴¹ [Reasons, para 52, ABC Vol 1 Tab 4](#)

⁴² [Reasons, paras 146, 253, and 282, ABC Vol 1 Tab 4](#)

⁴³ [Reasons, para 282, ABC Vol 1 Tab 4](#)

⁴⁴ [Reasons, para 283, ABC Vol 1 Tab 4](#)

⁴⁵ [Reasons, para 196, ABC Vol 1 Tab 4](#)

⁴⁶ *Securities Act*, RSO 1990 c S5 (the "*Securities Act*"), Schedule "B" below

⁴⁷ [Reasons, paras 390-391, ABC Vol 1 Tab 4](#)

⁴⁸ Schedule "B" below

⁴⁹ [Reasons, paras 390-391, ABC Vol 1 Tab 4](#)

⁵⁰ [Reasons, para 292-293, 321, and 328-330, ABC Vol 1 Tab 4](#)

C. SIGNIFICANT REPUTATIONAL AND FINANCIAL HARM TO THE APPELLANTS

14. The effects of the false allegations against Catalyst and Callidus in the WSJ Fraud Articles were immediate and devastating. Callidus' stock price dropped 19.2% within 28 minutes of publication of the WSJ Fraud Articles.⁵¹

15. The WSJ Fraud Articles destroyed Callidus' business and reputation. Callidus filed an expert report of Mark Sunshine, an expert in distressed lending.⁵² His evidence was unopposed by any responding expert. As a lending expert, Sunshine explained that being publicly accused of fraud and deceptive lending practices would be devastating to Callidus' ability to attract new borrowers.⁵³ This is indeed what happened. Callidus' ability to originate new loans to grow its loan portfolio was seriously damaged.⁵⁴ As Sunshine added, "this is especially true when such allegations are published by *The Wall Street Journal* including having a color photograph that featured a Toronto police car."⁵⁵

16. The Appellants also filed an expert report of Dr. Vinita Juneja, an expert in securities, finance, valuation disputes, and regulatory investigations.⁵⁶ Dr. Juneja's evidence was unopposed by any responding expert. Using an event study to measure the impact of the WSJ Fraud Articles on Callidus' share price, isolated from other potential causal factors for the decline in the share price,⁵⁷ Dr. Juneja concluded:

“(a) Callidus' share price fell between \$2.86 and \$3.19, at a minimum, because of the WSJ Fraud Articles;

⁵¹ [Riley Conspiracy Affidavit para 360, ABC Vol 4 Tab 45, p. 153](#)

⁵² [Expert Report of Mark Sunshine dated May 29, 2020 \("Sunshine Report"\), ABC Vol 6 Tab 64](#)

⁵³ [Riley Conspiracy Affidavit para 351-353, ABC Vol 4 Tab 45, p. 150-151; Sunshine Report, para 4.1-4.2, 7.1 and 7.2, ABC Vol 6 Tab 64, pg. 120-121, 128](#)

⁵⁴ [Riley Conspiracy Affidavit para 351, ABC Vol 4 Tab 45, p. 150](#)

⁵⁵ [Sunshine Report, para 4.2, ABC Vol 6 Tab 64, pg. 121. See also Transcript from the cross-examination of Mark Sunshine on November 10, 2020, p. 50-51, q. 110, ABC Vol 3 Tab 35 and Email from Nathan Anderson dated December 7, 2016, ABC Vol 6 Tab 63](#)

⁵⁶ [Expert Report of Vinita Juneja dated May 29, 2020 \("Juneja Report"\), ABC Vol 6 Tab 65](#)

⁵⁷ [Juneja Report, para 34-38, ABC Vol 6 Tab 65, p. 153-155](#)

- (b) the harm to Callidus was at least approximately \$144 to 161 million; and
- (c) the impact of the WSJ Fraud Articles on the value of Callidus has persisted to the present day.”⁵⁸

D. THE APPELLANTS’ RESPONSE TO THE WSJ FRAUD ARTICLES

17. The Appellants recognized the harm to their reputations and Callidus’ share price, and released a Statement on August 9, 2017, in an attempt to defend the reputations and businesses of Callidus and Catalyst.⁵⁹ Confidential email notifications were also sent that day to the Limited Partners of the Catalyst Funds, responding to the allegations in the WSJ Fraud Articles and undertaking to take the steps necessary to protect the interests of the Limited Partners and the reputation of the firm.⁶⁰

18. Counsel for the Appellants also engaged with counsel for *The Wall Street Journal* about the false and misleading statements in the WSJ Fraud Articles.⁶¹ Catalyst and Callidus served a Notice of Libel regarding the WSJ Fraud Articles on August 22, 2017. On November 7, 2017, the Statement of Claim commencing the Wolfpack Action was issued as was a Statement of Claim advancing allegations of libel against *The Wall Street Journal*.⁶² There was no evidence that these claims were commenced for a punitive or retributory purpose; rather, they were commenced to protect the Appellants’ stakeholders and hold accountable those individuals the Motions Judge found there was a real prospect of establishing had acted unlawfully and with the malicious intent to harm the Appellants.

⁵⁸ [Reasons, para 210, ABC Vol 1 Tab 4; Juneja Report, para 10, ABC Vol 6 Tab 65, p. 145-146](#)

⁵⁹ [Affidavit of James A. Riley, sworn May 29, 2020 regarding The Wall Street Journal's Fraud Articles \(“Riley Libel Affidavit”\) para 83, ABC Vol 4 Tab 46, p. 207](#)

⁶⁰ [Riley Libel Affidavit para 86, ABC Vol 4 Tab 46, p. 208-209](#)

⁶¹ [Riley Libel Affidavit paras 100-101, ABC Vol 4 Tab 46, p. 213](#)

⁶² Referred to as the “**Defamation Action**” in the Reasons

E. REASONS OF THE MOTIONS JUDGE – TEST UNDER S. 137.1 OF THE CJA

19. In the course of delivering his Reasons, the Motions Judge reviewed the extensive evidence and submissions of the Appellants⁶³ and the Respondents.

(i) Section 137.1(3) – Whether the Proceeding Arises from “an Expression Made by the Person”

20. The Motions Judge found that Copeland, McFarlane, and Anderson could seek protection for their expressions under s. 137.1(3) of the CJA, as they all admitted to participating in the publication of the expressions in issue (i.e. the Copeland Defamation and WSJ Fraud Articles).⁶⁴

21. The Motions Judge also found that West Face, Levitt, Baumann, and Livesey⁶⁵ satisfied the threshold test under s. 137.1(3) of the CJA that the “proceeding arises from an expression made by [them]”, even though they did not admit making, participating in, or taking responsibility for the Copeland Defamation and WSJ Fraud Articles, or acting in any common design with the other Defendants giving rise to the expressions.

(ii) Section 137.1(4)(a)(i) – The Proceeding has a Real Prospect of Success at Trial

22. The Motions Judge found, on the evidence, that there indeed was a real prospect of success at trial of establishing that the Acknowledged Conspirators engaged in “a coordinated effort to file the Whistleblower Complaints and contact the media once the Whistleblower Complaints were filed”⁶⁶ and “acted with the predominant purpose of harming”⁶⁷ the Appellants. The Motions Judge also found that the record supported a finding that the Copeland Defamation, “to which all

⁶³ [Responding Factum of the Plaintiffs May 12, 2021, ABC Vol 7 Tab 66; Plaintiffs’ Aide to Argument, May 17-21, 2021, ABC Vol 7 Tab 67](#)

⁶⁴ [Reasons, para 132-133, 249, 278, ABC Vol 1 Tab 4](#)

⁶⁵ the “**Denying Respondents**”

⁶⁶ [Reasons, para 350, ABC Vol 1 Tab 4](#)

⁶⁷ [Reasons, para 355, ABC Vol 1 Tab 4](#). In finding at para 343 of the Reasons that “Predominant purpose conspiracy requires an actual intent to injure the plaintiff”, the Motions Judge cited Justice Moldaver’s statement that “[i]t is not enough if the harm is the collateral result of acts pursued predominantly out of self-interest” in [Harris v GlaxoSmithKline Incorporated](#), 2010 ONCA 872 at para 39 (“*Harris*”), ABOA Tab 10

the defendants contributed”,⁶⁸ may have been “misleading or untrue and... would reasonably be expected to have a significant effect on the market price of Callidus securities,”⁶⁹ in breach of the *Securities Act*. The Motion Judge held that the Appellants met the test under s. 137.1(4)(a)(i) of the *CJA* in demonstrating a real prospect of success at trial against the Acknowledged Conspirators for:

- (a) **Predominant Purpose Conspiracy:** they acted in agreement or common design with “the predominant purpose”⁷⁰ of harming Catalyst and Callidus (i.e. the harm was not collateral to, but the very purpose of the agreement).⁷¹
- (b) **Unlawful Means Conspiracy:** they carried out unlawful acts (described below) in furtherance of a common design to cause harm to Catalyst and Callidus.⁷²
- (c) **Unlawful Manipulation of the Capital Markets:** they had breached s. 126.1 of the *Securities Act* prohibiting fraud and market manipulation and s. 126.2 of the *Securities Act* prohibiting false and untrue statements reasonably be expected to have a significant effect on the market price of a security.⁷³
- (d) **Defamation:** the Acknowledged Conspirators’ statements in the Copeland Defamation and WSJ Fraud Articles were defamatory,⁷⁴ untrue,⁷⁵ and actuated by express malice against Catalyst and Callidus.⁷⁶
- (e) **Injurious Falsehood:** the accusations against Catalyst and Callidus “were, in fact, false”,⁷⁷ were “actuated by malice”,⁷⁸ and that the Appellants had “assert[ed] and prove[d] special damage... pecuniary in nature and ... demonstrate[d] a ‘causal connection’ between

⁶⁸ [Reasons, para 391, ABC Vol 1 Tab 4](#)

⁶⁹ [Reasons, para 391, ABC Vol 1 Tab 4](#)

⁷⁰ [Reasons, para 355, ABC Vol 1 Tab 4](#)

⁷¹ [Reasons, para 343, ABC Vol 1 Tab 4](#)

⁷² [Reasons, para 386, ABC Vol 1 Tab 4](#)

⁷³ [Reasons, para 391, ABC Vol 1 Tab 4](#)

⁷⁴ [Reasons, para 135, 144, 147, 253-254, 278, 282, 286 and 388, ABC Vol 1 Tab 4](#)

⁷⁵ [Reasons, paras 156, ABC Vol 1 Tab 4](#)

⁷⁶ [Reasons, para 292, ABC Vol 1 Tab 4](#)

⁷⁷ [Reasons, para 327, ABC Vol 1 Tab 4](#)

⁷⁸ [Reasons, para 328, ABC Vol 1 Tab 4](#)

the injurious falsehood and the special damage”.⁷⁹

(f) **Intentional Interference:** the expressions and conduct in issue were unlawful acts carried out with the specific intention to injure the Appellants’ economic relations (i.e. harm was not just a foreseeable consequence of these activities).⁸⁰

23. In dismissing the Appellants’ claim against Copeland at this pre-discovery stage, the Motions Judge found that there is “no evidence”⁸¹ suggesting that Copeland was aware that Anderson had shorted Callidus stock, even though the record contained unequivocal documentary evidence to the contrary, including that:

(a) prior to publication of the WSJ Fraud Articles, Copeland reviewed Anderson’s Report, which specifically disclosed that Anderson and others who had contributed to the report held short positions in Callidus and stood to realize gains in the event that the price of the stock decreased.⁸²

(b) Copeland spoke with Anderson on the phone “fairly regularly”⁸³ (although how frequently and when are not yet fully known as Anderson and Copeland have not produced phone records for the weeks leading up to the publication of the WSJ Fraud Articles).

(c) In text messages between Copeland and Anderson, Copeland provided advance notice to Anderson of when he anticipated the first of the WSJ Fraud Articles was to be published and told him, “Don’t tell the conspiracy of short sellers!”⁸⁴ In response, Anderson said he was deleting “this whole chat log”,⁸⁵ which he did.

(d) Copeland provided advance notice to Anderson regarding the anticipated timing of the publication of the WSJ Fraud Article (immediately following which Anderson in fact

⁷⁹ [Reasons, para 306 and 329, ABC Vol 1 Tab 4](#)

⁸⁰ [Reasons, para 409, 414, 418, ABC Vol 1 Tab 4](#)

⁸¹ [Reasons, para 188, ABC Vol 1 Tab 4](#)

⁸² [Riley Conspiracy Affidavit para 183, ABC Vol 4 Tab 45, p. 97-98; Anderson's Report, ABC Vol 5 Tab 57; Anderson Affidavit para 31, ABC Vol 4 Tab 49, p. 23; Copeland CXM, p. 68-73, q. 141-144, ABC Vol 3 Tab 36, p. 50-55](#)

⁸³ [Anderson CXM, p. 30-31, q. 56, ABC Vol 3 Tab 38, p. 67-68](#)

⁸⁴ [Copeland Anderson Texts, \(p. 16, texts of July 27, 2017\), ABC Vol 5 Tab 50, p. 26](#)

⁸⁵ [Copeland Anderson Texts, \(p. 16, texts of July 27, 2017\), ABC Vol 5 Tab 50, p. 26](#)

shorted Callidus stock),⁸⁶ in breach of News Corporations' *Insider Trading and Confidentiality Policy* and the *Dow Jones' Code of Conduct*, both of which prohibit the disclosure of forthcoming news to assist a third party in buying or selling securities.

(e) Following publication of the first of the WSJ Fraud Articles, Copeland demonstrated that he knew and intended the WSJ Fraud Article would crash Callidus' share price of Callidus when he gloated to Anderson, "shares tankingggggg".⁸⁷

(iii) Section 137.1(4)(a)(ii) – No Valid Defences

24. The Motions Judge found that there were grounds to believe that the Acknowledged Conspirators had no valid defences under s. 137.1(4)(ii) of the *CJA* to any of the claims.⁸⁸

(iv) Section 137.1(4)(b) – Harm Suffered as a Result of the Expressions

25. The Motions Judge, relying on the Juneja and Sunshine Reports, found that Catalyst and Callidus had suffered harm as a result of the Acknowledged Conspirators' conduct.⁸⁹ The Motions Judge concluded that the Appellants met this element of the test.⁹⁰

(v) Section 137.1(4)(b) – Weighing the Corresponding Public Interest in Permitting the Proceeding to Continue vs. the Public Interest in Protecting the Expressions

26. The Motions Judge held that the Wolfpack Action ought to be dismissed as against all the Respondents, despite having grounds to believe that the Appellants had suffered harm and had a real prospect of success at trial in proving their claims of conspiracy, defamation, and breaches of the *Securities Act*, among others.

27. In dismissing the Appellants' claims, the Motions Judge gave no consideration to the

⁸⁶ [Reasons, para 51, ABC Vol 1 Tab 4; ClaritySpring Trading Records, p. 11, ABC Vol 5 Tab 54, pg. 98; Copeland Anderson Texts, \(p. 16, texts of July 27, 2017\), ABC Vol 5 Tab 50, pg. 26; Levitt CXM, p. 194, q. 819 and p. 196-197, q. 828-834, ABC Vol 3 Tab 39, p. 175, 177-178; Anderson CXM, p. 193, q. 582-609, ABC Vol 3 Tab 38, p. 123-129](#)

⁸⁷ [Copeland Anderson Texts, \(p. 31, texts of August 9, 2017\), ABC Vol 5 Tab 50, pg. 41](#)

⁸⁸ [Reasons, paras 334, 362, 396, and 420, ABC Vol 1 Tab 4](#)

⁸⁹ [Reasons, paras 209-214, ABC Vol 1 Tab 4](#)

⁹⁰ [Reasons, para 425, ABC Vol 1 Tab 4](#)

Appellants' fiduciary obligations to their stakeholders in commencing the Wolfpack Action, the Respondents' motive or unlawful nature of the impugned expressions, their untruthfulness, or the public interest in protecting the integrity of the public capital markets.

28. Instead, the Motions Judge held that “[e]ven if there are some legitimate aspects to both the Defamation and Wolfpack Actions, in light of the [Appellants’] litigation history, as well as their history of executing Project Maple Tree, it is appropriate to infer that the ... present claims are underlined by a punitive or retributory purpose that relates to their failure to acquire WIND”.⁹¹ In making this inference, the Motions Judge cited the conduct of a contractor hired in September 2017 who conducted publicity campaigns⁹² and a contractor hired on Catalyst’s behalf⁹³ on the express basis that it would conduct lawful investigations, and which carried out a pretext investigation against Justice Newbould, who had presided over the WIND litigation.⁹⁴

29. In dismissing the action against the Respondents, the Motions Judge held that this “out-of-courtroom conduct”⁹⁵ “bears significantly on the public interest weighing exercise, and which ultimately tips the scales very much in favour of the [Respondents]”.⁹⁶ The Motions Judge was explicit in his Reasons for dismissing the Wolfpack Action that his analysis was tethered not to the text of s. 137.1 of the *CJA* but rather, to his disapproval of the conduct he attributed to the Appellants:⁹⁷

“In my view, then, even if the Catalyst Parties have indeed suffered some form of harm, the public has little interest in permitting parties with a history of relying on incredible private investigators to advance multiple lawsuits and extra-judicial “stings” to proceed with yet another claim.”

⁹¹ [Reasons, para 448, ABC Vol 1 Tab 4](#)

⁹² “**Project Maple Tree**”

⁹³ “**Black Cube**”

⁹⁴ [Reasons, para 449, ABC Vol 1 Tab 4](#)

⁹⁵ [Reasons, para 20, ABC Vol 1 Tab 4](#)

⁹⁶ [Reasons, para 453, ABC Vol 1 Tab 4](#)

⁹⁷ [Reasons, para 455, ABC Vol 1 Tab 4](#)

30. In making this inference, the Motions Judge relied on an earlier decision of Justice Boswell, which dealt with claims of privilege over documents generated by Black Cube, among others,⁹⁸ and was further concerned that Project Maple Tree was commenced on the sole strength of an email sent under the pseudonym “Vincent Hanna”, which he found to be insufficient.⁹⁹ The Hanna email stated that a “cabal”¹⁰⁰ of investment funds, including West Face and Anson, were targeting Callidus and caused the publication of the WSJ Fraud Articles.¹⁰¹

31. In his weighing exercise, the Motions Judge implied that the Respondents’ actions to seek redress and ultimately engage in the conspiracy, were justified because of their “acrimonious dealings” with the Appellants.¹⁰² The supposed acrimonious dealings however cannot justify a conspiracy to harm by unlawful means. The motive for the expression was already determined by the Motions Judge to be the predominant purpose to harm.¹⁰³

32. These references to irrelevant considerations show that the Motions Judge did not tether his analysis of the 137.1(4)(b) weighing exercise to the considerations mandated by the Supreme Court, but rather, to the out-of-courtroom conduct he disapproved of. In doing so, the Motions Judge erred in the ultimate task by dismissing this action which was commenced “to vindicate a *bona fide* claim”¹⁰⁴ against a group of conspirators whose predominant purpose was to harm the Appellants, including by breaching securities legislation.

⁹⁸ [The Catalyst Capital Group Incorporated v West Face Capital Incorporated, 2021 ONSC 125 \("Decision of Justice Boswell"\)](#), ABC Vol 1 Tab 8

⁹⁹ [Reasons, para 232, 455, ABC Vol 1 Tab 4](#)

¹⁰⁰ [Reasons, para 22, ABC Vol 1 Tab 4](#)

¹⁰¹ [Email from Vincent Hanna dated August 11, 2017, ABC Vol 7 Tab 68](#)

¹⁰² [Reasons, para 468, ABC Vol 1 Tab 4](#)

¹⁰³ [Reasons, para 349, ABC Vol 1 Tab 4](#)

¹⁰⁴ [Pointes Protection supra note 9 at para 97, ABOA Tab 1](#)

PART IV – STATEMENT OF ISSUES, LAW & AUTHORITIES

33. The interpretation of the s. 137.1 framework raises questions of law that are reviewable on a standard of correctness.¹⁰⁵ The Supreme Court of Canada in *Pointes Protection* stated that the regime established by s. 137.1 of the *CJA* is intended to screen out lawsuits that unduly limit expression on matters of public interest.¹⁰⁶ However, the Court also stressed that, in addition to protecting expression on matters of public interest, s. 137.1 must also “ensur[e] that a plaintiff with a legitimate claim is not unduly deprived of the opportunity to pursue it”.¹⁰⁷ As the Court stated in *Pointes Protection*, an individual’s ability to vindicate their rights through a lawsuit is “a fundamental value in its own right in a democracy”.¹⁰⁸

34. At issue in this appeal are the following questions:

(a) **Appeal Issue #1:** In conducting the public interest weighing exercise under s. 137.1(4)(b) of the *CJA*, did the Motions Judge err in law by failing to tether his analysis to the text of s. 137.1(4)(b) as required by the Supreme Court of Canada’s decision in *Pointes Protection*? In addition, did the Motions Judge err by focussing his analysis on the Appellants’ purported motive in advancing this meritorious claim, rather than properly considering the harm to the Appellants and their stakeholders, the unlawful quality and malicious nature of the expressions, the underlying conduct of the conspirators which was unlawful and in violation of securities laws, and the corresponding public interest in allowing the Appellants’ claim to continue?

(b) **Appeal Issue #2:** In holding that the Denying Respondents met the threshold test under s. 137.1(3) of the *CJA*, did the Motions Judge err in law in finding that the protections

¹⁰⁵ [Pointes Protection supra note 9 at para 97, ABOA Tab 1](#)

¹⁰⁶ [Pointes Protection supra note 9 at para 16, ABOA Tab 1](#)

¹⁰⁷ [Pointes Protection supra note 9 at para 46, ABOA Tab 1](#)

¹⁰⁸ [Pointes Protection supra note 9 at para 81, ABOA Tab 1](#). See also [Bent v Platnick, 2020 SCC 23 at para 139 \(“Bent”\)](#), [ABOA Tab 4](#)

under s. 137.1 of the *CJA* could apply to the Respondents that denied making the expression from which the proceeding arises or the common design giving rise to those expressions?

(c) **Appeal Issue #3:** In finding there were no grounds to believe that the Appellants' claims of conspiracy had a real prospect of success against Copeland under s. 137.1(4)(a)(i) of the *CJA*, did the Motions Judge err in law by weighing the evidence and making credibility findings with respect to Copeland's participation in the common design, or by misapprehending the record regarding these issues?

A. APPEAL ISSUE # 1 – PUBLIC INTEREST HURDLE ERRORS UNDER s. 137.1(4)(b) OF THE CJA

35. The weighing exercise under 137.1(4)(b) of the *CJA* does not import unfettered judicial discretion into the anti-SLAPP regime. While the weighing exercise under s. 137.1(4)(b) involves the exercise of a limited discretion, the resulting deference does not apply where there has been “an error in law, a material misapprehension of the evidence, or unreasonable factual findings.”¹⁰⁹

36. In his application of the weighing exercise under s. 137.1(4)(b) of the *CJA*, the Motions Judge erred in failing to tether his analysis to the considerations required by s. 137.1(4)(b), but rather to Catalyst's inferred motive for commencing the proceeding. In doing so the Motions Judge failed to follow the Supreme Court's direction in *Pointes Protection* to tether the analysis to the text of s. 137.1(4)(b) of the *CJA* by considering only: (i) the harm suffered or potentially suffered by the plaintiff, (ii) the corresponding public interest in allowing the underlying proceeding to continue, and (iii) the public interest in protecting the underlying expression.¹¹⁰

37. In *Pointes Protection*, Justice Côté described this tethered analysis as follows:¹¹¹

[79] ...the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP. Therefore, for this reason, the

¹⁰⁹ [UD Trading Group Holding PTE Limited v TransAsia Private Capital Limited, 2022 ONCA 100 at para 8, ABOA Tab 24](#)

¹¹⁰ [Pointes Protection supra note 9 at para 79, ABOA Tab 1](#)

¹¹¹ [Pointes Protection supra note 9 at para 79 \[underlining added\] ABOA Tab 1](#). On the irrelevance of motive generally in

only factors that might be relevant in guiding that weighing exercise are those tethered to the text of s. 137.1(4)(b), which calls for a consideration of: the harm suffered or potentially suffered by the plaintiff, the corresponding public interest in allowing the underlying proceeding to continue, and the public interest in protecting the underlying expression.

38. The Supreme Court in *Bent* similarly explained that this finding in *Pointes Protection* was a straightforward rejection of an “unmoored” analysis of the hallmarks of a SLAPP:¹¹²

[171] This line of reasoning by my colleague is, respectfully, unmoored from a proper s. 137.1(4)(b) analysis. This Court in *Pointes Protection* squarely rejects any inquiry into the hallmarks of a SLAPP: “the s. 137.1(4)(b) stage is fundamentally a public interest weighing exercise and not simply an inquiry into the hallmarks of a SLAPP” (para. 79).

39. The legislative history of the enactment is relevant to identifying the principles which are appropriate to consider under s. 137.1(4)(b).¹¹³ The *Anti-SLAPP Advisory Panel: Report to the Attorney General*, which led to the enactment of s. 137.1 of the *CJA*, was clear that the “key evaluation” under s. 137.1(4)(b) “should be the effect, and not the purpose, of the legal action under review”.¹¹⁴ The Panel expressly rejected a test examining the motive behind the litigation.

40. The Supreme Court has said that the fundamental purpose behind the enactment of s. 137.1 of the *CJA* is to weed out claims that are “merely a façade” and which are directed fundamentally to quashing debate on a matter of public importance.¹¹⁵ In arriving at his decision, the Motions Judge reviewed an extensive record of communications between the Defendants (even pre-discovery) and concluded that there is a real prospect that there was a conspiracy to harm for which there is no valid defence. This conspiracy caused at minimum, tens of millions of dollars in damages, and substantial

the case of proceedings brought to remedy actual harm, see [Metrick v Deeb, 2003 CanLII 804 \(ONCA\) at para 3, ABOA Tab 14](#), [leave to appeal ref'd 2004 CarswellOnt 1315 \(SCC\), ABOA Tab 15](#); [Huachangda Canada Holdings Incorporated v Solcz Group Inc, 2019 ONCA 649 at para 3, ABOA Tab 12](#); and [Angle v LaPierre, 2006 ABQB 380, ABOA Tab 2](#) aff'd on other grounds [2008 ABCA 120, ABOA Tab 3](#)

¹¹² [Bent supra note 108 at para 171 \[underlining added\], ABOA Tab 4](#)

¹¹³ [Pointes Protection supra note 9 at para 14, ABOA Tab 1](#)

¹¹⁴ Ministry of the Attorney General, “Anti-Slapp Advisory Panel Report To The Attorney General” (28 October 2010) at paras 32-35, online: <https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html> (“**Advisory Panel Report**”), [ABOA Tab 30](#)

¹¹⁵ [Pointes Protection supra note 9 at paras 2-4, ABOA Tab 1](#)

reputational harm. This case is clearly not a mere façade, and bears none of the hallmarks of a façade (i.e. borderline defamatory statements or nominal harm/damages). There is no basis for the Court to inquire into a Plaintiff's motive or purpose for commencing the action where the action is demonstrably not a facade.

41. Nonetheless, the Motions Judge focussed his analysis under s. 137.1(4)(b) virtually entirely on the Appellants' purported motive for commencing what he found to be an otherwise meritorious claim. The Motions Judge considered certain "out-of-courtroom" conduct attributed to Catalyst (occurring after the events at issue in the claim) to draw an inference that the action was brought for an improper purpose. It is clear that the Motions Judge took offence to what he considered to be the "ethically dubious" conduct he attributed to Catalyst.¹¹⁶

42. In any event, the Motions Judge's inferences were reached without recognizing that all of the allegations pertaining to Project Maple Tree were (and are) to be the subject of a full trial into the merits of WestFace's \$400 million Counterclaim, and without regard to the caveats repeatedly expressed by Justice Boswell about the limits and scope of his reasons.¹¹⁷

43. Moreover, the Motions Judge's finding that the Appellants commenced "multiple lawsuits" on the strength of information from "uncredible private investigators"¹¹⁸ was, in addition to being an irrelevant consideration, one which was made without regard to the evidence. The only lawsuits commenced after the WSJ Fraud Articles are the ones under consideration in these appeals.

44. In addition to being an irrelevant consideration, the Motions Judge's inferences about the motives for the Wolfpack Action, and in particular the Appellant's reliance on the Hanna email,

¹¹⁶ [Reasons, para 467, ABC Vol 1 Tab 4](#)

¹¹⁷ Decision of Justice Boswell, *supra* note 98 at paras 4 and 124

¹¹⁸ [Reasons, para 455, ABC Vol 1 Tab 4](#)

ignored material parts of the record regarding the Appellants' due diligence prior to commencing the lawsuit. This included that (i) prior to the litigation and Project Maple Tree, the Appellants had sworn evidence of Andrew Levy, one of the alleged co-conspirators, regarding communications between certain Defendants,¹¹⁹ and which was in fact relied on by the Motions Judge to conclude there was meritorious claim; (ii) the information from Hanna and others that there was a conspiracy to harm Callidus by a short attack was, in fact, borne out by the Motions Judge's decision; and (iii) prior to the litigation, Catalyst had conducted investigations including of social media.¹²⁰

(i) The Public Interest in Protecting the Impugned Expressions

45. The Supreme Court in *Pointes Protection* held that, in conducting the weighing exercise under s. 137.1(4)(b) of the *CJA*, the Court must take into account the *quality* of the expressions of the defendant sought to be protected and the *motivation* behind such expressions.¹²¹ The touchstones for this inquiry are the core values underlying freedom of expression (s. 2(b) of the Canadian *Charter of Rights and Freedoms*),¹²² such as the search for truth, participation in political decision making, and diversity in forms of self-fulfilment and human flourishing.¹²³ As the Supreme Court stated, the "closer the expression is to any of these core values, the greater the public interest in protecting it."¹²⁴ Conversely, as it was recently put by the British Columbia Court of Appeal, "A malicious statement is the antithesis of the core values underlying the freedom of expression. There is no public interest in protecting malicious speech".¹²⁵ As the Supreme Court

¹¹⁹ [Transcript of the examination of Andrew Levy held on August 30, 2017, ABC Vol 3 Tab 33](#)

¹²⁰ [Riley CXM on January 5, 2021, p. 43, q. 104, ABC Vol 3 Tab 41; Transcript from the cross-examination of Newton Glassman on May 3, 2021, p. 62-63, q. 162-164, ABC Vol 3 Tab 43; Affidavit of James Riley sworn December 28, 2020 paras 22, 30-31, 35-38, and 41-43, ABC Vol 4 Tab 48, p. 387, 390-395](#)

¹²¹ [Pointes Protection supra note 9 at para 74, ABOA Tab 1](#)

¹²² Charter of Rights and Freedoms, s 2(b), Part 1 of the *Constitution Act 1982*, being Schedule B to the *Canada Act 1982* (UK) 1982 c 11, Schedule "B" below

¹²³ [Pointes Protection supra note 9 at para 77, ABOA Tab 1](#)

¹²⁴ [Pointes Protection supra note 9 at para 77, ABOA Tab 1](#), citing *R v Sharpe*, 2001 SCC 2 at para 182, ABOA Tab 18 and *Thomson Newspapers Company v Canada (Attorney General)*, [1998] 1 SCR 877 at para 24, ABOA Tab 23

¹²⁵ [Hobbs v Warner](#), 2021 BCCA 290 at para 90 ("*Hobbs*"), ABOA Tab 11

expressed, “‘chilling’ false and defamatory speech is not a bad thing in itself”.¹²⁶ Not all expressions are created equal.¹²⁷

46. Thus, to the extent motive is relevant, it is not the motive for commencing the lawsuit that is the focus of the inquiry, but rather the motive of the expression that is at issue. Here, the predominant purpose of the Defendant’s expressions were to harm the Appellants.

47. In considering the public interest, the Motions Judge described the expressions as “commercial speech”.¹²⁸ Objectifying the expression as “commercial speech” does not address the *quality* of or *motivation* for the expression. The Motions Judge erred in law in failing to consider that the motive for the expression was a malicious intent to harm and that the quality of the expression was that it was false, defamatory, and part of an unlawful conspiracy.¹²⁹

48. Similarly, after deciding that the Appellants have a real prospect of success in establishing the expression was false, motivated by malice, and part of a conspiracy to harm, the Motions Judge stated that “at this stage” it is not “fair to conclude” that the “statements contained deliberate falsehoods or amounted to gratuitous personal attacks”.¹³⁰ At this stage, the Court was not doing a deep dive, and this finding amounts to an inconclusive finding that must be decided at trial.

49. Indeed, this analysis of the Motions Judge fails to consider his earlier findings. For example, he found that the evidence established there was a real prospect of showing that the predominant intention of the expression was to inflict harm. Harm was not simply a collateral

¹²⁶ [WIC Radio Limited v Simpson](#), 2008 SCC 40 at para 15, ABOA Tab 26; [Pointes Protection supra](#) note 9 at para 75, ABOA Tab 1

¹²⁷ [Pointes Protection supra](#) note 9 at para 76, ABOA Tab 1 citing [R v Keegstra](#), [1990] 3 SCR 697, ABOA Tab 17

¹²⁸ [Reasons](#), para 439, ABC Vol 1 Tab 4

¹²⁹ [Grist v TruGrp Incorporated](#), 2021 ONCA 309 at para 21 (“*Grist*”), ABOA Tab 8; [Neufeld v Hansman](#), 2021 BCCA 222 at para 61 (“*Neufeld*”), ABOA Tab 16

¹³⁰ [Reasons](#), para 429, ABC Vol 1 Tab 4

result of acts pursued for other reasons.¹³¹ In this case, the false expressions were the means to achieve that harm. The false expressions also violated securities laws and detrimentally impacted the public markets to the benefit of at least three conspirators. The public interest in protecting expressions that are the gravamen of a conspiracy to deliberately harm was not considered by the Motions Judge, although it was at the heart of this case. False statements used to further a conspiracy and commit illegal acts in violation of securities laws are by definition not in the public interest and cannot be worthy of protection.

50. The Motions Judge further erred in law¹³² by considering that allowing the Wolfpack Action to proceed “might”¹³³ have the negative effect of discouraging future “[w]histleblower submissions to regulatory authorities”.¹³⁴ This action never took issue with whistleblower submissions to regulatory authorities. In fact, the Motions Judge ignored his own finding that the Appellants advanced no claims based on the filing of the Whistleblower Complaints.¹³⁵ Instead, the Wolfpack Action is an appropriate response to the ulterior and malicious uses to which those Whistleblower Complaints were put,¹³⁶ as part of an unlawful conspiracy and an illegal short and distort attack.

51. Had the Whistleblower Complaints been filed with the Regulator but not shared with the media, there would be an absolute privilege protecting those expressions.¹³⁷ The public interest does not require the dismissal of this action to protect genuine whistleblower complaints.

52. The Motions Judge erred in law by failing in the weighing exercise to consider the unlawful

¹³¹ [Reasons, para 343, ABC Vol 1 Tab 4](#), citing [Harris supra note 67 at para 39, ABOA Tab 10](#)

¹³² See [Grist supra note 129 at para 21, ABOA Tab 8](#)

¹³³ [Reasons, para 462, ABC Vol 1 Tab 4](#)

¹³⁴ [Reasons, para 462, ABC Vol 1 Tab 4](#)

¹³⁵ [Reasons, para 52, ABC Vol 1 Tab 4](#). See also [The Catalyst Capital Group Incorporated v West Face Capital Incorporated, 2021 ONSC 1454 at para 54-66, ABC Tab 10](#)

¹³⁶ [Reasons, para 52, ABC Vol 1 Tab 4](#)

¹³⁷ [Reasons, para 297, ABC Vol 1 Tab 4](#)

quality of and malicious motivations behind the expressions that give rise to this proceeding, which show that there is no public interest in protecting the expressions:

- (a) **Expressions that breach the *Securities Act*:** The Motions Judge found that there were grounds to believe that the impugned expressions were made in breach of s. 126.1 of the *Securities Act*, which prohibits fraud and market manipulation, and s. 126.2 of the *Securities Act*, which prohibits misleading or untrue statements reasonably expected to have a significant effect on the price of a security.¹³⁸ The legislature has already decided that expressions that breach the *Securities Act* are not in the public interest. The Motions Judge erred in law in finding that expressions that violated the *Securities Act* were worth protecting in the public interest.
- (b) **Expressions that are untrue, malicious, and made with the predominant purpose to harm:** The expressions in issue were made to the media for malicious purposes and with a motive for profit, not to law enforcement or regulatory authorities to assist with the detection and prevention of crimes.¹³⁹ False and malicious statements are detrimental to the advancement of the values enshrined in s. 2(b) of the *Charter of Rights and Freedoms* which inform the weighing test under s. 137.1(4)(b) of the *CJA*.
- (c) **No chilling effect:** The evidence on the record makes it clear that none of the Respondents were “chilled” or intimidated in any way by the action commenced by the Appellants. The Respondents have continued to publicly express criticism of the Appellants.¹⁴⁰
- (d) **Harm to Others:** the expressions, which were intended to harm the Appellants, had a knowingly direct negative impact on third parties including public shareholders of

¹³⁸ [Reasons, paras 390 and 391, ABC Vol 1 Tab 4](#). See the provisions of the *Securities Act* at Sched “B” below

¹³⁹ [Hobbs supra note 125, ABOA Tab 11](#)

¹⁴⁰ [G. Zukerman, “How Nikola Stock Got Torched by a Short Seller” *The Wall Street Journal* \(September 23, 2020\), ABC Vol 7 Tab 69; B. Livezey, “Newton Glassman’s Legacy of Ashes” *SIRF* \(April 11, 2018\) and “Newton Glassman and Other People’s Money” *SIRF* \(November 27, 2018\), ABC Vol 7 Tab 70; \[Select examples of West Face Regulator Communications\]\(#\), ABC Vol 7 Tab 71; \[Baumann complaints to Regulators\]\(#\), Vol 7 Tab 72; \[Transcript of the cross-examination of Kevin Baumann on December 14, 2020\]\(#\), p. 22-29, q. 64-88, ABC Vol 3 Tab 40; J. McNish, “Black Cube Was Paid ‘Large Amount of Money’ to Improperly Discredit Judge, Court Rules” *The Wall Street Journal* \(March 31, 2021\), ABC Vol 7 Tab 73](#)

Callidus and investors in the Catalyst Funds, including endowments and pension funds. It is not in the public interest to protect expressions that harm third parties.

(ii) *The Harm Suffered by the Appellants*

53. The harm to the Appellants in this case is demonstrable and, at this stage of the proceeding, clearly so. The Appellants “must simply provide evidence for the motion judge to draw an inference of likelihood in respect of the existence of the harm and the relevant causal link.”¹⁴¹

54. Although purporting not to engage in a “deep dive”,¹⁴² in observing that the harm alleged by the Plaintiffs “is less, perhaps significantly so, than the Juneja and Sunshine Reports opine”,¹⁴³ the Motions Judge fundamentally misapprehended the record. Specifically, the Motions Judge failed to take into account that the Juneja Report did not just “purport to take other factors into account”¹⁴⁴ but rather had specifically discounted its preliminary damages calculation of \$144-161 million to exclude any other causes for the decline in Callidus’ share price other than the WSJ Fraud Articles.¹⁴⁵ In making evidentiary findings about the Appellants’ damages in the face of the uncontradicted expert evidence, the Motions Judge erred in law in assessing damages as if he were the trial judge and failed to appreciate that the damages assessment was an ongoing process.¹⁴⁶

55. The Motions Judge erred in the weighing exercise by assessing the harm suffered by the Appellants as result of the impugned expressions as being in the “mid range of the spectrum”.¹⁴⁷ This assessment was unnecessary and failed to appreciate that the magnitude of damages in this

¹⁴¹ [Pointes Protection supra note 9 at paras 71, ABOA Tab 1](#). See also [Subway Franchise Systems of Canada, Incorporated v Canadian Broadcasting Corporation, 2021 ONCA 26 at para 104 \("Subway"\)](#), ABOA Tab 20; [Hobbs supra note 125 at para 78, ABOA Tab 11](#), citing [Bent supra note 108 at para 150, ABOA Tab 4](#)

¹⁴² [Reasons, para 214, ABC Vol 1 Tab 4](#)

¹⁴³ [Reasons, para 212, ABC Vol 1 Tab 4](#)

¹⁴⁴ [Reasons, para 210, ABC Vol 1 Tab 4](#)

¹⁴⁵ [Juneja Report para 34, ABC Vol 6 Tab 65, pg. 153](#)

¹⁴⁶ [Subway supra note 141 at para 104, ABOA Tab 20](#); [Neufeld supra note 129 at para 58-59, ABOA Tab 16](#)

¹⁴⁷ [Reasons, para 214, ABC Vol 1 Tab 4](#)

case are at the very highest range of any case challenged under s. 137.1 of the *CJA*. For example, in *Bent v Platnick*, the evidence proffered by the plaintiff was that he had suffered a direct financial impact of \$578,949,¹⁴⁸ which the Supreme Court held was “extensive and quite serious”¹⁴⁹ and lay “close to the high end of the spectrum”.¹⁵⁰

(iii) The Public Interest in Allowing the Wolfpack Action to Continue

56. In articulating (and later applying) the test under s. 137.1(4)(b) of the *CJA*, the Motions Judge further erred in law by failing to avert to a relevant consideration: the public interest in permitting the underlying proceeding to continue.¹⁵¹ As is evident from the Motions Judge’s analysis of the likely success of the Wolfpack Action, this was not a case that has “only technical validity”.¹⁵²

57. Apart from the Appellants’ own significant interest in pursuing their legitimate claims against the Respondents, there are also corresponding *public* interests in allowing the underlying proceeding to continue. The Motions Judge erred in failing to consider and recognize that it is not only the harm to the Appellants that is to be weighed under s. 137.1(4)(b) of the *CJA*, but the *public* interests in vindicating this meritorious claim.¹⁵³

(a) Public Interest in Protecting the Integrity of the Canadian Capital Markets:

Among others,¹⁵⁴ Ontario’s Capital Markets Modernization Task Force has recognised that the manipulation of the Canadian capital markets through false and defamatory statements

¹⁴⁸ [Bent supra note 108 at para 145, ABOA Tab 4](#)

¹⁴⁹ [Bent supra note 108 at para 145, ABOA Tab 4](#)

¹⁵⁰ [Bent supra note 108 at para 162, ABOA Tab 4](#)

¹⁵¹ [Reasons, para 207, ABC Vol 1 Tab 4](#)

¹⁵² [Pointes Protection supra note 9 at para 47, ABOA Tab 1](#); [Advisory Panel Report at para 37, ABOA Tab 30](#)

¹⁵³ [Neufeld supra note 129 at para 63, ABOA Tab 16](#); [Pointes Protection supra note 9 at para 63, ABOA Tab 1](#); [Bent supra note 108 at para 146, ABOA Tab 4](#)

¹⁵⁴ [McMillan Report dated October 2019 \("McMillan Report"\), ABC Vol 8 Tab 74](#); [Article by Paul Simon dated March 30, 2016, Vol 8 Tab 75](#); [Article by Rick Wayman dated April 19, 2016, Vol 8 Tab 76](#); [Economist Article dated November 10, 2015, Vol 8 Tab 77](#); [Article by Larry Smith dated June 16, 2015, Vol 8 Tab 78](#). See also [Harrington Global Opportunities Fund S.A.R.L. v Investment Industry Regulatory Organization of Canada, 2018 ONSC 7739 at para 11, ABOA Tab 9](#)

is a significant and pressing issue.¹⁵⁵ Short and distort campaigns involve the dissemination of either intentionally false statements or misleading or untrue information and as such have little to no public utility.¹⁵⁶ Indeed, some commentators have said that Canada is a “haven” for short and distort attacks.¹⁵⁷ The Legislature has recognized the public interest in stamping out such conduct through the enactment of ss. 126.1 and 126.2 of the *Securities Act*. The Government of Ontario has also proposed draft legislation for the new *Capital Markets Act* to make it easier to prosecute unwanted activist short selling activity by eliminating the requirement to show a causal impact on the market price of a security caused by manipulative trading schemes.¹⁵⁸

(b) **Public Interest in Vindicating a Potentially Meritorious Claim:** The Motions Judge found that the Appellants’ claims of conspiracy and market manipulation have substantial merit. The Supreme Court has recognized that the ability of a party to vindicate their rights through an action in the courts is “a fundamental value in its own right in a democracy”¹⁵⁹ and that s. 137.1(4) of the *CJA* engages the interest of ensuring that a plaintiff with a legitimate claim in protecting its reputation is not unduly deprived of the opportunity to pursue it.¹⁶⁰ The Motions Judge found that the Appellants did not have to resort to litigation as a result of West Face’s conduct,¹⁶¹ but nowhere is there a suggestion of how the Appellants were to obtain recourse for the conspiracy or harm. The Motions

¹⁵⁵Ministry of Finance, Capital Markets Modernization Task Force, *Consultation Report* (July 2020) at page 37, online (pdf): <<https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf>>, [ABOA Tab 31](#); Ministry of Finance, Capital Markets Modernization Task Force, *Final Report* (January 2021) at page 87 and 90-91, online (pdf): <<https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf>>, [ABOA Tab 32](#)

¹⁵⁶ Canadian Securities Administrators remarked in its *CSA Consultation Paper 25-403 Activist Short Selling*, (3 December 2020), online (pdf): <https://www.osc.ca/sites/default/files/2020-12/csa_20201203_25-403_activist-short-selling.pdf>, [ABOA Tab 28](#)

¹⁵⁷ [McMillan Report, ABC Vol 8 Tab 74](#)

¹⁵⁸ Ontario's Regulatory Registry, “Capital Markets Act – Consultation Draft” (extract) and “Capital Markets Act – Consultation Commentary” (12 October 2021), online: <<https://www.ontariocanada.com/registry/view.do?postingId=38527&language=en>>, [ABOA Tab 33](#) and [Tab 34](#). See also Joan Piccone et. al. “Outlook 2021: Regulating Market Manipulation – Challenges and Change” (30 November 2021), online: *Cassels Brock LLP* <https://cassels.com/?export=pdf&post_id=13956&force>, [ABOA Tab 29](#)

¹⁵⁹ [Pointes Protection supra note 9 at para 81, ABOA Tab 1](#)

¹⁶⁰ [Pointes Protection supra note 9 at para 46, ABOA Tab 1](#); [Bent supra note 108 at para 146, ABOA Tab 4](#)

¹⁶¹ [Reasons, para 454, ABC Vol 1 Tab 4](#)

Judge further failed to recognize that Catalyst engaged in a graduated response ultimately culminating in a civil lawsuit, which is the accepted response to short and distort attacks.¹⁶²

(c) **Public Interest in Protecting Corporate Stakeholders:** Like other companies, Catalyst and Callidus have fiduciary duties to advance meritorious litigation in the interests of their stakeholders where they are adversely affected by those who conspire to engage in conduct such as that addressed this proceeding. In this case, the dismissal of the claims ultimately harms the public pension funds, university endorsements, and retail investors who were harmed by the conspiracy.

58. The Wolfpack Action addresses not just the expressions but also the conspiracy from which the expressions arose. In this case, the expressions were not just defamatory, but part of a malicious conspiracy to harm. From the public's perspective, expressions which are weaponized to harm in breach of the *Securities Act* cannot be worthy of protection. The expressions were expressly intended to negatively impact the capital markets and in fact did so. Those who deliberately take steps to artificially impact the public markets ought not to be shielded from meritorious claims. The Motions Judge erred in law by not weighing any of these considerations in his weighing exercise under s. 137.1(4)(b) of the *CJA*.

59. The Motions Judge further erred in law in his analysis under s. 137.1(4)(b) of the *CJA* in considering a number of matters that are extraneous and irrelevant to the public interest corresponding to the harm suffered by the Appellants:

(a) **Access to Justice:** The Motions Judge erred in considering that the Appellants' lawsuits had resulted in the expenditure of an inordinate amount of court time and legal fees and had put a strain on an already overburdened civil justice system in Ontario,¹⁶³ notwithstanding the Supreme Court's affirmation in *Pointes Protection* that the ability of

¹⁶² [McMillan Report, ABC Vol 8 Tab 74](#)

¹⁶³ [Reasons, paras 464-466, ABC Vol 1 Tab 4](#)

a person to vindicate their rights through a lawsuit is a fundamental value.¹⁶⁴ The fact that such an apparently meritorious case involving a secret conspiracy and multiple conspirators requires extensive court time cannot, in law, be a ground to dismiss the Appellants' action and absolve the conspirators of their conduct at this stage of the proceedings.

(b) **Prior Litigation with West Face:** The Motions Judge referred to litigation Catalyst unsuccessfully brought against West Face relating to the WIND transaction and the yet to be tried Veritas Action which this Court described as a "proceeding in good faith with a *prima facie* case". The Motions Judge erred in relying on prior litigation with West Face to infer that the Appellants' "primary purpose is to silence critics using spiteful tactics if necessary".¹⁶⁵ With regard to the WIND litigation, the Motions Judge did not find that these lawsuits involved any attempt by the Appellants to silence, let alone prevent, anyone making expressions relating to matters of public interest. They related to other matters.¹⁶⁶ Finally, the Motions Judge erred in failing to take into account that neither Callidus nor any of the other Respondents had anything to do with the WIND litigation, and that this was an extraneous and irrelevant consideration insofar as these parties are concerned.

(c) **Prior Litigation with the Guarantors:** Callidus has previously sued the Guarantors and their companies in separate and earlier enforcement proceedings. In holding that this weighed against allowing the claim to proceed,¹⁶⁷ the Motions Judge erred by failing to recognize that these "other" proceedings were collections actions to recover the debts owed and enforce guarantees. The Motions Judge further erred by failing to take into account the fact that the Guarantors had been largely unsuccessful in such actions, yet have continued to advance the same allegations against Callidus in this proceeding.

¹⁶⁴ [Pointes Protection supra note 9 at para 81, ABOA Tab 1](#)

¹⁶⁵ [Reasons, para 448, ABC Vol 1 Tab 4](#)

¹⁶⁶ The WIND litigation was dismissed because of the Court's findings, among others, that no information confidential to Catalyst had been used to unlawfully compete for and ultimately secure the purchase of WIND: [Catalyst Capital Group Incorporated v Moyse, 2016 ONSC 5271, ABOA Tab 6](#) and [The Catalyst Capital Group Incorporated v VimpelCom Limited, 2018 ONSC 2471, ABOA Tab 22](#)

¹⁶⁷ [Reasons, para 292 and 440, ABC Vol 1 Tab 4](#)

(d) **Financial and Power Imbalance:** The Motions Judge held that the disparity in resources between the Appellants and the Guarantors was relevant because Callidus has sued the Guarantors.¹⁶⁸ The Motions Judge failed to consider that the guarantee litigation resulted from defaults on loans on which the Guarantors had provided personal guarantees. Callidus was largely successful in this litigation (despite numerous unfounded allegations made by the Guarantors in defence), resulting in positive awards to Callidus. The Motions Judge also failed to recognize that this litigation had nothing to do with Catalyst.

60. The Motions Judge failed to tether his analysis to the harm and the corresponding public interest in allowing the action to continue, or properly consider the motive and quality of the expressions in issue. Had he done so, the Motions Judge would have found that (i) there is no public interest in protecting the expressions that were the product of an unlawful and malicious conspiracy, (ii) the harm to the Appellants that was significant and lasting, and (iii) there was a corresponding public interest in permitting the proceeding to continue that is reflected in the policies underpinning the law of conspiracy, defamation, and the *Securities Act*.

B. APPEAL ISSUE #2 – DENYING RESPONDENTS DO NOT SATISFY THE THRESHOLD TEST UNDER s. 137.1(3) OF THE CJA

61. Section 137.1(3) of the *CJA* requires the defendant to show that the proceeding arises from an expression made by that defendant that relates to a matter of public interest. The Supreme Court stated in *Pointes Protection* that “it is necessary for the moving party to meet this burden in order to even proceed to s. 137.1(4) for the ultimate determination of whether the proceeding should be dismissed.”¹⁶⁹ The reason for this is clear: the purpose of s. 137.1 of the *CJA* is to encourage individuals to speak out and participate in debates on matters of public interest free from the fear of being sued.¹⁷⁰ A party cannot be silenced if they do not admit to speaking.

¹⁶⁸ [Reasons, para 457-458, ABC Vol 1 Tab 4](#)

¹⁶⁹ [Pointes Protection supra note 9 at para 21, ABOA Tab 1](#)

¹⁷⁰ [Walsh v Badin, 2019 ONSC 689 at para 29 \(“Walsh”\), ABOA Tab 25](#)

62. Even though they deny contributing to or participating in any way in the publication of the Copeland Defamation and WSJ Fraud Articles, the Motions Judge found that the Denying Respondents still satisfied the threshold test that the “proceeding arises from an expression made by [them]”.¹⁷¹ In doing so, the Motions Judge distinguished the precedent case law on the basis that this case is complex and that the parties had made other comments about the Appellants.¹⁷² This error in the interpretation of s. 137.1(3) is reviewable on a standard of correctness.¹⁷³

63. Contrary to the Motions Judge’s reasons, neither the complexity of the case nor the fact that a party moving under s. 137.1 of the *CJA* admits to other expressions satisfies the threshold test under s. 137.1(3). Even though there is good reason to believe the Denying Respondents will ultimately be found liable for the expressions and conduct in issue there is, as held by this Court, “no viable argument” that can be advanced by a defendant who does not admit making the expressions that the defendant seeks to protect.¹⁷⁴

C. APPEAL ISSUE #3 – GROUNDS TO BELIEVE COPELAND’S PARTICIPATION IN THE CONSPIRACY ALLEGED

64. The Motions Judge found that the Appellants had no reasonable prospect of success at trial of proving Copeland’s participation in the common design with the other Respondents.¹⁷⁵ In doing so, the Motions Judge erred in applying an incorrect standard of proof under s. 137.1(4)(a)(i) of the *CJA* by weighing the evidence as he would at trial. The proper standard of proof simply required that there be a legally tenable claim supported by evidence that is reasonably capable of belief.¹⁷⁶ That test was met in this case.

¹⁷¹ [Reasons, para 104, ABC Vol 1 Tab 4](#)

¹⁷² [Reasons, paras 108-112, ABC Vol 1 Tab 4](#)

¹⁷³ [Pointes Protection supra note 9 at para 97, ABOA Tab 1](#). See also [Grist supra note 129 at para 21, ABOA Tab 8](#)

¹⁷⁴ [Zoutman v Graham, 2020 ONCA 767 at para 18, ABOA Tab 27](#). See also [Walsh supra note 170 at para 27, ABOA Tab 25](#)

¹⁷⁵ [Reasons, para 357, ABC Vol 1 Tab 4](#). The Motions Judge’s finding that the Appellants had no reasonable prospect of success at trial of showing Copeland defamed the Appellants or acted with malice is addressed in the Appellants’ Factum in the Dow Jones Defamation Action

¹⁷⁶ [Bent supra note 108 at para 88, ABOA Tab 4](#)

65. The Motions Judge also erred in law insofar as he “forgo[t], ignored or misconceived”¹⁷⁷ evidence of Copeland’s participation in the Respondents’ common design. In finding that there was “no evidence” suggesting that Copeland was aware that Anderson shorted Callidus stock at the time he supplied Copeland with the Whistleblower Complaints,¹⁷⁸ the Motions Judge:

(a) erred in law when he “forgo[t], ignored or misconceived”¹⁷⁹ evidence of Copeland’s participation in the Respondents’ common design, or did not apply the correct test of simply requiring the Appellants’ claims against Copeland in this regard be legally tenable and supported by evidence that is reasonably capable of belief;

(b) erred in law in failing to defer to trial the ultimate assessments of credibility, and other questions requiring a deep dive into the evidence regarding Copeland’s participation in the conspiracy¹⁸⁰ by making a finding that text communications between Anderson and Copeland (such as giving advance notice of the release of the WSJ Fraud Articles and the warning “Don’t tell the conspiracy of short sellers”) were “childish banter”;¹⁸¹ and

(c) made a palpable and overriding error in failing to recognise that, prior to publication of the WSJ Fraud Articles, Copeland was provided with and reviewed Anderson’s Report and was therefore aware that Anderson had placed short positions on Callidus stock.

66. The Motions Judge failed to apply the correct test and to recognize there was a sufficient basis under s. 137.1(4)(a)(i) of the *CJA* to establish Copeland was party to the tortious conduct.

This is an error of law.¹⁸²

¹⁷⁷ [Cowles v Balac](#), 2006 CanLII 34916 (ONCA) at para 117 (“*Cowles*”), ABOA Tab 7

¹⁷⁸ [Reasons](#), para 188, ABC Vol 1 Tab 4

¹⁷⁹ [Cowles supra](#) note 177 at para 117, ABOA Tab 7; [Sharbern Holding Incorporated v Vancouver Airport Centre Limited](#), 2011 SCC 23 at para 71, ABOA Tab 19; [Ladisa v Ladisa](#), 2005 CanLII 1627 (ONCA) at para 26, ABOA Tab 13

¹⁸⁰ [Pointes Protection supra](#) note 9 at para 52, ABOA Tab 1; [Bondfield Construction Company Limited v The Globe and Mail Incorporated](#), 2019 ONCA 166 at para 15, ABOA Tab 5

¹⁸¹ [Reasons](#), para 357, ABC Vol 1 Tab 4

¹⁸² [Neufeld supra](#) note 129 at paras 24-25, ABOA Tab 16

PART V – ORDER REQUESTED

67. The Appellants respectfully request that the Motions Judge's Order be set aside and an Order be granted that the motions brought by the Respondents be dismissed and that the Appellants' action against the Respondents may continue. The Appellants also request the costs of this appeal and the costs of the proceedings below, or alternatively in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of February, 2022



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ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs (Appellants)

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)

CERTIFICATE OF TIME

I estimate that one day will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 18th day of February, 2022.



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SCHEDULE A – LIST OF AUTHORITIES RELIED ON

Cases

1. [*1704604 Ontario Limited v Pointes Protection Association*, 2020 SCC 22](#)
2. [*Angle v LaPierre*, 2006 ABQB 380](#)
3. [*Angle v LaPierre*, 2008 ABCA 120](#)
4. [*Bent v Platnick*, 2020 SCC 23](#)
5. [*Bondfield Construction Company Limited v The Globe and Mail Incorporated*, 2019 ONCA 166](#)
6. [*Catalyst Capital Group Incorporated v Moyses*, 2014 ONSC 6442](#)
7. [*Cowles v Balac*, 2006 CanLII 34916 \(ONCA\)](#)
8. [*Grist v TruGrp Incorporated*, 2021 ONCA 309](#)
9. [*Harrington Global Opportunities Fund S.A.R.L. v Investment Industry Regulatory Organization of Canada*, 2018 ONSC 7739](#)
10. [*Harris v GlaxoSmithKline Incorporated*, 2010 ONCA 872](#)
11. [*Hobbs v Warner*, 2021 BCCA 290](#)
12. [*Huachangda Canada Holdings Incorporated v Solcz Group Inc*, 2019 ONCA 649](#)
13. [*Ladisa v Ladisa*, 2005 CanLII 1627 \(ONCA\)](#)
14. [*Metrick v Deeb*, 2003 CanLII 804 \(ONCA\)](#)
15. [*Metrick v Deeb*, 2004 CarswellOnt 1315 \(SCC\)](#)
16. [*Neufeld v Hansman*, 2021 BCCA 222](#)
17. [*R v Keegstra*, \[1990\] 3 SCR 697](#)
18. [*R v Sharpe*, 2001 SCC 2](#)
19. [*Sharbern Holding Incorporated v Vancouver Airport Centre Limited*, 2011 SCC 23](#)
20. [*Subway Franchise Systems of Canada Incorporated v Canadian Broadcasting Corporation*, 2021 ONCA 26](#)

21. [*The Catalyst Capital Group Incorporated v Veritas Investment Research Corporation*, 2017 ONCA 85](#)
22. [*The Catalyst Capital Group Incorporated v VimpelCom Limited*, 2018 ONSC 2471](#)
23. [*Thomson Newspapers Company v Canada \(Attorney General\)*, \[1998\] 1 SCR 877](#)
24. [*UD Trading Group Holding PTE Limited v TransAsia Private Capital Limited*, 2022 ONCA 100](#)
25. [*Walsh v Badin*, 2019 ONSC 689](#)
26. [*WIC Radio Limited v Simpson*, 2008 SCC 40](#)
27. [*Zoutman v Graham*, 2020 ONCA 767](#)

Secondary Sources

28. [Canadian Securities Administrators, *CSA Consultation Paper 25-403 Activist Short Selling*, \(3 December 2020\), online \(pdf\): <https://www.osc.ca/sites/default/files/2020-12/csa_20201203_25-403_activist-short-selling.pdf>](#)
29. [Joan Piccone et. al. “Outlook 2021: Regulating Market Manipulation – Challenges and Change” \(30 November 2021\), online: *Cassels Brock LLP* <https://cassels.com/?export=pdf&post_id=13956&force>](#)
30. [Ministry of the Attorney General, “Anti-Slapp Advisory Panel Report To The Attorney General” \(28 October 2010\) at paras 32-35, online: <https://www.attorneygeneral.jus.gov.on.ca/english/anti_slapp/anti_slapp_final_report_en.html>](#)
31. [Ministry of Finance, Capital Markets Modernization Task Force, *Consultation Report* \(July 2020\) at page 37, online \(pdf\): <https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-report-en-2020-07-09.pdf>](#)
32. [Ministry of Finance, Capital Markets Modernization Task Force, *Final Report* \(January 2021\) at page 87 and 90-91, online \(pdf\): <https://files.ontario.ca/books/mof-capital-markets-modernization-taskforce-final-report-en-2021-01-22-v2.pdf>](#)
33. [Ontario's Regulatory Registry, “Capital Markets Act – Consultation Draft” \(12 October 2021\), online: <https://www.ontariocanada.com/registry/view.do?postingId=38527&language=en>](#)
34. [Ontario's Regulatory Registry, “Capital Markets Act – Consultation Commentary” \(12 October 2021\), online: <https://www.ontariocanada.com/registry/view.do?postingId=38527&language=en>](#)

SCHEDULE B – TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. SECURITIES ACT, RSO 1990 c S5

Fraud and market manipulation

126.1 (1) A person or company shall not, directly or indirectly, engage or participate in any act, practice or course of conduct relating to securities, derivatives or the underlying interest of a derivative that the person or company knows or reasonably ought to know,

(a) results in or contributes to a misleading appearance of trading activity in, or an artificial price for, a security, derivative or underlying interest of a derivative; or

(b) perpetrates a fraud on any person or company.

Attempts

(2) A person or company shall not, directly or indirectly, attempt to engage or participate in any act, practice or course of conduct that is contrary to subsection (1).

Misleading or untrue statements

126.2 (1) A person or company shall not make a statement that the person or company knows or reasonably ought to know,

(a) in a material respect and at the time and in the light of the circumstances under which it is made, is misleading or untrue or does not state a fact that is required to be stated or that is necessary to make the statement not misleading; and

(b) would reasonably be expected to have a significant effect on the market price or value of a security, derivative or underlying interest of a derivative.

Same

(2) A breach of subsection (1) does not give rise to a statutory right of action for damages otherwise than under Part XXIII or XXIII.1.

2. COURTS OF JUSTICE ACT, RSO 1990 c C43

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.

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.

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.

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.

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.

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.

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.

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.

3. CHARTER OF RIGHTS AND FREEDOMS, PART 1 OF THE CONSTITUTION ACT 1982, BEING SCHEDULE B TO THE CANADA ACT 1982 (UK) 1982 C 11

Fundamental freedoms

2. Everyone has the following fundamental freedoms:

...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

Court of Appeal File No.: C70228
Superior Court File No.: CV-17-587463-00C

THE CATALYST CAPITAL GROUP INC. et al
Plaintiffs (Appellants)

and

WEST FACE CAPITAL INC. et al
Defendants (Respondents)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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