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Ontario Court of Appeal Issues Decision in *The Catalyst Capital Group Inc. v West Face Capital Inc.*

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The Ontario Court of Appeal, following the guidance issued by the Supreme Court of Canada in *1704604 Ontario Ltd. v Pointes Protection Association*[1] (*Pointes Protection*) and *Hansman v Neufeld*[2] (*Neufeld*), has issued its much-anticipated decision in *The Catalyst Capital Group Inc. v West Face Capital Inc.*, 2023 ONCA 381. The decision, released on May 29, 2023, confirms that the traditional hallmarks of a strategic lawsuit against public participation (SLAPP) are an open-ended list that may be relevant to the public interest weighing exercise in an appropriate case.

Key Takeaways

- **Judges are correct to focus on "what is really going on" when evaluating anti-SLAPP motions:** Considering the broader context or backdrop of the dispute is not merely recommended, but described by the Ontario Court of Appeal as "essential" and "necessary" where it is relevant to an anti-SLAPP motion. Claims that appear to have a punitive or retributory purpose are apt to be dismissed.
- **Public interest weighing is the crux of an anti-SLAPP analysis:** Even claims that are found to be technically meritorious will be dismissed if the balance of public interest weighs in favour of protecting the impugned expression.
- **Recognized indicia of a SLAPP can be relied upon notwithstanding that they are not determinative:** The court confirmed that the indicia of a SLAPP, as set out in *Pointes Protection*, constitute an open-ended list that may be considered as part of the public interest weighing exercise.
- **Partial anti-SLAPP motions that are not dispositive of an entire cause of action should be avoided:** Anti-SLAPP motions are "meant to be summary, efficient, and final." Anti-SLAPP motions that could not yield a final determination even on a cause of action, let alone the action in its entirety, should be avoided.
- **Appellants must identify actual errors of law or fact:** The automatic right to appeal an anti-SLAPP motion is not an opportunity for the losing party to rehash the arguments made before the motion judge, nor to request that the appellate court revisit factual findings or redo the public interest weighing exercise. Appeals made on this basis misconceive the limited nature of appellate review and the considerable deference owed to the motion judge.

Facts and Procedural History

Background

The Catalyst Capital Group Inc. (Catalyst) is a Canadian private equity firm. Callidus Capital Corporation (Callidus) is an asset-based lender which, at the time of the relevant events, was majority-owned by funds managed by Catalyst. The plaintiffs were collectively referred to in the decision as the "Catalyst parties."

West Face Capital Inc. is a Canadian private equity investment firm. Prior to this action, West Face had been the target of numerous unsuccessful lawsuits filed by Catalyst in relation to West Face's success and Catalyst's failure in acquiring WIND Mobile in 2014.

In August 2017, *The Wall Street Journal* (WSJ) published an article reporting that several whistleblowers had accused Callidus of financial misconduct (the article). Immediately following publication of the article, the market price of Callidus shares dropped.

Lower Court Decisions

In response to the article, the Catalyst parties commenced two separate actions:

The defamation action was brought against the WSJ, the article's authors and one of the whistleblowers (collectively referred to in the decision as the "Dow Jones parties").

The Wolfpack action was brought against West Face as well as various whistleblowers, capital market participants, journalists and perceived enemies of the Catalyst parties (collectively referred to in the decision as the "Wolfpack parties"). The Wolfpack action alleged a conspiracy to bring about the publication of the article to drive down Callidus' share price.

The West Face counterclaim was filed by West Face in the Wolfpack action against the Catalyst parties, their principals and others. West Face alleged defamatory comments and other tortious behaviour in connection with the Catalyst parties' engagement of foreign private investigative firms and others to spy on and generate negative stories about West Face and the trial judge who had dismissed Catalyst's first action against West Face over WIND, in a defamation campaign that the Catalyst parties' operatives referred to as "Project Maple Tree."

The Dow Jones parties and certain Wolfpack parties brought anti-SLAPP motions to have the Defamation and Wolfpack actions dismissed as against them. The Catalyst parties and their principals in turn brought a partial anti-SLAPP motion in respect of only defamation claims arising from four discrete publications pleaded in the West Face Counterclaim. All three motions were decided against the Catalyst parties. Subsequently, the Catalyst parties appealed each of these decisions to the Ontario Court of Appeal.

Anti-SLAPP Framework

Anti-SLAPP legislation empowers courts to screen out SLAPPs, which are lawsuits that seek "not so much a legal as a political victory," by silencing critics and suppressing debate on matters of public interest.

Anti-SLAPP legislation in very similar terms has been passed in numerous jurisdictions, including Ontario, Québec and British Columbia. An anti-SLAPP motion in these provinces involves the following analysis:

1. The onus is first on the defendant to establish that the proceeding arises from an expression of the defendant that relates to a matter of public interest.
2. If the defendant meets this onus, the plaintiff must establish all of the following factors if the lawsuit is to be permitted to continue:
   - the claim has substantial merit;
   - the defendant has no valid defence in the proceeding; and
   - the harm caused to the plaintiff by the defendant's expression is so serious as to outweigh the public interest in protecting that expression.

Decision of the Ontario Court of Appeal

1. Defamation Action

The motion judge had held that the Catalyst parties failed at each step of the anti-SLAPP analysis set out above as against the Dow Jones parties. On appeal, the Catalyst parties claimed that the motion judge erred in his assessment of whether their claim had substantial merit, whether the Dow Jones parties had a valid defence and how the public interest ought to be weighed. The Court of Appeal addressed

each of these challenges in turn, noting in each case that the challenges pertained to a finding of fact and/or a proper exercise of judicial discretion, not a finding of law, and were therefore beyond the scope of the Court of Appeal to re-evaluate.

Reinforcing the principle that appellate courts owe deference to factual findings of lower courts, Justice Miller wrote that "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." The appeal was therefore dismissed.

2. Wolfpack Action

The motion judge had held that the Wolfpack action met the relatively low bar of the "substantial merit" test, but failed at the stage of weighing the public interest. The main focus of the Wolfpack action appeal therefore concerned the weighing of public interest. In order to weigh public interest, the courts undertake an analysis consisting of three parts: (1) the degree of harm suffered; (2) the public interest in allowing the claims to proceed; and (3) the public interest in protecting the expression. In a similar fashion to the defamation action, the court noted that the claims made by the Catalyst parties with respect to parts (1) and (3) of the analysis concerned findings of fact and were therefore owed deference.

Concerning part (2), the appellants argued that since the motion judge found that their claim was meritorious, the public interest in allowing their claim to proceed **necessarily** outweighed the public interest in protecting the expression. The court held that this argument was based on a fundamental misunderstanding of the public weighing exercise. When establishing that a claim has "substantial merit," a plaintiff must only meet the low standard of establishing "grounds to believe." However, in order to pass the public interest hurdle, the plaintiff must meet the more onerous "balance of probabilities" standard. Consequently, there will be instances where a plaintiff is able to establish that their claim has substantial merit and still fail to establish that there is sufficient public interest in protecting their expression.

The court, citing *Pointes Protection and Neufeld*, confirmed that the function of the public interest hurdle is to serve as a "robust backstop" that allows motion judges to dismiss claims that, despite being technically meritorious, are not reflective of the public's best interest. In upholding this interpretation, the court affirmed that the public interest weighing should be understood as the crux of the anti-SLAPP analysis.

The Catalyst parties further argued that the motion judge erred by considering factors that were irrelevant to the public interest weighing exercise. Here, the court confirmed that the indicia of a SLAPP suit identified in *Pointes Protection* may be considered as part of the public interest weighing exercise. Given the Catalyst parties' history of litigation and "exceptionally bad" conduct, the court concluded that the motion judge was not only permitted to take into account this context, but this consideration was "a necessary one on the facts of this case in order to step back and ask what is really going on." In circumstances where the Catalyst parties "were animated by a punitive and retributory purpose," their lawsuit was "the opposite of 'meritorious'" and the appeal was therefore dismissed.

3. West Face Counterclaim

The Catalyst parties argued that the motion judge erred by concluding that Ontario anti-SLAPP legislation does not permit partial anti-SLAPP motions. The court did not arrive at a conclusive decision regarding the permissibility of partial anti-SLAPP claims – noting that, in this case, such a decision would not be dispositive – though they did note that an anti-SLAPP motion is "meant to be summary, efficient, and final," suggesting that a partial motion would not fulfill this purpose.

The Catalyst parties also claimed that the motion judge failed to conduct a comprehensive review of evidence related to the West Face parties' claim that they suffered harm. Here, the court confirmed that anti-SLAPP motions, which are intended to be brought at an early stage in the proceedings, require only a limited amount of evidence from the motion judge's perspective. The purpose of an anti-SLAPP motion is to provide a means of expeditiously addressing SLAPPs. Consequently, the motion judge is not obligated to undertake a "deep dive" into the record. The Catalyst parties' anti-SLAPP motion was therefore dismissed and the West Face Counterclaim will continue.

[1] 2020 SCC 22.
[2] 2023 SCC 14.

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