

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs

and

VERITAS INVESTMENT RESEARCH CORPORATION and
WEST FACE CAPITAL INC.

Defendants

FACTUM OF THE MOVING PARTY, WEST FACE CAPITAL INC.

May 8, 2017

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith (LSUC# 44266P)

Tel: 416.863.5595

Email: mmilne-smith@dwpv.com

Andrew Carlson (LSUC# 58850N)

Tel: 416.367.7437

Email: acarlson@dwpv.com

Tel: 416.863.0900

Fax: 416.863.0871

Lawyers for the Defendant,
WEST FACE CAPITAL INC.

TO: **LAX O'SULLIVAN LISUS GOTTLIEB LLP**

Barristers and Solicitors
145 King Street West
Suite 2750
Toronto ON M5H 1J8

Rocco DiPucchio (LSUC# 38185I)

Tel: 416.598.2268
Email: rdipucchio@counsel-toronto.com

Andrew Winton (LSUC# 544731)

Tel: 416.644.5342
Email: awinton@counsel-toronto.com

Tel: 416.598.1744
Fax: 416.598.3730

Lawyers for the Plaintiffs,
The Catalyst Capital Group Inc. and Callidus Capital Corporation

AND TO: **LENCZNER SLAGHT ROYCE SMITH GRIFFIN LLP**

Barristers and Solicitors
130 Adelaide Street West
Suite 2600
Toronto ON M5H 3P5

J. Thomas Curry (LSUC# 25740V)

Tel: 416.865.3096
Email: tcurry@litigate.com

Brendan f. Morrison (LSUC# 61635B)

Tel: 416.865.3559
Email: bmorrison@litigate.com

Tel: 416.865.9500
Fax: 416.865.9010

Lawyers for the Defendant,
Veritas Investment Research Corporation

AND TO: **JULIAN PORTER Q.C. PROFESSIONAL CORPORATION**
Barrister and Solicitor
1 First Canadian Place
100 King Street West
Suite 1600
Toronto ON M5X 1G5

Julian Porter, QC

Email: julian.porter@julianporterqc.com

Tel: 416.862.4297

Fax: 416.862.7661

Lawyer for the Defendant,
Veritas Investment Research Corporation

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs

and

VERITAS INVESTMENT RESEARCH CORPORATION and
WEST FACE CAPITAL INC.

Defendants

FACTUM OF THE MOVING PARTY, WEST FACE CAPITAL INC.

PART I ~ INTRODUCTION

1. This is a motion by the Defendant West Face Capital Inc. to transfer this action to the Commercial List.
2. This action belongs on the Commercial List. It is high stakes, complex, commercial litigation between multiple sophisticated players in the capital markets. The Plaintiffs, Callidus Capital Corporation and The Catalyst Capital Group Inc., have claimed \$55 million in damages for defamation, conspiracy, and intentional interference with economic relations. West Face and its co-Defendant, Veritas Investment Research Corporation, are alleged to have entered into a conspiracy to manipulate the share price of Callidus, a publicly-traded company. Specifically, the Plaintiffs plead that West Face and Veritas published false and defamatory statements about Callidus in order to drive down Callidus's share price and profit from a short-selling strategy engaged in by West

Face. In sum, even if considered in isolation, this action meets the "in essence" test for transferral to the Commercial List.

3. Moreover, this action is not an isolated one. It is one of four proceedings involving Catalyst and West Face, all others of which have proceeded or are currently proceeding on the Commercial List. The fact that this action – an already inherently commercial dispute – is also linked to multiple other proceedings on the Commercial List should be a significant factor weighing in favour of the transfer.

4. Finally, there is no good reason for this action not to be transferred. The Plaintiffs will suffer no prejudice or disadvantage, and all Parties will gain from having the case managed and heard by a judge with expertise in commercial matters.

PART II ~ CONCISE SUMMARY OF FACTS

A. Background and Summary of the Issues in Dispute

5. The Plaintiff Callidus is a lender of last resort. It loans money to distressed companies that are unable to obtain adequate financing from conventional lenders. Callidus is majority-owned by funds managed by the other Plaintiff, Catalyst (a private equity investment fund manager). The remainder of Callidus's shares are publicly-traded.

6. Historically, Callidus was wholly owned by Catalyst-managed funds. Catalyst made an initial public offering of approximately 40% of Callidus's shares in April 2014. Callidus's share price rose over 50% in the following months. Both before and after the IPO, Callidus made numerous representations of robust growth and performance of its loan book. Callidus's market capitalization was by late October 2014 over 2.5 times higher than the disclosed book value of its assets.

7. The Defendant West Face is an investment management firm. West Face had been following Callidus since its IPO. By October 2014, West Face was skeptical of the sustainability of Callidus's elevated share price for a host of reasons. For this reason, West Face decided to "short" Callidus. Short-selling is an investment strategy premised on a belief that the shares' price will decrease.

8. In mid-December 2014, West Face met with the other Defendant, Veritas – an independent market research firm. During the meeting, West Face suggested to Veritas that Callidus (a relatively new public issuer) might be an appropriate company for Veritas to research. After that meeting, West Face also gave Veritas a list of the Callidus borrowers that West Face believed it had identified through its research of public sources.

9. The Plaintiffs allege that at this meeting, the Defendants entered into a conspiracy to defame the Plaintiffs and interfere with Callidus's economic relations by publishing false and defamatory statements about Callidus so as to induce a broad sell-off of Callidus's shares. West Face pleads that it and Veritas did no such thing. The Defendants had no agreement that Veritas would do any research, let alone what the results of any Veritas research might be, or if or when Veritas would publish those results. Moreover, West Face did not give Veritas a copy of its internal research report, as the Plaintiffs allege. As set out above, all West Face provided to Veritas was West Face's inferences, based on public information, about the identity of certain Callidus borrowers.

10. Ultimately, Veritas did research Callidus, and reached similar conclusions to West Face, presumably based on the same or similar publicly available information about Callidus that West Face had relied on. Veritas published the results of its research

in April 2015. In its report, Veritas highlighted risks and concerns related to Callidus's business, but did not provide an investment recommendation (that is, Veritas did not advise readers to buy, hold, or sell Callidus shares). Notably, West Face had already begun closing out its short position a month *before* Veritas published its research on Callidus (which is inconsistent with the Plaintiffs' theory).

B. Catalyst's Ongoing Commercial List Litigation Against West Face

11. The Plaintiffs allege in their Statement of Claim that ongoing Commercial List litigation between Catalyst and West Face provides the relevant background to this action. In particular, the Plaintiffs allege that Catalyst's previous lawsuit against West Face in *The Catalyst Capital Group Inc. v. Brandon Moyses and West Face Capital Inc.* (the "**Moyse Action**") gave West Face motive to defame, conspire against, and interfere with the Plaintiffs. In its Statement of Defence, West Face pleads that these allegations are categorically false, but has itself relied on the existing Commercial List litigation to demonstrate that it is Catalyst that has an animus towards West Face.¹

12. In the Moyse Action, Catalyst alleged that West Face solicited and obtained from Brandon Moyses, a former employee of Catalyst hired by West Face in Spring 2014, confidential information relating to Catalyst's strategy to acquire Canadian wireless company WIND Mobile Inc. ("**WIND**"). Catalyst alleged that "but for" West Face's alleged misuse, Catalyst would have acquired WIND instead.

13. Catalyst commenced the Moyse Action in June 2014. After Catalyst spent 18 months (unsuccessfully) pursuing interlocutory relief against West Face without

¹ Plaintiffs' Statement of Claim, at paras. 8-12 & 20; and West Face's Statement of Defence, at paras. 13-16.

advancing the action towards trial, West Face successfully moved to transfer the Moyse Action to the Commercial List in January 2016, without opposition by Catalyst. From that point on, the Moyse Action proceeded expeditiously to trial on the Commercial List in June 2016. Ultimately, Justice Newbould dismissed the action in its entirety.

14. The Moyse Action was not the motive for West Face's research into Callidus. However, Catalyst only obtained a copy of West Face's research into Callidus – research that forms the basis for this defamation action against West Face – by putting West Face's research into Callidus in issue as part of Catalyst's motion for interlocutory relief in the Moyse Action. In support of its motion, Catalyst alleged that West Face had received confidential information about (among other things) Callidus from Mr. Moyse. In responding to Catalyst's motion, West Face made comprehensive disclosure of its internal research into Callidus in order to prove that its knowledge of Callidus's loan book was based on public, and not confidential, information. Only after receiving this voluminous disclosure (and then losing the motion in which Catalyst had made these allegations) did the Plaintiffs commence this action.

15. In short, both the Plaintiffs and West Face have acted in a manner that inextricably links this case to Catalyst's Moyse Action against West Face.

16. The Moyse Action is, in turn, inextricably linked to two other proceedings involving Catalyst and West Face, both of which proceeded on, or are proceeding on, the Commercial List. In January 2016, the entity through which West Face and its co-investors held their interests in WIND (Mid-Bowline Group Corp.) brought an application on the Commercial List for approval of a plan of arrangement to transfer the

shares of Mid-Bowline (and therefore WIND) to Shaw Communications free and clear of Catalyst's claim for a constructive trust over West Face's interest in WIND. This application was heard by Justice Newbould on the Commercial List on January 25, 2016, and he released his reasons for decision the next day. Ultimately, the parties, including Catalyst, negotiated a consent order approving the plan of arrangement.

17. Finally, on May 31, 2016, Catalyst commenced a new action against West Face and its co-investors in WIND, as well as WIND's former owner, VimpelCom Ltd., and its financial advisor, alleging various causes of action relating to the WIND opportunity (the "**VimpelCom Action**"). West Face successfully moved to have the VimpelCom Action transferred to the Commercial List in October 2016. Notably, while Catalyst initially opposed West Face's motion to transfer the VimpelCom Action to the Commercial List, it ultimately consented to the transfer.

PART III ~ LAW & ARGUMENT

A. General Principles on Motions to Transfer to the Commercial List

18. Generally speaking, judges who sit on the Commercial List are those who have "experience, expertise and an interest by aptitude and inclination" in complex corporate/commercial matters.² The List strives to provide the benefits of "real time" litigation, where parties can gain access to justice on an expedited and efficient basis.³

² *771225 Ontario Inc. v. Bramco Holdings Co.*, [1992] O.J. No. 1772 at p. 3 (Ct. J. (Gen. Div.)), West Face's Book of Authorities, Tab 1.

³ *Gyles v. Mytravel Canada Holidays Inc.*, [2006] O.J. No. 2497 at para. 15 (S.C.J.), West Face's Book of Authorities, Tab 2.

19. This "basket clause" (as paragraph 1(m) is widely known) provides a broad discretion to transfer matters to the List.⁴ The basket clause has considerable breadth, and it is not necessary that the matter in question be analogous to the types of matters enumerated in sub-paragraphs (a) to (l) of the Practice Direction.⁵ As noted by Blair J.:

If the matter is a commercial one, and if it is of sufficient complexity in terms of subject matter or of procedure or in terms of the numbers of parties involved – or a combination of these varying factors – it will be considered.⁶

20. Put differently, the basket clause provides for an "in essence" test. If the matter "in essence" involves a commercial dispute, it may be transferred to the List. Whether the matter is "in essence" a commercial dispute is itself a matter of discretion – no hard and fast rules govern the assessment of sufficiency of the commercial nature of the action in question before a transfer can be granted.⁷ It is also clear that there is no need that all of the issues in the proceeding be exclusively commercial in nature.⁸

B. This Action Belongs on the Commercial List

21. This action meets the "in essence" test. It is high stakes commercial litigation involving four different commercial parties involved in sophisticated commercial businesses.

22. The complexity of the allegations is demonstrated by West Face's 44 page Statement of Defence, which pleads justification and explains in detail why West Face's

⁴ *Toronto Dominion Bank v. Bank of Nova Scotia*, [2013] O.J. No. 4355 at para. 4 (S.C.J. (Commercial List)), West Face's Book of Authorities, Tab 7.

⁵ *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce*, [1992] O.J. No. 2610 at p. 3 (Ct. J. (Gen. Div.) [*Maple Valley*], West Face's Book of Authorities, Tab 4.

⁶ *Maple Valley*, at p. 3, West Face's Book of Authorities, Tab 4.

⁷ *Piedra v. Tsx Inc.*, [2009] O.J. No. 5351 at paras. 10 & 18 (Div. Ct.) [*Piedra*], West Face's Book of Authorities, Tab 5.

⁸ *Royal Bank v. Société Générale (Canada)*, 2002 CarswellOnt 3852 at para. 2. (S.C.J.), West Face's Book of Authorities, Tab 6.

research on Callidus was accurate. The pleadings raise questions that would benefit from being answered by a judge with expertise in adjudicating commercial matters. Without in any way limiting the many issues raised by the pleadings, some of the questions to be decided include:

- (a) What are the reasons why an investment management firm like West Face would make a decision to short-sell Callidus's shares?
- (b) In Callidus's particular field of asset-backed lending to distressed borrowers, what statements about Callidus can be reasonably understood to be "defamatory"? For example, even if it were false, is the statement "Six of the loans Callidus has outstanding are in restructuring, bankruptcy, or court proceedings" defamatory? Is the statement that "Callidus is similar to a U.S. business development corporation" defamatory?
- (c) Which of the alleged defamatory statements can be justified? For example:
 - (i) What constitutes a "strong undisclosed indicator of material impairment" of a Callidus loan?
 - (ii) What constitutes a misstatement by Callidus about a loan impairment provision?
 - (iii) What constitutes a misrepresentation by Callidus about the quality of its loan portfolio?
 - (iv) Did Catalyst publicly misrepresent the quality of its loan book to its investors?
- (d) Which of the alleged defamatory statements made by West Face about Callidus's loan book are fair comment in light of the public information that West Face had available? In particular, what are reasonable areas of

disagreement (and therefore fair comment) regarding how a public company, like Callidus, should be valued?

- (e) What actually caused the decrease in the publicly-traded value of Callidus's shares? Was it a result of the alleged publication of the Alleged Defamatory Statements to Callidus's shareholders, or was it a result of the underlying issues and concerns (or other issues and concerns) that West Face had identified?

23. Moreover, assessing West Face's research on Callidus will require examining many loans in Callidus's loan portfolio to determine how it should be valued as a receivable to Callidus. As set out in detail in West Face's Statement of Defence, a number of Callidus's borrowers are or have been involved in bankruptcy, insolvency, or other restructuring proceedings. West Face has pled that Callidus's valuations of its own loans are unrealistic in that they grossly overvalue (or rather, do not acknowledgment appropriate impairment of) these receivables. The judges of the Commercial List have experience and familiarity with these types of proceedings, which will undoubtedly be of assistance in assessing West Face's defences in this regard.

24. The nexus between this action and the other three proceedings between Catalyst and West Face, all of which proceeded on the Commercial List, weighs in favour of the transfer of this action to the Commercial List. In that regard, the Plaintiffs have clearly put in issue the Moyse Action between Catalyst and West Face. As set out above, the Moyse Action was transferred to, tried before, and decided by a judge of, the Commercial List. Both parties rely on the Moyse Action as impetus for events giving rise

to this action. As set out above, the Moyse Action is inextricably linked to two other proceedings, both of which proceeded on, or are proceeding on, the Commercial List.

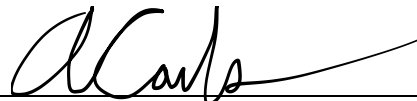
25. Furthermore, given West Face's history of litigating against Catalyst, West Face anticipates significant issues (and potentially disputes) that will benefit from active case management by a judge with familiarity with commercial disputes. In that regard, all parties (including the Plaintiffs) will benefit from the special procedures adopted for the hearing of matters on the Commercial List, including 9:30 chambers appointments, expeditious hearing dates, case management, and, most importantly, an experienced roster of commercially-savvy judges.

26. Finally, there is no disadvantage or prejudice to the Plaintiffs whatsoever in having this action transferred to the Commercial List. Indeed, it has been held that a plaintiff's decision to commence an action on the regular list is not a "compelling reason" to deny a motion to transfer to the List, and that there are no "disadvantages" to a plaintiff as a result of an action being placed on the Commercial List.⁹

PART IV ~ ORDER REQUESTED

27. West Face respectfully requests an Order transferring this action to the Commercial List.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of May, 2017.



Andrew Carlson

⁹ *Lehner v. Gottfried*, [1999] O.J. No. 4083 at paras. 1, 9, 17, & 20-25 (S.C.J. (Commercial List)), West Face's Book of Authorities, Tab 3.

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith (LSUC# 44266P)

Tel: 416.863.5595

Email: mmilne-smith@dwpv.com

Andrew Carlson (LSUC# 58850N)

Tel: 416.367.7437

Email: acarlson@dwpv.com

Tel: 416.863.0900

Fax: 416.863.0871

Lawyers for the Defendant,
WEST FACE CAPITAL INC.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *771225 Ontario Inc. v. Bramco Holdings Co.*, [1992] O.J. No. 1772 (Ct. J. (Gen. Div.)).
2. *Gyles v. Mytravel Canada Holidays Inc.*, [2006] O.J. No. 2497 (S.C.J.).
3. *Lehner v. Gottfried*, [1999] O.J. No. 4083 (S.C.J. (Commercial List)).
4. *Maple Valley Acres Ltd. v. Canadian Imperial Bank of Commerce*, [1992] O.J. No. 2610 (Ct. J. (Gen. Div.)).
5. *Piedra v. Tsx Inc.*, [2009] O.J. No. 5351 (Div. Ct.).
6. *Royal Bank v. Société Générale (Canada)*, 2002 CarswellOnt 3852 (S.C.J.).
7. *Toronto Dominion Bank v. Bank of Nova Scotia*, [2013] O.J. No. 4355 (S.C.J. (Commercial List)).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

RULE 1 CITATION, APPLICATION AND INTERPRETATION

INTERPRETATION

General Principle

Rule 1.04 (1) These rules shall be liberally construed to secure the just, most expeditious and least expensive determination of every civil proceeding on its merits. R.R.O. 1990, Reg. 194, r. 1.04 (1).

RULE 37 MOTIONS — JURISDICTION AND PROCEDURE

NOTICE OF MOTION

37.01 A motion shall be made by a notice of motion (Form 37A) unless the nature of the motion or the circumstances make a notice of motion unnecessary. R.R.O. 1990, Reg. 194, r. 37.01.

JURISDICTION TO HEAR A MOTION

Jurisdiction of Judge

37.02 (1) A judge has jurisdiction to hear any motion in a proceeding. R.R.O. 1990, Reg. 194, r. 37.02 (1).

Jurisdiction of a Master

(2) A master has jurisdiction to hear any motion in a proceeding, and has all the jurisdiction of a judge in respect of a motion, except a motion,

- (a) where the power to grant the relief sought is conferred expressly on a judge by a statute or rule;
- (b) to set aside, vary or amend an order of a judge;
- (c) to abridge or extend a time prescribed by an order that a master could not have made;
- (d) for judgment on consent in favour of or against a party under disability;
- (e) relating to the liberty of the subject;
- (f) under section 4 or 5 of the *Judicial Review Procedure Act*, or
- (g) in an appeal. R.R.O. 1990, Reg. 194, r. 37.02 (2).

Jurisdiction of Registrar

(3) The registrar shall make an order granting the relief sought on a motion for an order on consent, if,

- (a) the consent of all parties (including the consent of any party to be added, deleted or substituted) is filed;
- (b) the consent states that no party affected by the order is under disability; and
- (c) the order sought is for,
 - (i) amendment of a pleading, notice of application or notice of motion,

- (ii) addition, deletion or substitution of a party,
- (iii) removal of a lawyer as lawyer of record;
- (iv) setting aside the noting of a party in default,
- (v) setting aside a default judgment,
- (vi) discharge of a certificate of pending litigation,
- (vii) security for costs in a specified amount,
- (viii) re-attendance of a witness to answer questions on an examination,
- (ix) fulfilment of undertakings given on an examination, or
- (x) dismissal of a proceeding, with or without costs. O. Reg. 19/03, s. 8; O. Reg. 575/07, s. 21.

PLACE OF HEARING OF MOTIONS

37.03 (1) All motions shall be brought and heard in the county where the proceeding was commenced or to which it has been transferred under rule 13.1.02, unless the court orders otherwise. O. Reg. 14/04, s. 17; O. Reg. 438/08, s. 32.

(2) REVOKED: R.R.O. 1990, Reg. 194, r. 37.03 (3).

(3) SPENT: O. Reg. 14/04, s. 17.

MOTIONS — TO WHOM TO BE MADE

37.04 A motion shall be made to the court if it is within the jurisdiction of a master or registrar and otherwise shall be made to a judge. R.R.O. 1990, Reg. 194, r. 37.04; O. Reg. 19/03, s. 9.

HEARING DATE FOR MOTIONS

Where no practice direction

37.05 (1) At any place where no practice direction concerning the scheduling of motions is in effect, a motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions. O. Reg. 770/92, s. 10.

Exception, lengthy hearing

(2) If a lawyer estimates that the hearing of the motion will be more than two hours long, a hearing date shall be obtained from the registrar before the notice of motion is served. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

Urgent motion

(3) An urgent motion may be set down for hearing on any day on which a judge or master is scheduled to hear motions, even if a lawyer estimates that the hearing is likely to be more than two hours long. O. Reg. 770/92, s. 10; O. Reg. 575/07, s. 3.

CONTENT OF NOTICE

37.06 Every notice of motion (Form 37A) shall,

- (a) state the precise relief sought;
- (b) state the grounds to be argued, including a reference to any statutory provision or rule to be relied on; and

- (c) list the documentary evidence to be used at the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.06.

SERVICE OF NOTICE

Required as General Rule

37.07 (1) The notice of motion shall be served on any party or other person who will be affected by the order sought, unless these rules provide otherwise. R.R.O. 1990, Reg. 194, r. 37.07 (1); O. Reg. 260/05, s. 9 (1).

Where Not Required

(2) Where the nature of the motion or the circumstances render service of the notice of motion impracticable or unnecessary, the court may make an order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (2).

(3) Where the delay necessary to effect service might entail serious consequences, the court may make an interim order without notice. R.R.O. 1990, Reg. 194, r. 37.07 (3).

(4) Unless the court orders or these rules provide otherwise, an order made without notice to a party or other person affected by the order shall be served on the party or other person, together with a copy of the notice of motion and all affidavits and other documents used at the hearing of the motion. O. Reg. 219/91, s. 3; O. Reg. 260/05, s. 9 (2).

Where Notice Ought to Have Been Served

(5) Where it appears to the court that the notice of motion ought to have been served on a person who has not been served, the court may,

- (a) dismiss the motion or dismiss it only against the person who was not served;
- (b) adjourn the motion and direct that the notice of motion be served on the person;
or
- (c) direct that any order made on the motion be served on the person. R.R.O. 1990, Reg. 194, r. 37.07 (5).

Minimum Notice Period

(6) Where a motion is made on notice, the notice of motion shall be served at least seven days before the date on which the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.07 (6); O. Reg. 171/98, s. 12; O. Reg. 438/08, s. 33.

FILING OF NOTICE OF MOTION

37.08 (1) Where a motion is made on notice, the notice of motion shall be filed with proof of service at least seven days before the hearing date in the court office where the motion is to be heard. R.R.O. 1990, Reg. 194, r. 37.08 (1); O. Reg. 171/98, s. 13; O. Reg. 438/08, s. 34.

(2) Where service of the notice of motion is not required, it shall be filed at or before the hearing. R.R.O. 1990, Reg. 194, r. 37.08 (2).

ABANDONED MOTIONS

37.09 (1) A party who makes a motion may abandon it by delivering a notice of abandonment. R.R.O. 1990, Reg. 194, r. 37.09 (1).

(2) A party who serves a notice of motion and does not file it or appear at the hearing shall be deemed to have abandoned the motion unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (2).

(3) Where a motion is abandoned or is deemed to have been abandoned, a responding party on whom the notice of motion was served is entitled to the costs of the motion forthwith, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 37.09 (3).

MATERIAL FOR USE ON MOTIONS

Where Motion Record Required

37.10 (1) Where a motion is made on notice, the moving party shall, unless the court orders otherwise before or at the hearing of the motion, serve a motion record on every other party to the motion and file it, with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, and the court file shall not be placed before the judge or master hearing the motion unless he or she requests it or a party requisitions it. R.R.O. 1990, Reg. 194, r. 37.10 (1); O. Reg. 171/98, s. 14 (1); O. Reg. 438/08, s. 35 (1).

Contents of Motion Record

(2) The motion record shall contain, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter;
- (b) a copy of the notice of motion;
- (c) a copy of all affidavits and other material served by any party for use on the motion;
- (d) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves; and
- (e) a copy of any other material in the court file that is necessary for the hearing of the motion. R.R.O. 1990, Reg. 194, r. 37.10 (2).

Responding Party's Motion Record

(3) Where a motion record is served a responding party who is of the opinion that it is incomplete may serve on every other party, and file, with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a responding party's motion record containing, in consecutively numbered pages arranged in the following order,

- (a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and
- (b) a copy of any material to be used by the responding party on the motion and not included in the motion record. R.R.O. 1990, Reg. 194, r. 37.10 (3); O. Reg. 171/98, s. 14 (2); O. Reg. 438/08, s. 35 (2).

Material may be Filed as Part of Record

(4) A notice of motion and any other material served by a party for use on a motion may be filed, together with proof of service, as part of the party's motion record and need not be filed separately. R.R.O. 1990, Reg. 194, r. 37.10 (4).

Transcript of Evidence

(5) A party who intends to refer to a transcript of evidence at the hearing of a motion shall file a copy of the transcript as provided by rule 34.18. R.R.O. 1990, Reg. 194, r. 37.10 (5).

Factum

(6) A party may serve on every other party a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 18.

(7) The moving party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 15 (1).

(8) The responding party's factum, if any, shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 15 (2).

(9) REVOKED: O. Reg. 394/09, s. 15 (3).

Refusals and Undertakings Chart

(10) On a motion to compel answers or to have undertakings given on an examination or cross-examination satisfied,

- (a) the moving party shall serve on every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least seven days before the hearing, a refusals and undertakings chart (Form 37C) that sets out,
 - (i) the issue that is the subject of the refusal or undertaking and its connection to the pleadings or affidavit,
 - (ii) the question number and a reference to the page of the transcript where the question appears, and
 - (iii) the exact words of the question; and
- (b) the responding party shall serve on the moving party and every other party to the motion and file with proof of service, in the court office where the motion is to be heard, at least four days before the hearing, a copy of the undertakings and refusals chart that was served by the moving party completed so as to show,
 - (i) the answer provided, or
 - (ii) the basis for the refusal to answer the question or satisfy the undertaking. O. Reg. 132/04, s. 8; O. Reg. 438/08, s. 35 (5, 6).

CONFIRMATION OF MOTION***Confirmation of Motion***

37.10.1 (1) A party who makes a motion on notice to another party shall,

- (a) confer or attempt to confer with the other party;

- (b) not later than 2 p.m. three days before the hearing date, give the registrar a confirmation of motion (Form 37B) by,
 - (i) sending it by fax, or by e-mail if available in the court office, or
 - (ii) leaving it at the court office; and
- (c) send a copy of the confirmation of motion to the other party by fax or e-mail. O. Reg. 14/04, s. 19; O. Reg. 438/08, s. 36.

Effect of Failure to Confirm

(2) If no confirmation is given, the motion shall not be heard, except by order of the court. O. Reg. 14/04, s. 19.

Duty to Update

(3) A party who has given a confirmation of motion and later determines that the confirmation is no longer correct shall immediately,

- (a) give the registrar a corrected confirmation of motion (Form 37B) by,
 - (i) sending it by fax, or by e-mail if available in the court office, or
 - (ii) leaving it at the court office; and
- (b) send a copy of the corrected confirmation of motion to the other party by fax or e-mail. O. Reg. 14/04, s. 19.

HEARING IN ABSENCE OF PUBLIC

37.11 (1) A motion may be heard in the absence of the public where,

- (a) the motion is to be heard and determined without oral argument;
- (b) because of urgency, it is impractical to have the motion heard in public;
- (c) the motion is to be heard by telephone conference or video conference;
- (d) the motion is made in the course of a pre-trial conference or case conference; or
- (e) the motion is before a single judge of an appellate court. R.R.O. 1990, Reg. 194, r. 37.11 (1); O. Reg. 465/93, s. 4 (1); O. Reg. 24/00, s. 7; O. Reg. 170/14, s. 9.

(2) The hearing of all other motions shall be open to the public, except as provided in section 135 of the *Courts of Justice Act*, in which case the presiding judge or officer shall endorse on the notice of motion leave for a hearing in the absence of the public. R.R.O. 1990, Reg. 194, r. 37.11 (2).

37.12 Revoked: O. Reg. 288/99, s. 15.

HEARING WITHOUT ORAL ARGUMENT

Consent motions, unopposed motions and motions without notice

37.12.1 (1) Where a motion is on consent, unopposed or without notice under subrule 37.07 (2), the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2).

(2) Where the motion is on consent, the consent and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

(3) Where the motion is unopposed, a notice from the responding party stating that the party does not oppose the motion and a draft order shall be filed with the notice of motion. O. Reg. 766/93, s. 1 (1).

Opposed Motions in Writing

(4) Where the issues of fact and law are not complex, the moving party may propose in the notice of motion that the motion be heard in writing without the attendance of the parties, in which case,

- (a) the motion shall be made on at least fourteen days notice;
- (b) the moving party shall serve with the notice of motion and immediately file, with proof of service in the court office where the motion is to be heard, a motion record, a draft order and a factum entitled factum for a motion in writing, setting out the moving party's argument;
- (c) the motion may be heard in writing without the attendance of the parties, unless the court orders otherwise. O. Reg. 465/93, s. 4 (2); O. Reg. 766/93, s. 1 (2).

(5) Within ten days after being served with the moving party's material, the responding party shall serve and file, with proof of service, in the court office where the motion is to be heard,

- (a) a consent to the motion;
- (b) a notice that the responding party does not oppose the motion;
- (c) a motion record, a notice that the responding party agrees to have the motion heard and determined in writing under this rule and a factum entitled factum for a motion in writing, setting out the party's argument; or
- (d) a notice that the responding party intends to make oral argument, along with any material intended to be relied upon by the party. O. Reg. 465/93, s. 4 (2).

(6) Where the responding party delivers a notice under subrule (5) that the party intends to make oral argument, the moving party may either attend the hearing and make oral argument or not attend and rely on the party's motion record and factum. O. Reg. 465/93, s. 4 (2).

DISPOSITION OF MOTION

37.13 (1) On the hearing of a motion, the presiding judge or officer may grant the relief sought or dismiss or adjourn the motion, in whole or in part and with or without terms, and may,

- (a) where the proceeding is an action, order that it be placed forthwith, or within a specified time, on a list of cases requiring speedy trial; or
- (b) where the proceeding is an application, order that it be heard at such time and place as are just. R.R.O. 1990, Reg. 194, r. 37.13 (1).

(2) A judge who hears a motion may,

- (a) in proper case, order that the motion be converted into a motion for judgment; or
- (b) order the trial of an issue, with such directions as are just, and adjourn the motion to be disposed of by the trial judge. R.R.O. 1990, Reg. 194, r. 37.13 (2).

(3) Where on a motion a judge directs the trial of an issue, subrules 38.10 (2) and (3) (issue treated as action) apply with necessary modifications. R.R.O. 1990, Reg. 194, r. 37.13 (3).

Exception, motions in estate matters

(4) Clause (2) (b) and subrule (3) do not apply to motions under Rules 74 and 75. O. Reg. 484/94, s. 7.

SETTING ASIDE, VARYING OR AMENDING ORDERS

Motion to Set Aside or Vary

37.14 (1) A party or other person who,

- (a) is affected by an order obtained on motion without notice;
- (b) fails to appear on a motion through accident, mistake or insufficient notice; or
- (c) is affected by an order of a registrar,

may move to set aside or vary the order, by a notice of motion that is served forthwith after the order comes to the person's attention and names the first available hearing date that is at least three days after service of the notice of motion. R.R.O. 1990, Reg. 194, r. 37.14 (1); O. Reg. 132/04, s. 9.

(2) On a motion under subrule (1), the court may set aside or vary the order on such terms as are just. R.R.O. 1990, Reg. 194, r. 37.14 (2).

Order Made by Registrar

(3) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a registrar may be made to a judge or master, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (3).

Order Made by Judge

(4) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a judge may be made,

- (a) to the judge who made it, at any place; or
- (b) to any other judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (4).

Order Made by Master

(5) A motion under subrule (1) or any other rule to set aside, vary or amend an order of a master may be made,

- (a) to the master who made it, at any place; or
- (b) to any other master or to a judge, at a place determined in accordance with rule 37.03 (place of hearing of motions). R.R.O. 1990, Reg. 194, r. 37.14 (5).

Order Made in Court of Appeal or Divisional Court

(6) A motion under subrule (1) or any other rule to set aside, vary or amend an order made by a judge or panel of the Court of Appeal or Divisional Court may be made,

- (a) where the order was made by a judge, to the judge who made it or any other judge of the court; or

- (b) where the order was made by a panel of the court, to the panel that made it or any other panel of the court. R.R.O. 1990, Reg. 194, r. 37.14 (6).

MOTIONS IN A COMPLICATED PROCEEDING OR SERIES OF PROCEEDINGS

37.15 (1) Where a proceeding involves complicated issues or where there are two or more proceedings that involve similar issues, the Chief Justice or Associate Chief Justice of the Superior Court of Justice, a regional senior judge of the Superior Court of Justice or a judge designated by any of them may direct that all motions in the proceeding or proceedings be heard by a particular judge, and rule 37.03 (place of hearing of motions) does not apply to those motions. R.R.O. 1990, Reg. 194, r. 37.15 (1); O. Reg. 292/99, ss. 2 (3), 4.

(1.1) A judge who is directed to hear all motions under subrule (1) may refer to a master any motion within the jurisdiction of a master under subrule 37.02 (2) unless the judge who made the direction under subrule (1) directs otherwise. O. Reg. 348/97, s. 2.

(1.2) A judge who is directed to hear all motions under subrule (1) and a master to whom a motion is referred under subrule (1.1) may give such directions and make such procedural orders as are necessary to promote the most expeditious and least expensive determination of the proceeding. O. Reg. 438/08, s. 37 (1); O. Reg. 394/09, s. 16.

(2) A judge who hears motions pursuant to a direction under subrule (1) shall not preside at the trial of the actions or the hearing of the applications except with the written consent of all parties. R.R.O. 1990, Reg. 194, r. 37.15 (2); O. Reg. 438/08, s. 37 (2).

PROHIBITING MOTIONS WITHOUT LEAVE

37.16 On motion by any party, a judge or master may by order prohibit another party from making further motions in the proceeding without leave, where the judge or master on the hearing of the motion is satisfied that the other party is attempting to delay or add to the costs of the proceeding or otherwise abuse the process of the court by a multiplicity of frivolous or vexatious motions. R.R.O. 1990, Reg. 194, r. 37.16.

MOTION BEFORE COMMENCEMENT OF PROCEEDING

37.17 In an urgent case, a motion may be made before the commencement of a proceeding on the moving party's undertaking to commence the proceeding forthwith. R.R.O. 1990, Reg. 194, r. 37.17.

8.

THE CATALYST CAPITAL GROUP INC. et. al.
Plaintiffs

-and- VERITAS INVESTMENT RESEARCH CORPORATION et al.
Defendants

Court File No. CV-15-530726

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

FACTUM

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith (LSUC# 44266P)
Email: mmilne-smith@dwpv.com
Tel: 416.863.5595

Andrew Carlson (LSUC# 58850N)
Email: acarlson@dwpv.com
Tel: 416.367.7437

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant,
WEST FACE CAPITAL INC.