COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2023 ONCA 381
DATE: 20230529
DOCKET: C70208, C70209 & C70228

Miller, Coroza and Copeland JJ.A.

DOCKET: C70208

BETWEEN

The Catalyst Capital Group Inc. and Callidus Capital Corporation

Plaintiffs

and

West Face Capital Inc., Gregory Boland, M5V Advisors Inc., c.o.b. Anson Group Canada, Admiralty Advisors LLC, Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMF GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears, Sunny Puri, ClaritySpring Inc., Nathan Anderson, Bruce Langstaff, Rob Copeland, Kevin Baumann, Jeffrey McFarlane, Darryl Levitt, Richard Molyneux, Gerald Duhamel, George Wesley Voorheis, Bruce Livesey and John Does #4-10

Defendants

AND BETWEEN

West Face Capital Inc. and Gregory Boland

Plaintiffs by Counterclaim
(Respondents)

and

The Catalyst Capital Group Inc. and Callidus Capital Corporation, Newton Glassman, Gabriel De Alba, James Riley, Virginia Jamieson, Emmanuel Rosen, B.C. Strategy Ltd. d/b/a Black Cube, B.C. Strategy UK LTD. d/b/a Black Cube, and PSY Group Inc.

Defendants by Counterclaim
(Appellants)

DOCKET: C70209

AND BETWEEN

The Catalyst Capital Group Inc. and Callidus Capital Corporation

Plaintiffs
(Appellants)

and

Dow Jones and Company, Rob Copeland, Jacquie McNish and Jeffrey McFarlane

Defendants
(Respondents)

DOCKET: C70228

AND BETWEEN

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)

John E. Callaghan, Richard G. Dearden, Benjamin Na, Matthew Karabus, and Marco S. Romeo, for the appellants (C70208, C70209 and C70228), Catalyst Capital Group Inc. and Callidus Capital Corporation

David Moore and Ken Jones, for the appellants (C70208, C70209 and C70228), Catalyst Capital Group Inc., Callidus Capital Corporation, Newton Glassman, Gabriel De Alba, and James Riley

Matthew Milne-Smith, Andrew Carlson, and Maura O'Sullivan, for the respondents (C70208 and C70228), West Face Capital Inc. and Gregory Boland

M. Philip Tunley, for the respondents, Dow Jones and Company and Jacquie McNish (C70209) and Rob Copeland (C70209 and C70228)

Lucas Lung and Rebecca Shoom, for respondents (C70228), ClaritySpring Inc. and Nathan Anderson

Eugene Bodnar and Breanne Campbell, for the respondent (C70228), Kevin Baumann

Mark Wiffen, for the respondents, Jeffrey McFarlane (C70209 and C70228) and Darryl Levitt (C70228)

A. Dimitri Lascaris, Paul Guy, and Ashley Seely, for the respondent (C70228), Bruce Livesey

Heard: October 18-19, 2022

On appeal from the orders of Justice Thomas J. McEwen of the Superior Court of Justice, dated December 2, 2021.

B.W. Miller J.A.:

[1] This is a complex set of appeals. The three underlying actions allege multiple torts involving the coordinated actions of many individuals and companies. The motion judge case managed the proceeding, which took five days to argue and was proceeded by extensive productions and cross-examinations. The reasons for decision exceed 100 pages and 500 paragraphs.

[2] The appellants launch a comprehensive attack on the motion judge's reasons, raising a dozen or so grounds of appeal against the dismissal of their two actions pursuant to anti-SLAPP motions and the dismissal of their competing anti-SLAPP motion in relation to a counterclaim. Most of the grounds of appeal misconceive the nature of appellate review and can be dismissed on the basis that the motion judge's findings of fact are entitled to deference absent an error in principle or misapprehension of the evidence. Absent such errors it is not the function of an appellate court to redo the exercise of judicial discretion. As explained below, the appellants have not been able to meet this high threshold for an appeal, and I would dismiss the appeals.

INTRODUCTION

The backstory

[3] I begin with a brief description of the numerous parties in these appeals taken from the motion judge's reasons:

- Catalyst Capital Group Inc. (“Catalyst”) is a private equity firm specializing in investments in distressed and undervalued entities. Callidus Capital Corporation (“Callidus”) is an asset-based lender that provides financing to companies that cannot obtain financing from traditional lending sources (collectively, the “Catalyst parties”). Callidus traded on the TSX from April 2014 to November 2019, when it was then taken private by Catalyst pursuant to a court approved Plan of Arrangement. While Callidus was a publicly traded company, various Catalyst investment funds held, in the aggregate, a majority of the shares in Callidus.
- Newton Glassman (“Glassman”) is a co-founder and Managing Partner of Catalyst and was formerly the Executive Chairman and Chief Executive Officer of Callidus.
- James Riley (“Riley”) is a Managing Director of Catalyst and was its Chief Operating Officer until his retirement. Riley was also an Officer and Director of Callidus until 2019 when Callidus went private.
- West Face Capital Inc. (“West Face”) is a private equity investment firm. Gregory Boland (“Boland”) is its Chief Executive Officer (collectively, the “West Face parties”).
- Dow Jones and Company owns *The Wall Street Journal* (“WSJ”), the media company which employs Robert Copeland (“Copeland”) and

Jacquie McNish (“McNish”) (collectively, the “Dow Jones parties”). Copeland and McNish authored the WSJ article (identified below).

- Nathan Anderson (“Anderson”) is a US business analyst, a professional short-seller, and a whistleblower. He is the principal of ClaritySpring Inc. (collectively, the “Anderson parties”). Anderson prepared two whistleblower complaints that were forwarded to the Ontario Securities Commission (“OSC”). Anderson also forwarded them to Copeland. Anderson’s whistleblower complaints formed two of the four whistleblower complaints referenced in the WSJ article. Only the Anderson parties’ whistleblower complaints were quoted in the WSJ article.
- Kevin Baumann (“Baumann”) is the former president of Alken Basin Drilling Inc. (“Alken”), a borrower of Callidus. Baumann guaranteed loans made by Callidus to Alken. Baumann is now being sued by Callidus on his guarantee.
- Jeffrey McFarlane (“McFarlane”) is the former president and Chief Executive Officer of Xchange Technology Group (“XTG”), a borrower of Callidus. McFarlane guaranteed the XTG loan and was successfully sued by Callidus on the guarantee. McFarlane is quoted in the WSJ article. McFarlane also filed a whistleblower submission with the OSC, which is briefly referenced in the WSJ article.
- Darryl Levitt (“Levitt”) is a Toronto-based corporate lawyer who invested in a company that entered into a loan agreement with Callidus. He too is being

sued on a guarantee he made to Callidus. Levitt also filed a whistleblower submission with the OSC, which is briefly referenced in the WSJ article.

- Bruce Livesey ("Livesey") is a freelance journalist who co-authored two articles about the Catalyst parties and Glassman. Livesey's articles were not referenced in the WSJ article.

[4] In the action identified below as the "Wolfpack action", there are several additional defendants not referenced above. Only the West Face parties, Copeland, the Anderson parties, Baumann, McFarlane, Levitt, and Livesey (collectively, the "Wolfpack parties") brought anti-SLAPP motions and are now parties to this appeal. The remaining defendants did not participate in the anti-SLAPP motions and have not participated in the appeal.

[5] Catalyst and West Face are both significant players in the Canadian private equity market. They have a considerable history of animosity, with Catalyst having sued West Face three times relating to a 2015 business deal in which West Face triumphed over Catalyst to acquire WIND Mobile ("WIND"). Of the three lawsuits, the only action to proceed to trial (the "Moyse action") was dismissed by Newbould J. in 2016.

[6] The dismissal of the Moyse action triggered a multifaceted response from the Catalyst parties, intended to increase Catalyst's prospects of successfully appealing Newbould J.'s judgment. This operation, known as "Project Maple Tree",

involved the retention of public relations firms tasked with creating a positive public perception of Glassman and generating negative stories about the West Face parties. A parallel public relations front would generate stories about the existence of a “Wolfpack” conspiracy that was trying to harm Catalyst.

[7] Project Maple Tree also saw Glassman retaining private investigators to conduct surveillance of Newbould J., the judge who heard the Moyse action. The investigators were tasked with obtaining evidence to establish that Newbould J. was biased against Catalyst or Glassman or was an anti-Semite. If they could do this, Glassman believed, it would provide grounds to overturn the judgment dismissing Catalyst’s claim and win Catalyst a new trial. Remarkably, the Project Maple Tree investigators set up a sting operation by which they met with Newbould J. (by that time retired) under the pretence of retaining his arbitration chambers, while secretly recording the conversation and attempting – unsuccessfully – to lead him into making antisemitic remarks.

[8] There were other targets of Project Maple Tree who were to be entrapped through other means, such as sham job interviews to exploit West Face’s former employees in financial distress. The details are unnecessary for the resolution of the appeal, but the fact that the Catalyst parties undertook these extraordinary activities is important context for this litigation.

The events leading up to the actions

[9] On August 9, 2017, an article published on the *WSJ*'s website reported that a series of whistleblower complaints had been filed with the OSC (the "WSJ article"). The WSJ article reported that whistleblowers had accused the Catalyst parties of fraud and, in particular, of deceiving borrowers. The article was written by the respondents Copeland and McNish, who were relying on information supplied by the respondent Anderson – a private corporate fraud investigator and whistleblower – that he and several Callidus borrowers (including McFarlane) had filed complaints about Catalyst with securities regulators.

[10] The WSJ article was published again later that day, and then again in print the next day. The three versions of the article are essentially the same, with the online version carrying the headline "Canadian Private-Equity Giant Catalyst Accused of Fraud by Whistleblowers", accompanied by a photo of a Toronto Police Service ("TPS") car parked outside the TPS headquarters.

[11] The Catalyst parties claim that the WSJ article defamed them to an audience of approximately 2.4 million readers and had a devastating effect on their business. This included shares of Callidus falling 19.2% in 28 minutes, resulting in a loss of at least $144 million.

[12] Although the Catalyst parties argued that the article, as a whole, would lead the ordinary person to infer defamatory meaning, they specifically relied on the

following statements that they claimed amount to innuendo or are simply false, including:

- the Catalyst parties engaged in fraudulent activities and wrongdoing;
- the Catalyst parties engaged in financial crimes;
- the Catalyst parties violated Ontario securities law;
- Catalyst deceived borrowers;
- Catalyst overpaid Callidus $34 million for XTG/the integrity of Callidus' accounting around XTG;
- Catalyst artificially inflated the value of some of its assets;
- Catalyst delayed and underreported losses;
- the PNC bank loan was USD$23.9 million not USD$11.6 million; and,
- the Catalyst parties would not comment for the article.

The actions

[13] The Catalyst parties bring three appeals from: the dismissal of two of their actions pursuant to anti-SLAPP motions brought by some or all of the defendants, and the dismissal of the Catalyst parties' partial anti-SLAPP motion in relation to the West Face parties' counterclaim:

- The **Defamation action** was brought by the Catalyst parties against the Dow Jones parties for publishing allegedly defamatory statements in the WSJ article. The Dow Jones parties were successful in having the action

against them dismissed through an anti-SLAPP motion, and the Catalyst parties have appealed.

- The **Wolfpack action** was brought by the Catalyst parties against the Wolfpack parties, claiming they engaged in a conspiracy against the Catalyst parties which culminated in the publication of the WSJ article. Some of the defendants brought an anti-SLAPP motion and were successful in having the Wolfpack action dismissed against them. The Catalyst parties have appealed the dismissal of the Wolfpack action.
- The **West Face counterclaim** was brought by the West Face parties in the Wolfpack action against the Catalyst parties and certain officers, seeking damages for defamatory comments and other tortious behaviour. The Catalyst parties brought an anti-SLAPP motion targeting a portion of West Face's defamation action in the counterclaim. The Catalyst parties were unsuccessful, and they have appealed.

The statutory framework

[14] To succeed on an anti-SLAPP motion, the moving party must satisfy the test set out in subsections 137.1(3) and (4) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). These provisions state:

> (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.
>
> (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.

[15] The statutory scheme was explained by the Supreme Court of Canada in *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22, 449 D.L.R. (4th) 1, at para. 18. Where the moving party is able to establish that the proceeding arises from an expression relating to a matter of public interest, the responding party must then satisfy the motion judge that (a) there are grounds to believe that the proceeding has substantial merit and the moving party has no valid defence, and (b) the harm suffered or likely to be suffered is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the expression.

[16] The latter question – the weighing of the public interest in seeing the proceeding adjudicated against the public interest in protecting the expression at issue – was described as the "crux" and the "core" of the s. 137.1 analysis:

Pointes Protection, at paras. 61-62; *Bent v. Platnick*, 2020 SCC 23, 449 D.L.R. (4th) 45, at para. 139.

[17] The overarching purpose of the legislation was well expressed by Pepall J.A. in *Park Lawn Corporation v. Kahu Capital Partners Ltd.*, 2023 ONCA 129, at para. 33: “the anti-SLAPP legislation was designed to stop a plaintiff from silencing a defendant by pursuing meritless litigation that served to intimidate and undermine public expression.”

The motion judge’s reasons

[18] The motion judge conducted a single threshold burden analysis for the Defamation and Wolfpack actions because the same expressions underlie both proceedings.

[19] The motion judge concluded that in both the Defamation and Wolfpack actions, the moving party defendants had satisfied their burden under s. 137.1(3) to establish that the two actions arose from an expression, specifically the expression contained in the WSJ article and the Whistleblower complaints it referenced.

[20] The motion judge also rejected the Catalyst parties’ argument that the expression did not relate to a matter of public interest because confidential complaints submitted to the OSC Whistleblower Program are not made public by the OSC. The motion judge found that although the OSC does not disclose the

complaints to the public, there is no legal restriction preventing whistleblowers from communicating their complaints to the public. That finding was not strenuously challenged on appeal.

[21] I will proceed to address the balance of the Defamation and Wolfpack actions separately, including the motion judge's analysis and the grounds of appeal for each.

DEFAMATION ACTION

Substantial merit and available defences

[22] The motion judge found the Catalyst parties had failed to discharge their burden of establishing that there are grounds to believe that the defamation action against the Dow Jones parties had substantial merit and that the Dow Jones parties had no valid defences.

[23] The motion judge found the WSJ article reported, accurately, that the OSC and TPS were making inquiries after receiving whistleblower complaints alleging fraud against the Catalyst parties, and merely reporting that allegations of fraud have been made is not actionable.

[24] The motion judge found the Catalyst parties had not established there were grounds to believe the defences of justification and responsible communication were not available to the Dow Jones parties, because the main thrust of the WSJ article was true. The WSJ article stated that inquiries do not necessarily lead to an

investigation being conducted, and that the Catalyst parties had not been accused by any authorities of wrongdoing. The motion judge thus granted the motion of the Dow Jones parties and dismissed the defamation action against them.

[25] The motion judge was persuaded, however, that there were grounds to believe the defamation action as against McFarlane had substantial merit. McFarlane had claimed, in his whistleblower complaint, that Catalyst had overpaid Callidus to acquire XTG, and thereby alleged that Catalyst was engaged in improper business practices. Importantly, however, there were grounds to believe McFarlane had misdescribed the nature of that transaction. Furthermore, the motion judge held, there were grounds to believe no defences were available to McFarlane, particularly because there was a real prospect that he had been actuated by malice, which would remove the availability of the defences of fair comment and qualified privilege.

[26] Because the motion judge found the Catalyst parties had satisfied their onus under s. 137.1(4)(a) with respect to McFarlane, it was necessary for him to carry out the public interest analysis under s. 137.1(4)(b) with respect to McFarlane. Out of an abundance of caution, he also carried out that analysis with respect to the Dow Jones parties.

Public interest weighing

[27] The public interest weighing analysis proceeded in three steps: (1) asking whether the Catalyst parties had suffered, or would suffer, harm caused by the impugned expressions; (2) assessing the public interest in protecting the expression; and (3) weighing the public interest in permitting the proceeding to continue against the public interest in protecting the expression.

(1) Harm suffered

[28] The motion judge was satisfied that the Catalyst parties had suffered some harm as a result of the publication, which he characterized as falling in "the mid range of the spectrum", noting that it was not his role on the motion to undertake the "deep dive" into the evidence that would be necessary to quantify the harm or resolve the differences between the parties.

(2) Public interest in the expression

[29] The motion judge rejected the Catalyst parties' submission that there was no public interest in protecting the expression as it was simply a repetition of unproven allegations – one-sided and tantamount to a smear campaign. He preferred the characterization of the Dow Jones parties and McFarlane that the statements contained in the WSJ article were "valid and important topics of public debate concerning major financial entities that solicit investments from both domestic and international actors." He added that the effect of the WSJ article and

McFarlane's whistleblower complaints was to draw attention to the business practices of a major financial entity, a matter of a search for truth, which is at the core of the constitutional concept of freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*. He added that the expressions "deserve an elevated level of protection as they serve a public interest in publishing issues concerning the vitality and transparency of significant, publicly-traded corporations, as well as Canada's capital markets."

[30] He found the article to have been responsibly published, and to have provided an accurate account of the accusations made by others and the nature of the inquiries undertaken by the OSC and the TPS. He was bolstered in this opinion by his conclusion that the source of the accusations – the whistleblower complaint filed by Anderson – appeared to be lengthy, detailed, and relatively well-researched. Finally, he took into account the fact that the Catalyst parties had been given a meaningful opportunity to respond prior to publication. The Dow Jones parties made several requests for information, and a meeting with representatives of the Catalyst parties was held the day before publication, at which several questions were put to the Catalyst parties. They declined the opportunity to make any comment on the record.

[31] Furthermore, the motion judge noted, that although the Catalyst parties declined to provide any comment on the draft of the WSJ article, the print version – which was published shortly after the WSJ article was posted online – included

statements made by the Catalyst parties about the whistleblower complaints, specifically that they were "deliberately misleading", and defending the Catalyst parties' position.

[32] The motion judge also followed *Pointes Protection* in considering "broader or collateral effects of other expression on matters of public interest", and concluded that if he were to characterize the expressions as falling at the lower end of the "protection-deserving spectrum" this might have a chilling effect on other publishers and potential whistleblowers.

(3) Weighing of the public interest

[33] The Supreme Court of Canada held in *Pointes Protection*, at para. 81, that "the open-ended nature of s. 137.1(4)(b) provides courts with the ability to scrutinize what is really going on in the particular case before them". The motion judge concluded that what was really going on was troubling:

> Essentially, the Catalyst Parties appear to have a lengthy history of suing (repeatedly and unsuccessfully in the case of West Face) and pursuing those who offend them. As noted, they have even gone so far as to launch the ethically dubious "Project Maple Tree", which saw the "sting" operations executed on a former judge of the Superior Court of Justice.

He continued:

> I have thus concluded that what is really going on in the Defamation Action is that the Catalyst

> Parties have strategically tried to silence the Dow Jones Defendants and McFarlane … this is a case where the Catalyst Parties are attempting to silence their critics rather than address legitimate wrongs against them. It is therefore the type of case that comes within the legislature's contemplation of one deserving to be summarily dismissed at an early stage…

[34] The motion judge thus found that even if the Catalyst parties had suffered some harm and even if he had found the Defamation action was technically meritorious (which he did in the case of McFarlane), he would have concluded that the public interest in protecting the expressions outweighed the public interest in allowing the action to proceed: the ethically dubious activities of the Catalyst parties made the circumstances of the case "truly extraordinary."

[35] McFarlane does not appeal the finding that the Catalyst parties have met their burden under s. 137.4(a)(ii) by showing grounds to believe that he has no valid defences of justification, fair comment, and qualified privilege, in part because he was actuated by malice. However, malice allegedly attributed to McFarlane will be addressed below under the public interest weighing exercise, where he succeeded, a finding now subject to the Catalyst parties' appeal in the Defamation action.

The grounds of appeal

[36] The Catalyst parties raise the following grounds of appeal:

1. The motion judge erred in finding the Catalyst parties failed to establish grounds to believe that the Defamation action as against the Dow Jones parties had substantial merit;
2. The motion judge erred in finding the Catalyst parties failed to establish grounds to believe that the Dow Jones parties had no valid defences of justification or responsible communication;
3. The motion judge erred in finding the Catalyst parties failed to establish grounds to believe that the Dow Jones parties were actuated by malice; and,
4. The motion judge erred in finding the Catalyst parties failed to establish that the public interest in permitting the action to proceed did not outweigh the public interest in protecting the expression of the Dow Jones parties and McFarlane.

Analysis of the Defamation action

[37] As I explain below, the Catalyst parties' appeal of the Defamation action is, despite its many components, at root an attempt to relitigate the motion that was before the motion judge. Although the appellants frame the argument in terms of legal errors, they have been unable to identify any such errors of law or principle committed by the motion judge, and the appeal amounts to a request that the court draw different inferences from the facts and conduct a fresh weighing analysis under s. 137.1(4)(b). That is not the function of this court, and I would dismiss this appeal.

[38] It is important to note from the outset the limited nature of a motion under s. 137.1(4). It is not, as this court recently reiterated in *Park Lawn*, a summary judgment motion. The proceeding is intended to be an expeditious means of weeding out a particular species of abusive claims. Too often it has been misused as a costly and time-consuming surrogate for a summary judgment motion.

[39] The appeal does not seriously challenge that the moving party met the threshold burden in s. 137.1(3) that the action relates to an expression on a matter of public interest. Rather, the focus of the appeal is on the s. 137.1(4) analysis. The first three grounds of appeal concern the merits-based analysis or hurdle under s. 137.1(4)(a) whereas the fourth ground concerns the public interest analysis or hurdle under s. 137.1(4)(b). I will begin my review with the appellants' arguments under s. 137.1(4)(a).

(1) Substantial merit

[40] At the merits analysis stage, the onus is on the responding party – the plaintiff in the action – to show there are "grounds to believe" the proceeding has substantial merit and the moving party has no valid defence. This standard is not high; it is more than mere suspicion but less than proof on the balance of probabilities: *Pointes Protection*, at para. 40. Accordingly, the motion judge is not intended to wade deeply into the thicket to resolve contested factual assertions.

The factual findings on a s. 137.1(4) motion are only provisional, based on a record that is not expected to be full.

[41] The Catalyst parties contest the motion judge's finding that they did not establish grounds to believe there was substantial merit to the allegation of defamation made against the Dow Jones parties. Two errors are alleged.

[42] The first error is said to be that the motion judge misinterpreted a distinction drawn in *Lewis v. The Daily Telegraph Ltd.* (1963), [1964] A.C. 234 (H.L.) between (i) reporting the fact that authorities – such as the OSC and the TPS – are conducting an inquiry into fraud, and (ii) reporting that parties have actually engaged in fraud. The motion judge relied on *Lewis* as support for the further proposition that "[t]he former is not capable, as a matter of law, of lowering the reputation of the Catalyst parties in the eyes of an ordinary person." The Catalyst parties argue that the motion judge misread *Lewis* and was bound by a passage from Lord Devlin's speech in which he stated: "I think it is undoubtedly defamatory of a company to say that its affairs are being inquired into by the police."

[43] I am not persuaded by this submission. Sentences taken out of context can of course mislead. The cited passage from Lord Devlin was *dicta* and not a binding proposition of law. Furthermore, Lord Devlin agreed with the view expressed by the majority of other Lord Justices that stating an investigation is afoot does not constitute innuendo imputing guilt. As Lord Devlin pragmatically observed at

p. 286, “If the ordinary sensible man was capable of thinking that wherever there was a police inquiry there was guilt, it would be almost impossible to give accurate information about anything”. The Catalyst parties make entirely too much of Lord Devlin’s *dicta* and the motion judge made no error either in his reading of *Lewis* or more generally in his understanding of the common law regarding defamation.

[44] The second error alleged is that the motion judge failed to give effect to the repetition rule – that one cannot escape liability for libel simply by prefacing the libel with a statement that one is just repeating what someone else has said: *Grant v. Torstar Corp.,* 2009 SCC 61, [2009] 3 S.C.R. 640, at paras. 119-21. A repetition of someone else’s libel is just as noxious as the original statement: *Lewis*, at p. 260.

[45] The Dow Jones parties argue, and I agree, that the motion judge did not commit this error. The article does not contain a statement, from a first-person perspective, that the Catalyst parties had engaged in fraud. Whistleblowers made allegations of fraud to the OSC and to the TPS. The article reports this fact. That a reader is thereby exposed to the idea that third parties believe the Catalyst parties to have committed fraud does not make the reporting of the allegation defamatory. The law of defamation presumes that a reasonably thoughtful and informed reader understands the difference between allegations and proof of guilt: *Guergis v. Novak*, 2013 ONCA 449, 116 O.R. (3d) 280, at para. 57. See also

Miguna v. Toronto (City) Police Services Board, [2004] O.J. No. 2455, at paras. 3-4, aff'd [2005] O.J. No. 107 (C.A.) and *Frank v. Legate*, 2015 ONCA 631, 390 D.L.R. (4th) 39, at para. 40.

[46] Further, the motion judge was persuaded that the WSJ article satisfied the four factors for reportage from *Grant v. Torstar*, at para. 120: (1) the report attributes the statements made to an identified person; (2) the report indicates that the truth of the claim has not been verified; (3) the report sets out both sides of the dispute fairly; and (4) the report provides the context in which the statements were made.

[47] Were the Catalyst parties' submissions accepted on this point, it would never be permissible for a journalist to report that anyone was being investigated for fraud until such time as the matter was concluded. For good reason, this has not been the law of defamation.

(2) No valid defence

[48] The Catalyst parties also argue that the motion judge erred in finding that they did not discharge their burden of demonstrating that there were grounds to believe the Dow Jones parties had no valid defences.

[49] With respect to the defence of truth or justification, the Catalyst parties argue that the defence is only available in this case to the extent that the whistleblower complaints are true. The motion judge accepted that there are grounds to believe

that McFarlane made statements that were not true – particularly with respect to his statements about the transaction between Catalyst and Callidus for the purchase of XTG. However, he found that the "main thrust" of the WSJ article was true – "that Whistleblower Complaints had been submitted to the OSC concerning the Catalyst Parties and that, as a result, enquiries were being made." He further noted that the WSJ article was not a "bald retailing of libels" but included statements that qualified the allegations by explaining they had not been proven and were at an early stage. The article stated that not all inquiries lead to an investigation. The motion judge found that the WSJ article did not "purport to comment on the innocence or guilt of the Catalyst Parties" or accuse them of wrongdoing. It also noted that the OSC, under the whistleblower program, "conducts interviews and other research before deciding whether to open a formal investigation". The motion judge made no reviewable error in his analysis or conclusion in this regard.

[50] The Catalyst parties also argued that justification is not available unless the defence accepts that it has made the impugned statements (including the inferences alleged to be drawn from those statements) contained in the statement of claim. The Catalyst parties had pleaded that the statements made in the WSJ article were capable of supporting inferences that were defamatory. The motion judge, however, made no error in dismissing this argument, relying on *WIC Radio Ltd. v. Simpson*, 2008 SCC 40, [2008] 2 S.C.R. 420, at para. 56, for

the proposition that the court need not accept the worst possible interpretation of the WSJ article for the purposes of assessing the truth defence. For the purposes of an anti-SLAPP motion, the motion judge was entitled to resolve the issues by making findings about the inferences available from the impugned statements, on the basis of the limited record before the court, and was not required to accept the interpretation proposed by the appellants.

[51] Similarly, the motion judge made no error in finding that the Catalyst parties had not discharged their burden with respect to the unavailability of the responsible communication defence. To establish this defence, the publication must be on a matter of public interest and the defendant must show the publication was responsible, in that those involved in writing and publication were diligent in trying to verify the allegations, having regard to all the relevant circumstances: *Grant v. Torstar*, at para. 98.

[52] There is no serious dispute that the publication addressed a matter of public interest. The Catalyst parties point to errors in the article as well as the lack of disclosure that Anderson, one of the whistleblowers, had shorted Callidus stock, and that other whistleblowers were disaffected former borrowers.

[53] These arguments were made before the motions judge, who rejected them. The motion judge was entitled to make the factual findings that he did, on the record that was before him, which included evidence that the WSJ article was

subject to a multi-tiered vetting process and the Catalyst parties had been provided an opportunity to comment before the article was released. As to the sources, the motion judge did not accept the view that Copeland should have treated Anderson with suspicion. Copeland and Anderson had known each other since at least 2014, and their relationship had led to the publication of several financial news stories.

[54] Further, there was no evidence that Copeland was aware that Anderson had shorted Callidus stock at the time when Anderson provided him with his whistleblower complaint. With respect to McFarlane, despite the motion judge concluding McFarlane had animus toward the Catalyst parties, he rejected the suggestion that McFarlane was an illegitimate source. Moreover, the Dow Jones parties made it explicitly clear in the WSJ article that McFarlane's accusations were only accusations. They did not rely on them for their truth or present them as such. These findings are entitled to deference from this court.

[55] The Catalyst parties further argued that the motion judge erred in not finding the Dow Jones parties were actuated by malice. Again, this is essentially an appeal of a factual finding. They argue the motion judge omitted important facts and failed to cumulatively assess all evidence of malice. I do not agree. The motion judge's lengthy reasons show a command of a large record including considerable communications such as text messages between Anderson and Copeland as well as Glassman's own electronic messages. The motion judge concluded these communications were not indicative of malice on the part of any party. This finding

is supported by the qualified wording of the WSJ article and by the Dow Jones parties seeking comment from the Catalyst parties. No error in principle or misapprehension of fact has been identified. These factual findings of the motion judge are entitled to deference on appeal.

(3) Weighing of the public interest

[56] In order to avoid having its proceeding dismissed under s. 137.1(4)(b), the responding party must satisfy the motion judge that the harm it has suffered or will suffer as a consequence 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. The Catalyst parties argue that the motion judge failed to undertake this analysis and instead applied a different standard – dismissing the proceedings because of the "exceptional circumstances" of the Catalyst parties' conduct.

[57] The argument is misconceived. Although the motion judge occasionally referenced the "exceptional circumstances" of Project Maple Tree, his s. 137.1(4)(b) analysis was entirely conventional.

[58] The argument that the motion judge only considered the harm suffered by the Catalyst parties and did not consider the *public interest* in allowing the litigation to redress that harm is, again, groundless. It is a very short walk from the conclusion that harm has been suffered – in this case characterized by the motion

judge as lying at the “mid range of the spectrum” – to the conclusion that there is a public interest in permitting a proceeding that seeks redress for that harm. That conclusion is inescapable from a fair reading of the motion judge’s decision. The reasons clearly presuppose a public interest in permitting the litigation to continue, which must be outweighed by the public interest in protecting the expression.

[59] Further, while the Catalyst parties frame their argument as the motion judge having failed to consider their right to bring an action to vindicate their reputation from reckless accusations, their argument on this point is essentially, again, an appeal of a factual finding. It is not that the motion judge did not consider this argument. He did. However, he attached little weight to it because he found that “this is a case where the Catalyst Parties are attempting to silence their critics rather than address legitimate wrongs against them”. His findings were that the Defamation action was brought to strategically silence the Dow Jones parties and McFarlane. He found it significant that the litigation was part of a broader strategy that included the Project Maple Tree attacks, which were also intended to undermine the Dow Jones parties and McFarlane. These conclusions, reached within his discretionary role, as to how little public interest there was in allowing the Defamation action to proceed, are entitled to deference.

[60] With respect to the public interest in protecting the expressions, the motion judge concluded that “the expressions contained in the WSJ article are valid and

important topics of public debate concerning major financial entities that solicit investments from both domestic and international actors." He characterized both the expressions contained in the WSJ article and the statements made by McFarlane in his whistleblower complaints as part of "the search for truth", the importance of which is underscored by the fact that it has been characterized as being at the core of the *Charter* right of freedom of expression. He reiterated his findings that the WSJ article was responsibly published, accurately reported the whistleblower accusations, and accurately characterized the stage of the OSC and TPS inquiries. The article as a whole was thus worthy of protection.

[61] With respect to Anderson, the motion judge was impressed that his complaint appeared to be a well-researched document. He ultimately concluded that all of the expressions, the WSJ article and the Whistleblower complaints, including McFarlane's, were at the mid to high end of the spectrum. On the whole, the motion judge found these expressions were deserving of an elevated level of protection because they served "a public interest in publishing issues concerning the vitality and transparency of significant, publicly-traded corporations, as well as Canada's capital markets". The motion judge's conclusions are entitled to deference. There is no reviewable error in this component of the analysis.

[62] The Catalyst parties argue that the motion judge failed to consider malice on the part of McFarlane and Anderson, key sources for the WSJ article, as a motive to be weighed in the balance against McFarlane. I disagree. The motion

judge did consider malice, but it was outweighed by what he saw as really going on in the case before him.

[63] What was really going on is set out in the motion judge's specific findings concerning the history of the litigation between the parties, Project Maple Tree, and the financial and power imbalance with respect to McFarlane. These findings were more expansively addressed in the motion judge's analysis in the Wolfpack action. As McFarlane is a respondent to that appeal and the weight to assign to his alleged malice was argued more strenuously there, this argument will be addressed in greater detail below. It is sufficient to say here that the Catalyst parties have not shown any palpable or overriding errors in these factual findings, nor have they shown that they were irrelevant considerations to the public interest analysis.

[64] Thus, the Catalyst parties argue, essentially, that the motion judge ought to have concluded there was greater harm to the Catalyst parties, and that the expression was of lesser value, than he in fact found. The Catalyst parties invite this court to replace the motion judge's findings of fact with its own and engage in a reweighing of the public interest. That is not the function of this court. I would therefore dismiss the appeal in relation to the Defamation action.

WOLFPACK ACTION

Overview

[65] In the Wolfpack action the Catalyst parties allege that the Wolfpack parties conspired to cause them economic harm by engaging in a “short and distort” scheme, which involved spreading false information about the Catalyst parties with the intention of harming their reputation, deflating the share price of Callidus, and destroying their business.

[66] Several parties are alleged to have been part of the conspiracy, and several causes of action are pleaded, including: defamation, injurious falsehood, predominant purpose conspiracy, unlawful means conspiracy, and causing loss by unlawful means.

[67] There is a significant factual overlap between the Defamation action and the Wolfpack action, and the WSJ article is central to both. The Wolfpack action, however, draws on a broader context and a larger cast of characters said to have coordinated with each other in a concerted attack on the Catalyst parties.

[68] It will be helpful to briefly introduce (or re-introduce) the Wolfpack parties and explain the role each is said to have played, before proceeding to the motion judge’s reasons and the grounds of appeal.

[69] West Face is the rival to Catalyst that prevailed in the deal to acquire WIND Mobile. Catalyst has sued West Face and Boland, its Chief Executive

Officer, many times and these West Face parties are also among the Wolfpack parties. West Face filed a complaint against Catalyst with the OSC in April 2017.

[70] Anderson is a Wolfpack defendant based on his two whistleblower complaints, his role in the WSJ article, and short selling Callidus stock.

[71] McFarlane is a defendant in both the Defamation and Wolfpack actions. McFarlane's company XTG borrowed funds from Callidus. McFarlane guaranteed the loans and Callidus successfully sued him under the guarantee. He filed a whistleblower complaint with the OSC and is quoted in the WSJ article.

[72] McFarlane is joined by Baumann and Levitt as Wolfpack defendants. Bauman is the former president of Alken Basin Drilling Inc., which borrowed funds from Callidus. Baumann guaranteed the loans to Alken, and Callidus is now suing him under the guarantee. Levitt invested in a company that entered into a loan agreement with Callidus. He guaranteed the loan and is being sued for performance of that obligation. Levitt filed a whistleblower complaint with the OSC, which is briefly referenced in the WSJ article.

[73] Copeland is named as a defendant in both the Defamation and Wolfpack actions. He is the reporter who authored the WSJ article along with McNish. Bruce Livesey is another journalist who co-authored two articles about the Catalyst parties. He is also a Wolfpack defendant.

The backdrop to the Wolfpack action

[74] In the spring of 2016, Baumann, McFarlane, Levitt, and others began discussing their grievances against the Catalyst parties and considering whether to file whistleblower complaints. Levitt began tweeting about this. Some of them had communications with Boland. West Face had complained to the OSC regarding Catalyst in December 2014 and had been short selling Callidus shares in 2014 and 2015.

[75] Meanwhile, Anderson – who at that time was unacquainted with Baumann, McFarlane, and Levitt – began reading their online complaints about the Catalyst parties and later began working with them on a coordinated effort to file whistleblower complaints and develop contacts with the media.

[76] Independently, Livesey was retained by George Wesley Voorheis (a defendant but not a party to the motion) to conduct investigations into Callidus's loan operations. During this time, Livesey communicated with the West Face parties, and he ended up selling an article about Callidus to a media outlet.

[77] Anderson filed his whistleblower complaint with the OSC in May 2017 with a similar version to the U.S. Securities and Exchange Commission thereafter. The substance of the claim is that the Catalyst parties had engaged in a scheme to artificially inflate the value of assets, had misled investors about the value of assets, and had thereby engaged in fraud. Anderson's complaint referred to the

Catalyst parties dealings with various companies, including McFarlane's former company XTG.

[78] Several of the Wolfpack Defendants contacted media outlets to see if they would report on the whistleblower complaints. Anderson reached out to Copeland and provided him with Anderson's whistleblower report. Copeland interviewed McFarlane. This provided the basis for the WSJ article.

[79] Anderson executed trades shorting Callidus stock in August 2017 and made a modest profit. After the WSJ article was published, he closed out his position on Callidus and again made a modest profit. Some of the other defendants did as well.

[80] The motion judge distilled the Catalyst parties' complaint in the following terms:

> [T]he Catalyst Parties do not object to the fact that Whistleblower Complaints, particularly Anderson's whistleblower complaints, were made to the OSC and SEC. They submit, however, that the Whistleblower Complaints ought to have remained confidential. Instead, however, Anderson provided copies of his whistleblower complaints to Copeland and the Whistleblower Complaints, along with the interview Copeland conducted with McFarlane, formed the basis of the WSJ Article. The Catalyst Parties submit that this was all part of a well-designed scheme by adversaries of the Catalyst Parties, short sellers, and journalists to make defamatory expressions against the Catalyst Parties to drive down the share price of Callidus and profit through a "short

> and distort" campaign, being a tactic of publicizing negative information about a company and profiting from a short position taken against that company.

[81] The gist of the complaint is the Wolfpack parties defamed the Catalyst parties, unlawfully conspired against them to cause economic harm, or caused loss by other unlawful means.

The motion judge's reasons

[82] As explained below, the Catalyst parties were successful in establishing most of the elements necessary for the motion, but ultimately failed in the final public interest balancing.

(1) Wolfpack defamation claim

[83] Unlike the Defamation action against the Dow Jones parties, the motion judge found that there were grounds to believe that the defamation claim against the Wolfpack parties (excluding Copeland) had a real prospect of success. This cause of action arose out of two expressions: (1) the accusations reported in the WSJ article, and (2) the statements about Catalyst made to Copeland in the course of preparing the article, by McFarlane, Baumann, Levitt, and Anderson.

[84] As in the Defamation action, the motion judge found that the WSJ article indisputably referred to the Catalyst parties and was published. The only question remaining at the first step of the merits-based hurdle in s. 137.1(4)(a)(i) was

whether the contents of the WSJ article were defamatory. As in the Defamation action, McFarlane's specific accusations against the Catalyst parties would tend to lower their reputation in the eyes of a reasonable person. Thus, the motion judge concluded the Catalyst parties had a real prospect of succeeding on the merits of a defamation action. The motion judge also accepted that there were grounds to believe that Anderson, Baumann, the West Face parties, Levitt, and Livesey were potentially liable as joint tortfeasors for cooperating with, lending aid to, supporting, or encouraging McFarlane to make the impugned statements in the WSJ article. As in the Defamation action, the motion judge found the Wolfpack action against Copeland did not meet the threshold merit analysis.

[85] The motion judge found that the Catalyst parties also succeeded, except for the action against Copeland, at the second step of the merits-based hurdle in s. 137.1(4)(a)(ii). The motion judge found that there were not grounds to believe that the defences of justification, fair comment, responsible communication, or qualified privilege would be successful because of the finding that McFarlane may have misdescribed facts or was actuated by malice. As joint tortfeasors, none of Anderson, Baumann, the West Face parties, Levitt, or Livesey could therefore advance these defences. The motion judge also found that the defence of absolute privilege did not apply.

[86] The other set of alleged defamatory statements consists of communications made by McFarlane, Baumann, Levitt, and Anderson to Copeland as follows:

- Catalyst and Callidus are under active investigation by the Toronto police department and various regulators, including the OSC and the Alberta Securities Commission, regarding accounting irregularities, securities fraud, and other criminal misconduct.
- Callidus and Catalyst failed to decrease the valuations of their loan collateral when companies in the Callidus portfolio ceased making interest payments or only made partial payments.
- Callidus and Catalyst engaged in fraud by misleading borrowers about deal terms in order to withhold funds from borrowers at critical times and to allow the debt to balloon in order to assume control and ultimately ownership of borrowers.
- Catalyst misled its investors about the valuation of assets held in Catalyst's investment portfolios to collect fees and other payments to which it was not entitled and that Callidus had misled its borrowers about loans extended to them by Callidus.
- Callidus and Catalyst falsely certified that their financial statements were prepared in accordance with International Financial Reporting Standards and, in particular, that they failed to conduct an appropriate impairment analysis on the assets of the Callidus borrowers and Catalyst funds despite disclosures in their financial statements that such analysis had been done.

[87] The motion judge found that there were grounds to believe, taking into account the stage in the proceeding, that McFarlane, Anderson, Baumann, and Levitt's statements to Copeland were capable of being defamatory.

[88] The Catalyst parties also met their burden to show there were grounds to believe that the Wolfpack parties had no valid defence. For the defence of justification, raised by Baumann, Levitt, and McFarlane, the motion judge accepted the evidence of Riley, filed on behalf of the Catalyst parties, that called into question the truth of the statements. The motion judge explicitly noted he was saving questions of ultimate credibility for a later stage in the proceedings.

[89] Anderson, Baumann, Levitt, and McFarlane relied on defences of fair comment, responsible communication, and qualified privilege. However, the motion judge found grounds to believe that each of the defendants were actuated by express malice.

[90] For Baumann, Levitt, and McFarlane, the motion judge reviewed the guarantee enforcement proceedings the Catalyst parties brought against them. He noted they were "highly emotional", had "spawned additional defamation proceedings", and that within them, the defendants had accused the Catalyst parties of fraud. The context of the guarantee enforcement proceedings provided grounds to believe the Catalyst parties would be able to establish malice at trial.

[91] For Anderson, while the evidence of animus was weaker, on balance and given that a deep dive at this stage is not permitted, the motion judge found the Catalyst parties had met the merits-based hurdle under s. 137.1(4)(a)(ii). The motion judge once again rejected the applicability of the defence of absolute privilege.

(2) Injurious falsehood, predominant purpose conspiracy, unlawful means conspiracy and unlawful means actions

[92] The motion judge found there were grounds to believe, taking into account the stage in the proceeding, that there is substantial merit to the allegations of injurious falsehood, predominant purpose conspiracy, unlawful means conspiracy, and unlawful means as against the Wolfpack parties except for Copeland. The motion judge also found the Catalyst parties succeeded in showing that the proposed defences lacked a real prospect of success in relation to the torts.

[93] I will not set out the motion judge's comprehensive analysis of these torts because they are not the focus of the appeal, the motion judge having found in favour of the appellants (save as against Copeland). I will say this. The claims, although there are separate elements to each tort, overlap in the sense that they all arise from the allegedly false statements in the WSJ article and the statements to Copeland by Baumann, Levitt, McFarlane, and Anderson. While I do not comment on the respondents' view that the motion judge gave every benefit of the

doubt to the appellants in his merits-based analysis, I note that the motions judge appropriately followed the guidance from authorities to limit the depth of his dive and not to place too high of a burden on the substantial merit threshold.

(3) Public interest analysis

[94] As with the Defamation action, the crux of the anti-SLAPP motion in the Wolfpack action is the balancing exercise under s. 137.1(4)(b). The motion judge relied upon his findings at this prong in the Defamation action. Ultimately, he concluded that the public interest in permitting the proceeding to continue did not outweigh the public interest in protecting the respondents' expression and dismissed the Wolfpack action in its entirety.

[95] First, the motion judge accepted the Catalyst parties' evidence that they had suffered at least some harm but expressed doubt as to the quantum they asserted due to conflicting evidence.

[96] Turning to the balance of the public interest prong, the motion judge found that the public had a strong interest in protecting the respondents' expressions. The expressions were commercial speech about matters of public interest concerning Catalyst, a significant player in the capital markets industry. The motion judge found the expressions did not contain deliberate falsehoods nor gratuitous personal attacks. He found the public interest in protecting the expression

outweighed the public interest in permitting the action to continue, having regard to factors including:

(a) The Catalyst parties' extensive history of litigation against the West Face parties, among others, which gave rise to an inference that the appellants use litigation for the primary purpose of silencing critics rather than seeking vindication for legitimate rights infringement;

(b) The risk of chilling future commercial speech and, in particular, whistleblower submissions, should the action proceed to trial;

(c) The significant disparity in financial resources between the Catalyst parties and the Wolfpack parties; and,

(d) The access to justice concerns resulting from the type of repetitive, unsuccessful, and protracted litigation in which the Catalyst parties had engaged, and the lack of public interest in condoning the litigation and ethically dubious investigative strategies employed by the appellants.

[97] After conducting the public interest weighing exercise, the motion judge found the balance tipped in favour of the Wolfpack parties and dismissed the Catalyst parties' action.

The grounds of appeal

[98] The Catalyst parties raise three main grounds of appeal:

1. The motion judge erred in law by improperly conducting the public interest weighing exercise under s. 137.1(4)(b);
2. The motion judge erred in law in finding the West Face parties, Baumann and Levitt, who denied making the impugned expressions, met the threshold test under s. 137.1(3); and,
3. The motion judge erred in law by weighing the evidence and making credibility findings with respect to Copeland's participation in the common design.

[99] I will address each ground in turn, but I note that the first and third grounds, although framed as questions of law, are essentially disputes with the motion judge's factual findings and exercise of discretion, which are entitled to significant deference on appeal absent palpable and overriding error. This is especially true with respect to the motion judge's weighing of the public interest: *Bangash v. Patel*, 2022 ONCA 763, at para. 12; *Park Lawn*, at para. 42. The discretion is subjective and to be exercised by the motion judge, not a "reasonable trier": *Pointes Protection*, at para. 41. In other words, where the motion judge identified the correct test and considered appropriate factors, ultimately, the decision was his to make.

Analysis of the Wolfpack action

(1) Weighing of the public interest

[100] The first ground of appeal, and indeed the appeal's main focus, alleges errors in the motion judge's public interest weighing exercise under s. 137.1(4)(b). I find no error in the motion judge's statement or application of the weighing exercise. Section 137.1(4)(b) required the Catalyst parties to show that the harm they have suffered (or are likely to suffer) as a result of the Wolfpack parties' expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting the underlying expression. I will address each step of the public interest weighing exercise below.

(i) Harm analysis

[101] The Catalyst parties take issue with the motion judge's finding that the harm they suffered is in the mid-range of the spectrum. The motion judge, having reviewed the expert reports filed by both parties and the cross-examination transcripts, reduced the harm as quantified by the Catalyst parties. I see nothing wrong with his finding, which is entitled to deference. To the extent that certain of the Wolfpack parties ask this court to revisit the motion judge's assessment of harm to further reduce the amount, I find it is unnecessary to do so since the appeal is dismissed even accepting the motion judge's assessment of the harm.

(ii) Public interest in allowing the claims to proceed

[102] Given the motion judge's finding that there were grounds to believe Catalyst would succeed on multiple claims, the appellants argue that the public interest in their claims necessarily outweigh the public interest in protecting the West Face parties' expressions, especially since the motion judge found grounds to believe those expressions were malicious.

[103] This argument ignores two guiding principles of the s. 137.1(4)(b) analysis. First, at this stage, the "grounds to believe" standard is replaced with the more onerous "balance of probabilities" standard: *Pointes Protection*, at paras. 82, 103, and 126; *Bent*, at paras. 141, 174. Thus, a finding of "substantial merit" on the lower threshold in 137.1(4)(a) does not necessarily meet the public interest hurdle in s. 137.1(4)(b). Second, the public interest hurdle of the analysis "serves as a robust backstop for motion judges to dismiss even technically meritorious claims if the public interest in protecting the expression that gives rise to the proceeding outweighs the public interest in allowing the proceeding to continue": *Pointes Protection*, at para. 62. Weighing the public interest is the crux of the analysis: *Hansman v. Neufeld*, 2023 SCC 14, at para. 57. It would be an error of law to do as the appellants suggest and tip the public interest balance in favour of findings made at an earlier stage of the s. 137.1 analysis, which would render the final step superfluous.

[104] Further, in making this argument, the Catalyst parties mistake merit with meritorious in relation to the torts they allege. Section 137.1(4)(b) is a chance for the court to assess what is really going on in the actions. A finding that there are grounds to believe the underlying actions have substantial merit does not mean they are meritorious simply because the torts alleged, if proven, would deter manipulation of capital markets through false and defamatory statements. It is true that such allegations are serious, but here they cannot be considered separately from the context in which they are brought. The motion judge found that in bringing the Wolfpack action, the Catalyst parties were animated by a punitive and retributory purpose rather than seeking vindication for some kind of legitimate wrong. This finding is the opposite of “meritorious”.

(iii) Public interest in protecting the expression

[105] The Catalyst parties argue that the motion judge erred by failing to consider the quality of the expressions sought to be protected and the motivation behind them. To support this argument, they point to the motion judge’s findings that there were grounds to believe the claim had substantial merit because, for example, there was a real prospect that the respondents were motivated by malice. For the reasons set out above, the Catalyst parties misunderstand the different thresholds of proof employed at the different stages of the s. 137.1 analysis. The motion judge was entitled to find the expression could be found false or motivated by malice on the lesser standard but also that it was not fair to conclude that the statements

contained deliberate falsehoods or amounted to gratuitous personal attacks on the higher standard.

[106] The Catalyst parties also take issue with the inference the motion judge drew as to the quality of the commercial speech involved. Earlier in his reasons, the motion judge drew from decisions of this court that found that an expression made about commercial activity could be a matter of public interest: see e.g., *Fortress Real Developments Inc. v. Rabidoux*, 2018 ONCA 686, 426 D.L.R. (4th) 1, at para. 40; *Subway Franchise Systems of Canada, Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 25, leave to appeal refused, [2021] S.C.C.A. No. 92, at paras. 38-47 ("*Subway No. 1*"). Further, he was well aware of the elements of the torts and his findings on malice that the appellants argue should tip the balance in their favour.

[107] Considering the law and the facts before him, the motion judge found the expressions were "valid and important topics of public debate concerning major financial entities that solicit investments from both domestic and international actors." It bears repeating: It is not the task of this court to redo the inferences drawn as to the quality of the commercial speech or the weight attached to it.

(iv) Factors relevant to weighing the public interest

[108] The Catalyst parties argue that the motion judge considered factors irrelevant to the balancing exercise under s. 137.1(4)(b). In my view, he did not.

As this court has recently noted, courts in Ontario have been "faced with a plethora of anti-SLAPP motions:" *Park Lawn*, at para. 1. There is a substantial accumulation of case law identifying permissible factors that can be considered under s. 137.1(4)(b). The Catalyst parties seek an unduly narrow interpretation of this provision, which runs contrary to the established jurisprudence.

[109] Contrary to the appellants' argument, in *Pointes Protection*, Côté J. stressed the "open-ended nature" of s. 137.1(4)(b). The analysis is not exhausted by an inquiry into the traditional indicia of a SLAPP suit, but neither does it exclude it. Côté J. identified, at para. 80, several potentially relevant factors to consider:

> For example…the importance of the expression, the history of litigation between the parties, broader or collateral effects on *other* expressions on matters of public interest, the potential chilling effect on *future* expression either by a party or by others, the defendant's history of activism or advocacy in the public interest, any disproportion between the resources being used in the lawsuit and the harm caused or the expected damages award, and the possibility that the expression or the claim might provoke hostility against an identifiably vulnerable group protected under s. 15 of the *Charter* or human rights legislation.

[110] These factors overlap considerably with the indicia or hallmarks of a SLAPP suit identified by Doherty J.A. at para. 99 of *Platnick v. Bent*, 2018 ONCA 687, 426 D.L.R. (4th) 60. It was thus not an error for the motion judge to consider these indicia as part of the public weighing exercise so long as they were considered

together with other relevant considerations and not automatically treated as dispositive.

[111] To the extent that the appellants characterize Côté J.'s gloss on *Pointes Protection* in *Bent* as a categorical rejection of considering the hallmarks of a SLAPP in the s. 137.1(4)(b) analysis, they have misunderstood both decisions. The proposition Côté J. rejected is that the presence of these hallmarks is *determinative*. The hallmarks (or indicia or factors) are an open-ended list and can always be relevant to the public interest weighing exercise in an appropriate case. The SLAPP indicia are "tethered to the text" of s. 137.1(4)(b) when they are considered in the weighing analysis that the section prescribes: *Pointes Protection*, at para. 79.

[112] It was thus open to the motion judge to consider, for example, the conduct of the Catalyst parties in Project Maple Tree and the extensive history of litigation initiated against West Face and other defendants. The history of litigation between the parties or a history of the plaintiff using litigation or the threat of litigation to silence critics is relevant to discerning the public interest in allowing the underlying proceeding to continue. As this court summarized in *Subway Franchise Systems of Canada Inc. v. Canadian Broadcasting Corporation*, 2021 ONCA 26, leave to appeal refused, [2021] S.C.C.A. No. 87 ("*Subway No. 2*"), at para. 102: "[w]hether a party is attempting to vindictively or strategically silence another party or is

attempting to legitimately recover for harm arising from a defamatory statement may form part of the public interest weighing inquiry".

[113] In this regard, the motion judge found the conduct here exceptionally bad, noting that "the Catalyst Parties appear to have a lengthy history of suing … and pursuing those who offend them", including through "ethically dubious" methods such as Project Maple Tree. He concluded that "the Catalyst Parties' present claims are underlined by a punitive or retributory purpose that relates to their failure to acquire WIND" and that "their primary purpose is to silence critics using spiteful tactics if necessary." Furthermore, the "unprecedented" sting operation targeting Newbould J. was a baseless attempt to attack decisions of the court and "could be seen as an attempt to manipulate the judicial system."

[114] This backdrop was not only a permissible consideration, but a necessary one on the facts of this case in order to step back and ask what is really going on. The unique and extraordinary circumstances of this case amply support considering these factors to inform the public interest in permitting the underlying proceeding to continue.

[115] It must be borne in mind that the facts underlying Catalyst's tort claims stem from whistleblower complaints and journalistic reporting on such expressions. The appellants ask this court to take an unduly narrow approach, which ignores this context and focuses exclusively on the motion judge's finding that there is a

real prospect that the claims may have substantial merit because certain defendants may have been actuated by malice. I disagree.

[116] First, as this court has recently explained, this stage of the test does not require a technical, granular analysis: *Park Lawn*, at para. 38. Instead, it requires the motion judge to step back and ask what is really going on. It would be an error if the motion judge had ended the analysis or restricted his discretion to the technical merit of the actions as the appellants suggest.

[117] Second, the motion judge did not fail to consider the motives of certain respondents. On balance, however, he found that the chilling effect on future expressions such as whistleblower submissions to regulatory authorities outweighed other concerns due to the importance to the functioning of capital markets of promoting free commercial speech. I see no error in the motion judge's findings on the motives underlying the expression and how they weigh in the balance. Contrary to the appellant's submissions, this does not amount to a blanket immunity for whistleblowers from defamation claims.

[118] Finally, the Catalyst parties argue that the financial and power imbalance between the parties and the impact of this defamation claim on court resources and access to justice concerns were irrelevant considerations. I disagree.

[119] Where, as here, the financial and power imbalance is evident in an extraordinary record of judicial and extra-judicial attempts to intimidate others and

suppress the public interest in free expression, it is difficult to argue that this consideration should be irrelevant to s. 137.1(4)(b). The thrust of the appellants' submission is that their litigation history was a matter of legitimate assertion of legal rights and the motion judge erred in finding it supports the inference that they are now engaged in an abuse of process. Again, the proposed review of the motion judge's fact finding is not the function of this court, and, in any event, there was sufficient evidence for the motion judge to conclude that the appellants have sought to deplete the resources of the respondents through round after round of litigation.

[120] Although I agree with the appellants that concern for court resources in a general sense is not a permissible consideration, in this case the concern was in relation to the current claim being the latest salvo from the appellants who have demonstrated a willingness and ability to repeatedly attack adversaries through litigation. The motion judge found that the "multiple actions commenced by the Catalyst Parties…[had] consumed an enormous amount of court time", and the anti-SLAPP motions had taken "weeks of court time, not to mention a significant amount of productions, over 30,000 documents and, days of cross-examinations", including various preliminary motions that were involved. He did not err by considering this conduct in weighing the public interest in allowing the actions to proceed.

[121] I would dismiss the appellants' first ground of appeal in relation to the Wolfpack action.

(2) The threshold burden

[122] The appellants' second ground of appeal argues that the respondents, West Face, Levitt, Baumann, and Livesey, who did not admit to making the expressions at issue or acting in common design with the other defendants giving rise to the expressions cannot then satisfy the threshold test under s. 137.1(3) that "the proceeding arises from an expression *made by the person* that relates to a matter of public interest" (emphasis added).

[123] This question of law does not arise on the facts of this case and will remain for another day. The motion judge found the West Face parties, Levitt, Baumann, and Livesey admitted to making expressions related to the Catalyst parties' business practices from which the Wolfpack action also arises, including the very expressions the Catalyst parties use to ground their claims in civil conspiracy and joint tortfeasance. The motion judge arrived at this conclusion following his detailed review of a complicated action, including the numerous transcripts of conversations between the respondents, and thousands of emails, text messages, phone records and business documents. His findings are entitled to deference and I would dismiss this ground of appeal.

(3) Copeland's participation in the conspiracy

[124] The Catalyst parties' third and final ground of appeal in the Wolfpack action relates to the defendant Copeland and his participation in the alleged conspiracy. The Catalyst parties assert legal errors such as applying the wrong test or misapprehending the evidence. The motion judge committed neither error. Once again, what the Catalyst parties really ask is that this court revisit the factual findings absent any palpable and overriding error and redo the weighing exercise. I have previously explained that this is not the role of this court. I would also dismiss this ground of appeal and consequently the appeal of the Wolfpack action.

(4) Cross-appeal of the West Face parties

[125] Since I have dispensed with the Catalyst parties' appeal, I do not need to consider the cross-appeal raised by West Face or Boland questioning the motion judge's finding that they were potentially joint tortfeasors. I understand from this court's case management direction that the West Face parties did not abandon their cross-appeal in the event that it should become an issue during the argument of the Catalyst parties' appeals. It has not, given the dismissal of the appeal in the Wolfpack action. Accordingly, it is not necessary for me to consider the merits of the cross-appeal.

[126] For these reasons, I would dismiss the appeal in relation to the Wolfpack action and the cross-appeal.

WEST FACE COUNTERCLAIM

[127] The West Face parties filed a counterclaim in defamation alleging that the Catalyst parties, motivated by Catalyst's unsuccessful attempt to purchase WIND, launched a coordinated scheme intended to undermine West Face and destroy its business. Specific conduct alleged included: (i) making public comments accusing the West Face parties of misconduct; (ii) questioning the legitimacy of Newbould J.'s decision in the Moyse action; and (iii) commencing the various Project Maple Tree "sting" operations against current and former employees of West Face as well as Newbould J.

[128] The action in defamation is only one part of a broader counterclaim that alleges multiple other torts including conspiracy, breach of confidence, inducing breach of confidence, inducing breach of contract, inducing breach of fiduciary duty, and the tort of unlawful means. Through these actions, the West Face parties claim that the Catalyst parties succeeded at destroying their business. The counterclaim seeks $500 million in damages.

[129] The Catalyst parties brought an anti-SLAPP motion in relation to only four statements among several allegedly defamatory statements and publications relied upon by the West Face parties in their counterclaim. The four statements are:

(a) a written statement by a spokesperson of Catalyst, published in an August 19, 2016 *Financial Post* article (the "August 2016 Written Statement"), stating:

> Additional evidence [had] come out since the Moyse Litigation that [supported] the new case that alleges conspiracy and breach of contract.
>
> We are deeply disappointed by the decision and the severe implications of possible bias by Judge Newbould. We believe that he did not give fair consideration to all of the evidence presented, ignored contradictory statements made by the defendants that are part of the court record and delivered a judgment containing clear misstatements of fact.

(b) a Press Release by Catalyst issued October 13, 2016 (the "October 2016 Press Release"), stating:

> We can understand the increasing pressure that West Face has experienced due to its questionable and potentially unlawful actions around its acquisition of WIND and activities regarding Callidus Capital that has resulted in numerous inquiries from current and prospective investors, service providers and industry participants.
>
> In regards to our litigation against West Face and other parties, there are very few firms out there that take the role of fiduciary as seriously as we do. Our commitment to LPs and to minority shareholders in Callidus Capital is the primary consideration in all decisions we make.

> It is exactly because of this culture at Catalyst, as compared to how others behave, that we have chosen to be incredibly tough and demanding when our rights are trampled or counterparties act unethically. Because ultimately, it is our LPs and investors that are impacted.
>
> Catalyst has put its faith in the judiciary and expect that our claims and appeals will be heard fairly and the judgment will expose the truth of West Face's actions, character and values.

(c) a letter sent by Catalyst to certain of its Limited Partners, dated August 14, 2017 (the "First Investor Letter"), stating:

> As a brief update on the West Face and Wind litigation, new facts helpful to the case have been discovered. These relate not only to their stand-alone behaviour but also to the possible interference and market manipulation involving West Face and others in Callidus.

(d) a confidential investor letter sent on March 18, 2018 by Catalyst to certain of its Limited Partners, portions of which were published on April 18, 2018 by *The Globe and Mail* (the "Second Investor Letter") stating:

> The interviews in Catalyst's possession include statements made by a former West Face employee, who has extensive experience as a portfolio manager. This former employee has repeatedly indicated in his interview that inside information about the WIND negotiations was improperly leaked to West Face.

> This former employee expressed his belief that the West Face consortium had received inside information about the WIND negotiations as a result of which West Face was able to buy WIND by making a different bid with fewer conditions than Catalyst. Consequently, this employee stated that "I didn't work on the deal because I thought it was polluted."

[130] At the outset, it is important to note that even if the Catalyst parties' anti-SLAPP motion was successful, the bulk of the West Face counterclaim including much of the defamation claim would continue to proceed as against them. The motion brought by the Catalyst parties is thus a partial anti-SLAPP motion.

[131] The timing of the statements also lends important context. The first statement was made in the immediate wake of Newbould J.'s decision in the Moyse action. Notably, when Catalyst subsequently appealed Newbould J.'s decision to this court, it did not allege bias as a ground of appeal. Shortly after Newbould J.'s costs endorsement was released, Catalyst issued the October 2016 Press Release repeating the allegations of misconduct against West Face that Newbould J. had rejected.

The motion judge's reasons

[132] The motion judge began his analysis with the legal question of whether s. 137.1 permits partial anti-SLAPP motions. He interpreted "proceeding" in s. 137.1 to mean that an anti-SLAPP motion, if successful, must result in a

dismissal of an entire statement of claim or application. To reach this conclusion, the motion judge distinguished this court's decision in *Subway No. 1*, where the defendant, Trent University, brought an anti-SLAPP motion only in relation to Subway's negligence claim and not in relation to Subway's defamation claim. This court upheld Trent's successful anti-SLAPP motion dismissing the claim in negligence alone.

[133] In contrast to *Subway No. 1*, which dispensed with an entire cause of action, the motion judge noted the Catalyst parties sought only to winnow the defamation claim to prune four isolated expressions from others that are said to give rise to a single claim in defamation. Even if successful, all claims, including the defamation claim, remain and, unlike in *Subway No. 1*, not a single cause of action would be dismissed in its entirety. The motion judge concluded that while there may be circumstances where an anti-SLAPP motion would be useful to winnow out an entire cause of action, that is not the case here. The Catalyst parties' motion increased expense and delay for all parties without moving to strike any claim against it. The motion judge concluded that s. 137.1 did not permit the motion and would have dismissed it on that basis alone.

[134] Notwithstanding this conclusion, the motion judge went on to analyze whether the Catalyst parties would have been successful under s. 137.1 had he found it applicable. He concluded they would not and, accordingly, also dismissed the anti-SLAPP motion on the merits.

[135] The West Face parties did not contest that the four statements met the definition of “expression” set out in s. 137.1 or that they relate to a matter of public interest. The motion judge concluded the expressions met the threshold burden of being expressions made in the public interest to discuss a high-profile dispute between two major players in Canada’s capital markets industry.

[136] The motion judge conducted a single s. 137.1(4)(a)(i) analysis to consider all four of the expressions together. He concluded that there were grounds to believe there is a real prospect that the West Face parties will establish defamation at trial. The statements are clearly capable of lowering the reputation of the West Face parties because they accuse them of having been engaged in unethical and unlawful business practices. The expressions also impugn Newbould J.’s decision and suggest it should be disregarded as biased and incorrect.

[137] The motion judge contrasted his finding on the four expressions with those he made in relation to the WSJ article in the Defamation and Wolfpack actions. Where the WSJ article merely reported that others had made allegations of wrongdoing against the Catalyst parties that had yet to be proven, Catalyst’s four expressions were unqualified and purported to assert facts supported by evidence and sources, which it knew to be unreliable. While the motion judge accepted the evidence of harm filed by the West Face parties, he also noted that, in an action for defamation, the law permits presuming general damages once the elements of defamation are satisfied, as there were grounds to believe they were here.

[138] On whether the Catalyst parties had a valid defence, the motion judge found the West Face parties met their burden under s. 137.1(4)(a)(ii). The motion judge considered each defence to each expression individually and concluded there were grounds to believe that the Catalyst parties have no valid defences to the West Face counterclaim.

[139] Since there is significant factual overlap in the defences, they may be grouped by defence for the purpose of this summary. Starting with fair comment, the motion judge rejected this defence in respect of all four expressions because of the real prospect the statements were actuated by malice. He arrived at this conclusion in light of the Catalyst parties' extensive history of unsuccessful litigation against the West Face parties, the Catalyst parties' initiation of Project Maple Tree, and the fact that the Catalyst parties implemented and continued Project Maple Tree in partial reliance upon information they knew was not credible. In addition, none of the statements were based on true or substantially true facts.

[140] Next, the motion judge rejected the defence of responsible communication in relation to the August 2016 Written Statement, First Investment Letter, and Second Investor Letter on similar grounds of malice and little to no evidence that Catalyst was reasonably diligent in validating the accuracy of its statements. Third, the motion judge rejected the defence of qualified privilege in respect of the First Investment Letter and Second Investment Letter, noting there could not be a moral, legal, or social duty to publish the noncredible allegations based on

information which, even if credible, had nothing to do with the WIND litigation (the subject of the investment letters). Finally, the motion judge rejected the defence that the West Face parties had failed to provide notice required under the *Libel and Slander Act*, R.S.O. 1990, c. L.12, with respect to their defamation claim for the August 2016 Written Statement and the Second Investment Letter. The notice requirement did not apply to the Catalyst parties, who are not media entities.

[141] Since the West Face parties had succeeded at s. 137.1(4)(a), assuming a partial anti-SLAPP motion was even available, the motion judge stated he would dismiss the motion at this stage of the analysis. However, he proceeded to conduct the public interest weighing exercise under s. 137.1(4)(b). Ultimately, the motion judge dismissed the Catalyst parties' anti-SLAPP motion because the public interest in allowing the action to proceed outweighed the low public interest in protecting the four statements. Like with the Defamation and Wolfpack actions, Catalyst's litigation history, the sting operations associated with Project Maple Tree, and the Catalyst parties' reliance on dubious information factored into the motion judge's conclusion that the four statements were made with a punitive and retributory purpose and that the public has little interest in protecting these kinds of expressions.

The grounds of appeal

[142] The Catalyst parties argue the motion judge erred in finding that:

1. Section 137.1 does not permit partial anti-SLAPP motions;
2. The four statements were defamatory;
3. The harm allegedly suffered by the West Face parties was due to the four statements; and,
4. The public interest weighed in favour of permitting the underlying action to proceed under s. 137.1(4)(b).

[143] Only the first ground of appeal is an alleged legal error. The remaining three grounds, though posited as legal errors, are disputes about the factual findings and discretionary weighing exercise undertaken by the motion judge.

Analysis of the counterclaim

[144] The first ground of appeal arises from the motion judge's determination that partial anti-SLAPP motions are not permitted by s. 137.1. The Catalyst parties explain that they brought a partial anti-SLAPP motion with respect to four expressions only, because the remainder of the expressions are not attributable to them. They argue that they should not be precluded from bringing an anti-SLAPP motion only in respect of the expressions they admit to making.

[145] It is unnecessary to decide, on the facts of this appeal, the broad question of whether s. 137.1 contemplates partial anti-SLAPP motions. This jurisprudential

question is better left to another appeal in which the issue would be dispositive. In this case, not only would the motion not be dispositive of the counterclaim as a whole, it is not even dispositive of the particular cause of action. In such a circumstance, I agree with the motion judge that *Subway No. 1* is distinguishable. Unlike in *Subway No. 1*, the defamation claim would remain, along with the many other causes of action, to be determined at trial. Further, the four expressions would remain at issue because they are part of the factual record for the other causes of action even if they were expunged in relation to the defamation action.

[146] An anti-SLAPP motion is meant to be summary, efficient, and final. It is intended to save resources. This court has expressed concern that it is too often simply an occasion for the waste of additional time and expense, at no risk to the moving party: *Park Lawn*, at paras. 34-40. I share the motion judge's concern that allowing a partial anti-SLAPP motion of this sort would have the effect of delaying the entire proceeding for little purpose and with great expense and delay. The motion judge did not err in dismissing the motion on the basis that s. 137.1 does not contemplate a motion that would not dispose of an entire cause of action against a defendant.

[147] The Catalyst parties' second ground of appeal takes issue with the motion judge's finding that the four statements were defamatory. It was not an error for the motion judge to deal collectively with the four statements after he had examined each individually and determined correctly that all four statements

advanced the same meaning: namely, that there is still reason to believe the West Face parties were engaged in unlawful and unethical business practices because (i) Newbould J. was wrong, showed bias, and ignored key evidence or made erroneous findings of fact; and (ii) new facts give further credence to the Catalyst parties' suggestion that the West Face parties were engaged in wrongdoing. Having reviewed the statements, I see no point to repeating the same finding four times when the defamatory sting of four related statements is the same.

[148] The Catalyst parties raise two other arguments under this ground taking issue with the factual findings. First, they argue that the timing of two of the statements means they were not part of the conspiracy at issue in the counterclaim. Their anti-SLAPP motion, however, addresses the statements only in relation to the defamation claim.

[149] Second, the Catalyst parties argue the motion judge fundamentally misapprehended the evidence. Again they fail to identify any palpable and overriding errors in his decision. Consequently, I reject the second ground of appeal in its entirety.

[150] With respect to the third ground of appeal, it is not the task of a judge faced with an anti-SLAPP motion to do a deep dive into the record, as requested by the Catalyst parties, to assess the West Face parties' claim that they have suffered

harm. In any event, the Catalyst parties do not identify the evidence they say was overlooked. The reasons are clear that the motion judge considered the Riley Affidavit filed by the Catalyst parties, which attributed the losses experienced by West Face to business difficulties and poor management. He also considered the Boland affidavit under the merits analysis for West Face's defamation claim, where Boland deposed that as a result of the publication of the Catalyst parties' claims against West Face, including the impugned statements, West Face's business was destroyed. Despite Riley's evidence, and without taking a deep dive into the record, the motion judge concluded West Face had suffered harm as a result of the Catalyst parties' conduct, which included the four statements. Although the motion judge considered the Catalyst parties' broader conduct in this analysis, he did not err in doing so given the close relationship between the statements and the conduct addressed. The four statements were, effectively, Project Maple Tree in typeface.

[151] This finding was the motion judge's to make and it was grounded in Boland's evidence that investors were shunning West Face on the basis that they could not invest with them while the Catalyst parties' allegations were outstanding. In addition, Boland attested that West Face struggled to retain top personnel who were fearful of endangering their professional reputations and jeopardizing their personal security and privacy by being involved with West Face during its feud with

the Catalyst parties. The four statements acted to prolong the feud beyond the disposition of the Moyse action and consequently increased the harm.

[152] An anti-SLAPP motion is brought at an early stage in the proceedings and requires only a limited assessment of the evidence from the motion judge's perspective: *Pointes Protection*, at para. 39. Damages assessment is an ongoing process in litigation. No doubt the issue of harm and damages will be highly contested at the trial of the action, but at this stage in the proceeding, the motion judge found the West Face parties met their burden to show the harm was sufficiently serious. Further, it should be noted that although the motion judge was prepared to presume harm from the defamation, this was in the alternative to his finding on the evidence that there was a causal link between the Catalyst parties' statements and harm suffered by the West Face parties. It was on the basis of the evidence on the motion, and not on the operation of the presumption, that the motion judge was able to conclude that the harm fell in the mid-range of the spectrum.

[153] Since the appellants have failed to overcome the merits-based hurdle under s. 137.1(4)(a), there is no need for this court to consider their final ground of appeal concerning the public interest analysis. However, in the interest of completeness, I have considered the arguments and in particular the argument that the motion judge erred in law by characterizing the conduct of Catalyst as being much worse than that of West Face. I reject this ground of appeal. This is clearly a finding of

fact entitled to significant deference. The appellants do not allege palpable and overriding error nor do I see one.

[154] To the extent the Catalyst parties seek to relitigate the balancing exercise undertaken by the motion judge and his reliance on facts from the Defamation and Wolfpack actions, for the same reasons expressed above in relation to those appeals, I find no error in his analysis.

[155] I would therefore dismiss the appeal in relation to the counterclaim.

COSTS APPEAL

[156] The Catalyst parties also appeal the motion judge's discretionary costs awards in relation to the Defamation action, the Wolfpack action, and the counterclaim.

The motion judge's reasons

[157] The motion judge ordered the Catalyst parties to pay costs on a full indemnity basis to the Dow Jones parties in relation to the Defamation and Wolfpack action save and except for fees, disbursements, and taxes directly applicable to a motion brought by the Catalyst parties to obtain unredacted copies of documents in the possession of the Dow Jones parties (the "Privilege Motion"). The Dow Jones parties were awarded their costs of $652,258.48 inclusive of HST and disbursements, less the costs of the Privilege Motion.

[158] To the Wolfpack parties that were represented by counsel – namely, the West Face parties, Livesey, and the Anderson parties – the motion judge awarded full indemnity costs, including applicable taxes and disbursements. For the Wolfpack action, the costs award to the West Face parties was $1,500,000 plus HST and disbursements. Livesey was found entitled to his costs of $479,498.23 inclusive of HST and disbursements. The Anderson parties were found entitled to their costs of $526,724.04 inclusive of HST and disbursements.

[159] To the defendants who were self-represented – namely, Baumann, McFarlane, and Levitt in the Wolfpack action and McFarlane alone in the Defamation action – the motion judge awarded the amount they sought, except for McFarlane whose per hour rate sought was reduced from $200 to $150 an hour. Baumann was awarded his costs of $118,160.67 inclusive of HST and disbursements. Levitt was awarded his costs of $199,748.92 inclusive of HST and disbursements. McFarlane was awarded costs of $142,044.91 inclusive of HST and disbursements, less the difference in the hourly rate he claimed from $200 to $150 per hour. These costs awards included both legal fees incurred by the self-represented defendants at points during the proceeding where they retained counsel and compensation for the time they personally incurred.

[160] Finally, the motion judge awarded partial indemnity costs to the West Face parties with respect to their successful defence of the Catalyst parties' partial

anti-SLAPP motion brought in relation to the counterclaim. This award amounted to $500,000 plus HST and disbursements.

[161] Notably, the Catalyst parties did not challenge the hourly rates sought or the number of hours spent by the defendants who were represented by counsel or that of counsel to the self-represented defendants when they retained lawyers from time to time. They did not allege that excessive time was spent by the parties represented by counsel, nor did they dispute disbursements or applicable taxes. As far as the time spent or hourly rate of the Catalyst parties' counsel is concerned, it is unknown. The Catalyst parties did not produce a bill of costs.

The grounds of appeal

[162] The Catalyst parties raise five grounds of appeal:

1. The motion judge erred in law by failing to take into account, as countervailing determinations to full indemnity costs awarded in the Wolfpack action: (i) the success of the Catalyst parties in respect of the threshold issues under subsections 137.1(4)(a) and (b); (ii) the nature of the misconduct of the defendants underlying the meritorious claims brought by the Catalyst parties; and, (iii) the conduct of the defendants denying and contesting every issue in the anti-SLAPP motions.

2. There was insufficient evidence to support awarding the self-represented defendants their own costs in addition to the legal fees that they had incurred.
3. The motion judge erred by awarding partial indemnity costs to the West Face parties in the counterclaim contrary to the statutory presumption that respondents to an anti-SLAPP motion are not entitled to their costs.
4. The motion judge erred by not setting off costs incurred by the Catalyst parties in the Privilege Motion against the award of anti-SLAPP costs in favour of the Dow Jones parties.
5. Leave to appeal is not required on an appeal of costs awarded in an anti-SLAPP motion.

Analysis of the costs appeal

[163] As will become apparent below, I defer to the motion judge's exercise of discretion in relation to costs for all parties. Further, as noted above, the appellants do not take issue with the hourly rates or number of hours billed by legal counsel. I would thus dismiss the Catalyst parties' costs appeal in its entirety as the costs awarded were appropriate in the circumstances of each case.

[164] I will begin with the fifth ground of appeal because it will determine whether the Catalyst parties must obtain leave to appeal the costs awards or may appeal as of right. The Catalyst parties argue, as a matter of statutory interpretation, that

s. 6(1)(d) of the *CJA* is a specific exception which overrides the general rule that a party must seek leave to appeal costs under s. 133(b).

[165] I disagree. The interpretation proffered by the appellants that parties to an anti-SLAPP motion have an automatic right of appeal for a costs award would be a significant departure from the general requirement that leave be obtained to appeal awards of costs. In my view, such a departure would require express language in the statute. Section 6(1)(d) does not refer to costs and s. 133(b) does not set out an exception for anti-SLAPP proceedings.

[166] Section 133(b) requires leave "where the appeal is only as to costs that are in the discretion of the court that made the order for costs." This means that where an appeal from the main action is dismissed and the appellant wants to appeal the costs award of the court below, then the appellant needs leave to appeal the costs order: *Murano v. Bank of Montreal* (1998), 41 O.R. (3d) 222 (C.A.), at paras. 74-80. An appeal from a costs order made in relation to an anti-SLAPP motion is no different; an appellant must seek leave to appeal: *Veneruzzo v. Storey*, 2018 ONCA 688, 23 C.P.C. (8th) 352, at para. 31. As stated above, I would dismiss the Catalyst parties' appeal of the anti-SLAPP motions brought in the Defamation action, Wolfpack action, and counterclaim. Accordingly, the appellants must seek leave, which they have done, out of an abundance of caution.

[167] To grant leave, there must be strong grounds upon which the appellate court could find that the judge erred in exercising his discretion: *Brad-Jay Investments Limited v. Village Developments Limited* (2006), 218 O.A.C. 315 (C.A.), at para. 21, leave to appeal refused, [2007] S.C.C.A. No. 92. Setting aside a costs award on appeal may only follow where the motion judge has made an error in principle or if the costs award is plainly wrong: *Hamilton v. Open Window Bakery Ltd*., 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27, citing *Duong v. NN Life Insurance Co. of Canada* (2001), 141 O.A.C. 307, at para. 14.

[168] Turning back to the Catalyst parties' first ground of appeal, the appellants argue the motion judge misinterpreted *Levant v. DeMelle*, 2022 ONCA 79, leave to appeal requested, [2022] S.C.C.A. No. 87 and [2022] S.C.C.A. No. 88, at para. 77, as to what countervailing determinations may result in a departure from the presumption of full indemnity costs in s. 137.1(7) of the *CJA*. They point to their success at the threshold stage and merits stage of the s. 137.1 analysis in the Wolfpack action, as well as the conduct of the Wolfpack parties at issue in the claims and their conduct in mounting "every defence imaginable."

[169] This ground of appeal fails. The motion judge correctly interpreted *Levant*. It is the appellants who misinterpret it by taking one paragraph out of context and parsing its words. Contrary to the appellants' interpretation, in *Levant*, this court allowed the appeal of a partial indemnity costs award and replaced it with the full indemnity amount because, in part, the motion judge had impermissibly discounted

the costs for the very reason the Catalyst parties request here: success at the threshold stage and merits analysis. I find no error in principle in the motion judge's reasoning on this point.

[170] Further, the indicia of a SLAPP lawsuit are relevant to the presumptive award of full indemnity costs found in s. 137.1(7): *Levant*, at para. 82. In making the costs award, the motion judge considered the conduct of the parties. Indeed, it is clear from the motion judge's reasons that he considered the Catalyst parties' exact arguments now made on appeal and still determined that it was appropriate to award costs on a full indemnity basis.

[171] Specifically, the motion judge considered that the Wolfpack parties were subject to significant, complicated, and broad ranging claims by the Catalyst parties, who claimed significant damages of $450 million. Each of the complicated causes of action gave rise to a number of equally complicated defences. He found the Wolfpack parties did not unduly expand the scope or complexity of the issues. Instead, it was the Catalyst parties who "upped the ante by engaging in ethically dubious activities, which included direct attacks on certain Wolfpack parties and a former member of the judiciary." The motion judge found the Catalyst parties engaged in a "vindictive attack", "sought to silence their critics rather than address legitimate legal wrongs against them", and were willing and able "to repeatedly attack their adversaries both inside and outside the courtroom".

[172] The law is clear that the costs consequences of an action that was found to unduly limit expressions on matters of public interest are severe to serve as a strong deterrent to SLAPPs: *Rabidoux*, at para. 61. I see no reason to interfere with the motion judge's exercise of discretion when awarding costs to the Wolfpack parties on a full indemnity basis, and I would deny leave to appeal on this basis.

[173] I also see no reason to interfere with the motion judge's discretion in relation to the appellants' second ground of appeal. Here, the appellants argue there was an insufficient evidentiary basis for the recovery of any costs by the self-represented defendants. This too is a request to reweigh the evidence.

[174] There is no error whatsoever in the motion judge's exercise of discretion to award costs for the modest amounts of time the self-represented defendants requested (and at the reduced rate for McFarlane). The motion judge considered all the evidence filed and, in the absence of cross-examination, found that the self-represented defendants were entitled to costs for time and effort for work ordinarily done by a lawyer as well as costs for opportunity loss by foregoing remunerative activity.

[175] Bearing in mind that the costs awards to the self-represented defendants also include legal fees they incurred at points during the anti-SLAPP motion when they retained counsel, the award to them personally is modest indeed. The Catalyst parties did not seriously dispute the time spent by these lawyers or

their hourly rates, which the motion judge found imminently reasonable, nor did the Catalyst parties appeal these amounts. Finally, the Catalyst parties did not deliver any dockets of their own so that a comparison could be made between the time and effort they undertook with that undertaken by the self-represented defendants. I find no grounds upon which to conclude that the judge erred in exercising his discretion. Consequently, I would deny leave to appeal on the second ground too.

[176] The third ground of appeal relates to partial indemnity costs awarded to the West Face parties on the counterclaim when the motion judge dismissed the Catalyst parties' anti-SLAPP motion. Pursuant to s. 137.1(8), a responding party is not entitled to costs where an anti-SLAPP motion is dismissed unless the judge determines that an award is appropriate in the circumstances. This again is a matter for the motion judge's discretion. Like s. 137.1(7), the presumption of no costs in s. 137.1(8) is merely a starting point that does not mandate what award is fair and appropriate in all the circumstances: *Rabidoux,* at paras. 60-64; *Park Lawn*, at para. 60.

[177] The Catalyst parties argue that costs of their unsuccessful anti-SLAPP motion should be payable in the cause in accordance with the principles explained by the British Columbia Court of Appeal in *Hobbs v. Warner*, 2021 BCCA 290, 56 B.C.L.R. (6th) 287, leave to appeal refused, [2021] S.C.C.A. No. 413. I see no difference between the British Columbia Court of Appeal's approach to costs in *Hobbs* and this court's analysis in *Rabidoux*. Indeed, the British Columbia Court of

Appeal expressly adopts this court's analysis from *Rabidoux* that, notwithstanding the legislative provisions, the costs award remains subject to the judge's overriding discretion: at paras. 102-03.

[178] In essence, this ground of appeal disagrees with the outcome of the motion judge's discretion. Here, the Catalyst parties point to the same circumstances and factors as those they put before the motion judge as to why the presumption of no costs should apply to their unsuccessful anti-SLAPP motion. Once again, this court is being asked to reweigh the evidence in the Catalyst parties' favour and downgrade the evidence against it. That is not the role of this court.

[179] Further, on the evidence, it was open to the motion judge to find that the appellants' partial anti-SLAPP motion was retaliatory, ill-conceived, and "a procedural bare-knuckle attempt to get at" the West Face parties when considered against the Catalyst parties' litigation history as well as their conduct outside of the courtroom. When, as here, the proceeding bears little resemblance to an anti-SLAPP motion, it is "appropriate in the circumstances" to award costs against the unsuccessful moving party: *Veneruzzo*, at para. 37-40; *Park Lawn*, at paras. 39-40. Accordingly, I defer to the motion judge's conclusion and would deny leave on this ground of appeal.

[180] The fourth and final ground of appeal concerns the Defamation action where the motion judge deducted the costs of the Privilege Motion from the Dow Jones'

parties' costs award but did not set-off costs incurred by the Catalyst parties in relation to that motion from the overall costs award against them.

[181] The backdrop to this ground is that the Catalyst parties did not file a bill of costs at any time in the proceedings; not at the Privilege Motion, nor at the anti-SLAPP motions, nor here on appeal. Despite this, they argue the motion judge's decision not to award them costs of the Privilege Motion was "unfair and unwarranted."

[182] I am not persuaded by this ground of appeal. First, it does not reach the threshold necessary to grant leave to appeal.

[183] Second, it is both fair and warranted to interpret, as the motion judge did, the failure to file a bill of costs of any kind as an indicator that the Catalyst parties were not serious in pursuing costs. I would add that in the absence of providing the court any means or form of assessment, the risk of bearing one's own costs should come as no surprise to parties such as the appellants who are familiar with litigation and well-represented during these proceedings. I would deny leave on this ground of appeal as well.

CONCLUSION

[184] For these reasons, I would dismiss the appeals and the cross-appeal and deny leave to appeal costs.

[185] If the parties cannot agree on costs of the appeals, the respondents may file written submissions of no more than 5 pages in length, excluding a costs outline, within 14 days, and the appellants within 7 days thereafter.

Released: May 29, 2023 “B.W.M”

“B.W. Miller J.A.”
“I agree. Coroza J.A.”
“I agree. J. Copeland J.A.”