Commercial Court File No. CV-17-587463-00CL
Court File No. CV-17-586096

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

WEST FACE CAPITAL INC., GREGORY BOLAND, MSV 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, AND JOHN DOES #1-10

Defendants

A N D B E T W E E N:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

and

THE CATALYST CAPITAL GROUP INC., 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 INVOP LTD. d/b/a PSY GROUP ~~INC~~.

Defendants by Counterclaim

FACTUM
(Motion to Strike)
The Catalyst Capital Group Inc., Callidus Capital Corporation, Newton Glassman, Gabriel De Alba and James Riley (the "Catalyst Defendants")

PART I
INTRODUCTION AND CONCISE STATEMENT OF FACT

1. On May 22, 2018, West Face Capital Inc. and Gregory Boland amended the pleading which they initially filed on December 29, 2017. Their new pleading contains a 9 page Statement of Defence and a 90 page amended counterclaim (hereinafter referred to as the "ACC").

2. The Catalyst Defendants seek an order striking out the ACC in its entirety.

3. This relief is sought because the ACC does not comply with the rules of pleading and contains numerous specific flaws and defects:

   (1) the ACC contains three separate sections which purport to provide an "Overview" and "Background," but which mainly contain repetitive argument and evidence;

   (2) these sections, in and of themselves, take up approximately 30 pages of the ACC and do not constitute proper pleading;

   (3) the balance of the ACC also contains numerous instances of argument, pleadings of evidence, and impermissible repetition;

   (4) the above deficiencies are aggravated by the repeated use of inflammatory, colourful, and conclusory language which is inappropriate, starting with the first "Overview" section;

   (5) the ACC does not plead the causes of action of defamation and conspiracy in a proper manner. Instead of being confined to a concise pleading of material facts, these causes of action are pleaded in a repetitive, argumentative and confusing manner which does not comply with the applicable principles;

   (6) the allegations and references to Justice Newbould and the "Black Cube Campaign" should be struck as irrelevant and scandalous, or alternatively, as a proper exercise of the Court's discretion under Rules 21.01(3)(d) and 25.11;

(7) the claims against Newton Glassman, Gabriel De Alba and James Riley do not disclose a personal cause of action and should be struck out;

(8) the remainder of the claims advanced (breach of confidence, inducing breach of confidence, inducing breach of fiduciary duty, wrongful means) are not pleaded properly and do not disclose and/or constitute causes of action, and

(9) the claims and allegations that the Catalyst Defendants are vexatious litigants are improper and in any event should not be advanced in this action.

4. The Catalyst Defendants ask that the entire ACC be struck out because of the nature and extent of the above deficiencies, which require a completely new pleading.

5. To assist the Court in its review of the ACC and its consideration of this motion, the Catalyst Defendants have prepared two Appendices.

6. Appendix A hereto is an index identifying the sections contained in the ACC, and setting out the overall structure of the pleading.

7. Appendix B is an annotated colour coded copy of the ACC. Appendix B identifies:

(1) in blue highlighting, extensive sections of the ACC which are expressly described therein as being "Overview" or "Background" sections;

(2) in yellow highlighting, the instances where Justice Newbould is referenced. These 104 references are numbered in the margin of Appendix B. 53 of these numbered references relate to allegations involving the "Black Cube Campaign," and are underscored in the margin of Appendix B. They include numerous allegations regarding causes or potential causes of action–if they exist–that would belong to Justice Newbould;

(3) in red highlighting, numerous instances (also numbered in red in the margin) where the ACC uses aggressive or inflammatory language;

(4) in green highlighting, numerous instances where defamation is alleged or described, throughout the ACC, in various different ways and means;

(5) in purple highlighting, numerous instances where "conspiracies" are alleged or described, throughout the ACC, again in various different ways and means, and,

(6) in orange highlighting, those instances when the Defendants Newton Glassman ("Glassman"), Gabriel De Alba ("De Alba") and James Riley ("Riley") are personally referred to.

8. Part II of this Factum sets out the case law and arguments relied upon in support of the Catalyst Defendants' Motion to Strike the ACC. Part II also contains many examples of pleadings in the ACC which contain impermissible repetition, recitals of evidence and argument, as well as the use of inflammatory and accusatory language impugning the Catalyst Defendants.

PART II
STATEMENT OF ISSUES, LAW & ARGUMENT

A. Issues To Be Determined

9. The Catalyst Defendants' Motion to Strike raises the following issues:

(1) Does the ACC conform to the basic rules and principles of pleading?

(2) Are the claims of defamation and conspiracy properly pleaded?

(3) Should the claims and allegations relating to Black Cube and to Justice Newbould be struck out?

(4) Are the claims alleging personal liability of Glassman, De Alba and Riley properly pleaded?

(5) Are certain additional claims sought to be advanced in the ACC properly pleaded and/or recognized causes of action?

(6) Should the vexatious litigant claim be permitted to stand?

(7) Should the ACC be struck out in its entirety?

B. General Principles Applicable to Pleadings

(i) The Court's Powers under Rules 21.01(1)(b), 21.01(3)(c) and (d), 25.06, and 25.11:

10. Rule 21.01(1)(b) of the Rules of Civil Procedure permits a judge to "strike out a pleading on the ground that it discloses no reasonable cause of action or defence".[1]

11. In addition, sub-rules 21.01(3)(c) and (d) permit a defendant to move before a judge to have an action (which includes a counterclaim, pursuant to Rule 1.03(1)) dismissed or stayed on the grounds that another proceeding is pending in Ontario between the same parties, or, more broadly, on the basis that the action is frivolous or vexatious or an abuse of process.[2]

12. Rule 25.06 provides the rules of pleadings that are applicable to all pleadings:

> "25.06 Rules of Pleading — Applicable to All Pleadings
>
> ***Material Facts***
>
> **25.06(1)** Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved.
>
> ***Pleading Law***
>
> **25.06(2)** A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded.
>
> ...
>
> ***Nature of Act or Condition of Mind***
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> **25.06(8)** Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred.

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[1] *Rules of Civil Procedure*, s. 21.01(1)(b).

[2] *Rules of Civil Procedure*, s. 1.03(1), 21.01(3)(c) and (d).

Claim for Relief

25.06(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

> (a) the amount claimed for each claimant in respect of each claim shall be stated; and
>
> (b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial."[3]

13. Finally, Rule 25.11 empowers the Court to strike out all or part of a pleading, with or without leave to amend, if the document:

> "(a) may prejudice or delay the fair trial of the action;
>
> (b) is scandalous, frivolous or vexatious; or
>
> (c) is an abuse of process of the court."[4]

(ii) The Applicable Case Law

14. Where a pleading fails to comply with the rules of pleading listed in Rule 25.06, the appropriate remedy is to strike out the pleading.[5]

15. In assessing the adequacy of pleadings under Rules 21.01, 25.06, and 25.11, the Court should consider the purposes of these rules, which were explained by Justice Cameron in *Balanyk v. University of Toronto*: [6]

> "(a) define clearly and precisely the questions in controversy between the litigants;
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> (b) give fair notice of the precise case which is required to be met and the precise remedies sought; and
>
> (c) assist the court in its investigations of the truth of the allegations made."

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[3] *Rules of Civil Procedure*, s. 25.06(1)-(2), 25.06(8)-(9).

[4] *Rules of Civil Procedure*, s. 25.11.

[5] *Meridian Credit Union Limited v. Rymer*, 2018 ONSC 2893 at para 12.

[6] *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 at para 27.

16. The case law also establishes that Defendants are entitled to know with certainty the case they have to meet. The party making the claim bears the burden of ensuring their pleadings satisfy the rules governing the drafting of pleadings.[7]

17. In *Cerqueira v. Ontario*,[8] Justice Strathy provided a detailed summary of the general principles governing pleadings:

> "(a) the purpose of pleadings is to give notice of the case to be met, to define the matters in issue for the parties and for the court, and to provide a permanent record of the issues raised…;
>
> (b) the causes of action must be clearly identifiable from the facts pleaded and must be supported by facts that are material…;
>
> (c) every pleading must contain a concise statement of the material facts on which the party relies but not the evidence by which those facts are to be proved: rule 25.06; this includes pleading the material facts necessary to support the causes of action alleged;
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> (d) a party is entitled to plead any fact that is relevant to the issues or that can reasonably affect the determination of the issues, but it may not plead irrelevant, immaterial or argumentative facts or facts that are inserted only for colour…;
>
> (e) allegations that are made only for the purpose of colour or to cast a party in a bad light, or that are bare allegations, are scandalous and will be struck under rule 25.11(b)...;
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> (f) the court may strike part of a pleading, with or without leave to amend, on the grounds that (a) it may prejudice or delay the trial of an action, (b) it is scandalous, frivolous or vexatious, or (c) it is an abuse of the process of the court: rule 25.11;
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> (g) on a motion to strike a pleading under rule 21.01(1) on the ground that it discloses no cause of action, it must be shown that it is plain, obvious and beyond doubt that the claim cannot succeed and the pleading must be read generously; allegations of fact, unless plainly ridiculous or incapable of proof must be accepted as proven…;
>
> (h) any fact that can affect the determination of rights between the parties can be pleaded, but the court will not permit facts to be alleged that are immaterial or irrelevant to the issues in the action…;"

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[7] *Prestige Toys Ltd v. Smith*, 2011 ONSC 8003 (Ont SCJ) at para 24.

[8] *Cerqueira v. Ontario*, 2010 ONSC 3954 (CanLII) (SCJ) at para 11.

> (i) allegations of fraud, misrepresentation, negligence and conspiracy must be pleaded with particularity..."
>
> [Internal citations omitted.]

18. In *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp*, the Court specifically considered the requirement codified in Rule 25.06 that pleadings be "concise", and concluded that the Rules require that a pleading be brief:

> "[20] The Rules provide a concise code for drafting pleadings. **The general Rule, 25.06(1) makes it clear that a pleading shall contain a *concise statement of the material facts***, but not the evidence by which those facts are to be proven or the argument relied on to support it being found as fact (see *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.*, 1991 CarswellOnt 428 (Ont. Gen. Div.)).
>
> [21] Thus, while it important to "tell the story" in a pleading, such that the material facts are related chronologically or in some other rational way, **a pleading is intended to provide a reader with the skeleton, rather than a fully fleshed out body detailing the events. Details are generally evidence and should be avoided unless otherwise specifically required by the Rules.**
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> ...
>
> [25] **The overall picture that emerges from the Rules and case law is that a pleading should be brief, to the point and clear.** Whatever is alleged should have a bearing on the relief sought and, though brevity is to be applauded, certain special torts must be pleaded with particulars, so those must be included. Everything contained in a pleading should be included for a legitimate reason. Allegations that are made only to provide "colour" should be discouraged. In sum, a pleading should be drafted with the role of pleadings in mind - they should define the issues for discoveries and trial."[9]
>
> [Emphasis added.]

19. In *Mudrick*, Master Haberman noted that the claim before her was "very long" because "it consist[ed] of 92 paragraphs spread over 26 pages."[10] She further observed that "the claim reads like an affidavit drafted by an irate client. Instead of setting out material facts, each

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[9] *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp*, [2008] O.J. No. 4512 (Master) at paras 20-21, 25.

[10] *Mudrick*, at para 29.

allegation takes the form of evidence, replete with the type of minutia that has no place in a pleading."[11] Master Haberman further stated:

> "[41] Repetition should be avoided. Superfluous detail should be eliminated. Editorialized comments should be removed. Counsel must bear in mind that this is the framework, only, not intended as evidence, itself, by which to prove the case. This is not "the last chance" to tell the whole story - it is only an overview of what the case will be about."[12]

20. In the result, the Court concluded that the pleading was so problematic that it could not be repaired by the "'bandaid' solution" of merely deleting paragraphs; rather, the appropriate remedy was that "the claim must be struck in its entirety."[13]

21. The problems caused by an excessively lengthy and repetitive pleading were addressed by Justice Pierce in *Somerleigh v. Lakehead Region Conservation Authority.*[14] The learned Justice found while "[l]ength, alone, is not determinative of prejudice," there are numerous prejudices that can result from a prolix pleading:[15]

> "[10] Unless the pleading is structured concisely, it is difficult to find the party's position in the mass of detail, particularly if the detail is collateral, or argumentative. The result can be an unfocussed statement, which the court and the opposing party must wade through to determine what is in issue. **A mass of unnecessary detail may in fact be misleading to the opposing party and the court, and therefore prejudicial**..."[16] [Emphasis added.]

22. Justice Pierce then undertook an analysis of the ways in which a pleading can be prolix, providing numerous examples, including:

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[11] *Mudrick,* at para 37.

[12] *Mudrick,* at para 41.

[13] *Mudrick,* at para 39.

[14] *Somerleigh v. Lakehead Region Conservation Authority,* [2005] O.J. No. 3401 at para 10.

[15] *Somerleigh,* at para 10.

[16] *Somerleigh,* at para 10.

(1) unnecessary detail: failing to "distill the essence of an event to plead what occurred when it is legally significant, or *material* to the case" is prolix and therefore prejudicial;[17]

(2) embellishment: "adds length without adding substance... obscure[ing] the issues and mak[ing] the pleading prolix";[18]

(3) argument in a pleading: "[w]hen it is inserted in a pleading it is out of place, like the cart before the horse. It is a distraction and does not constitute a proper pleading."[19]

(4) irrelevancies: "make a pleading prolix and obscure the issues".[20]

Justice Pierce struck every paragraph and heading in the pleading she deemed prolix for featuring the forgoing flaws.

23. Justice Pierce's approach to dealing with prolix pleadings has been employed in numerous decisions subsequent to *Somerleigh*, including the following examples:

(1) In *B (A) v. Halton Children's Aid Society*, Master Pope relied on *Somerleigh*, stating:

> "[56] In addition, **the pleading contains excessive prolix and immaterial facts**. Although the defendants do not take issue with it, it took seven paragraphs to describe the plaintiff's pregnancy, rather than a "concise" statement of the material facts, as required in rule 25.06(1). **The word "concise" is there for a reason which has been overlooked throughout this pleading.**
>
> [57] Other examples of prolix and immaterial facts are the history of the "triad theory", the details of and deficiencies in Dr. Cory's reports, deficiencies in Dr. Cory's qualifications, details of the interrogation with Constable Zarowny, expectations and reactions of the plaintiffs to the request for a polygraph test, qualifications and experience of Mr. DuVernet, plaintiffs' counsel, and the nature of and effect of a parenting capacity assessment."[21] [Emphasis added.]

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[17] *Somerleigh*, at paras 12-22.

[18] *Somerleigh*, at para 23.

[19] *Somerleigh*, at para 27.

[20] *Somerleigh*, at para 31.

[21] *B (A) v. Halton Children's Aid Society*, 2016 ONSC 6195 (Ont Master) at paras 56-57.

(2) In the recent case of *Sachedina v. De Rose*, Justice Bielby considered a statement of claim 87 pages in length, containing 259 paragraphs.[22] Justice Bielby relied on *Somerleigh*, *Cerqueira*, and *Mudrick* in striking out the pleading in its entirety.[23]

(3) In *Sachedina*, Justice Bielby found that the pleading was "excessively long and thereby prohibits a detailed, paragraph by paragraph analysis."[24] He also noted, among other flaws, that the pleading was "a 'fleshed out body', not a 'skeleton'", the facts were embellished, irrelevant facts were pleaded, and a summary section was included which was purely repetitive and "not part of a properly drafted statement of claim."[25] In rejecting the Plaintiff's argument that the facts alleged in the pleading were "necessary to provide context and understanding of his claim,"[26] Justice Bielby concluded that the pleading was excessive and had to be struck in its entirety:

> "[64] In my opinion the claim before me goes well beyond the recital of some evidence to particularize a claim. It is a comprehensive, evidentiary review of the plaintiff's interaction with the defendants and while it may be admissible evidence at trial, such evidence, certainly to this extent, represents an improperly drafted claim that must be struck in its entirety, with leave to deliver an Amended Statement of Claim."

24. In summary, the above case law makes it clear that pleadings which are excessively long, repetitive and argumentative should be struck.[27]

25. The importance of these principles was emphasized in the recent decision of Justice Perell in *Jacobson v. Skurka* (2015), 125 O.R. (3d) 279 (SCJ) in which a 132 paragraph statement of defence was struck out in its entirety, because it contained impermissible and unnecessary evidence and argument. In arriving at this result, Justice Perell stated as follows:

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[22] *Sachedina v. De Rose*, 2017 ONSC 6560 (Ont SCJ) at para 6.

[23] *Sachedina*, at paras 16-26, 69.

[24] *Sachedina*, at para 43.

[25] *Sachedina*, at paras 46-49.

[26] *Sachedina*, at para 62.

[27] See also *National Trust Co. v. Furbacher*, [1994] O.J. No. 2345, and *McCarthy Corp. v. KPMG LLP*, 2006 CanLII 11919 (SCJ), and [2007] O.J. No. 32 (SCJ)

[43] Rule 25.06(1) draws a distinction between the "material facts" and "the evidence by which those facts are to be proved". A material fact may itself be relevant evidence and particulars of material facts may also be relevant evidence, so the distinction drawn in the rule is not a litmus test clear differentiation, but the essence of the directive of rule 25.06 is clear enough that a pleading is not the place for a party to lead relevant evidence and to present argument to prove his claim or defence.

[44] A pleading should not describe the evidence that will prove a material fact; pleadings of evidence may be struck out: *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684, [1991] O.J. No. 915 (Gen. Div.). The difference between pleading material facts and pleading evidence is a difference in degree and not of kind: *Toronto (City) v. MFP Financial Services Ltd.*, [2005] O.J. No. 3214, [2005] O.T.C. 672 (Master), at para. 15. What the prohibition against pleading evidence is designed to do is to restrain the pleading of facts that are subordinate and that merely tend toward proving the truth of the material facts: *Grace v. Usalkas*, [1959] O.W.N. 237 (H.C.J.); *Phillips v. Phillips* (1878), 4 Q.B.D. 127 (C.A.). Even a pleading of an admission, which is a type of evidence, may be struck out: *Davy v. Garrett* (1878), 7 Ch. D. 473 (C.A.); *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd., supra.*

[45] In most pleadings and for most pleaders, it is easy enough to differentiate what is compliant with the rule and what is a non-compliant pleading of evidence. Most lawyers are and should be able to understand the difference between a material fact and the evidence to prove the material fact. In the case at bar, however, much of Mr. Skurka's statement of defence and counterclaim is patently not compliant with rule 25.06(1).

[46] To demonstrate the last point, I shall first analyze paras. to 28 to 85 of the statement of defence and counterclaim (some 58 paragraphs, some with subparagraphs). I begin by noting that six of these paragraphs (paras. 33, 72, 77, 78, 79 and 83) are lengthy quotes from documentary evidence and they are not a proper way of pleading material facts.

[47] Turning to paras. 28 to 33, which are set out below, these paragraphs are under the heading "Discussion", and apart from the fact that a proper pleading is not a memorandum with a discussion section, and even accepting that para. 28 is a proper pleading of the material fact that Mr. Jacobson's legal team knew that there was incriminating evidence connecting Mr. Jacobson with Affpower, paras. 29 to 33 are not a pleading of material facts, but rather these paragraphs are overwhelmingly evidence and argument to prove that Mr. Jacobson was connected to Affpower's incriminating activity.

26. Justice Perell reviewed the pleading in issue, and concluded that while portions of the document contained some "material facts", the statement of defence contained numerous

examples of argument and pleadings of evidence. These defects were compounded by the inclusion from time to time of aggressive and inflammatory conclusions, which coloured the pleading.

27. The Court also rejected the argument that the improper pleading merely provided permissible particulars:

> [56] In my opinion, paras. 59 to 67 do not comply with rule 25.06(1) and (7). The excision of these paragraphs will not preclude Mr. Skurka from disclosing in his affidavit of documents the notes of the meeting, which he ought to do as part of the discovery phase of the action, nor will it preclude him from relying on what occurred at the meeting in defence of Mr. Jacobson's claim. Including evidence in a pleading may make it easier for the opponent to prepare for examinations for discovery, but it remains improper for a party to make a pleading a pre-emptive closing address.
>
> [67] Finally, on the matter of the challenge to Mr. Skurka's statement of defence and counterclaim, Mr. Skurka justifies his pleading on the basis that he has just helpfully provided particulars of his serious allegations against Mr. Jacobson. I am sure that Mr. Jacobson, who did not ask for particulars but moved to have the allegations struck out, would have been happier to wait for the affidavit of documents and examination to discovery to obtain disclosure of the evidence upon which Mr. Skurka relies to prove his material facts. But more to the point, Mr. Skurka's unsolicited particularization of his defence abuses the notion of particulars.
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> [68] In between material facts and evidence is the concept of "particulars". Particulars are additional details that enhance the material facts, and particulars have a role to play different from just being evidence: *Copland v. Commodore Business Machines Ltd.* (1985), 52 O.R. (2d) 586, [1985] O.J. No. 2675 (Master), affd (1985), 52 O.R. (2d) 586*n*, 3 C.P.C. (2d) 77*n* (H.C.J.). Particulars are ordered primarily to clarify a pleading sufficiently to enable the adverse party to frame his or her answer, and their secondary purpose is to prevent surprise at trial: *Steiner v. Lindzon* (1976), 14 O.R. (2d) 122, [1976] O.J. No. 2301 (H.C.J.). Particulars have the effect of providing information that narrows the generality of pleadings: *Mexican Northern Power Co. v. Pearson*, [1913] O.J. No. 816, 25 O.W.R. 422 (S.C.).
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> [69] In *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369 (C.A.), at para. 15, the British Columbia Court of Appeal identified six functions for particulars: (1) to inform the other side of the nature of the case they have to meet as distinguished from the mode in which that case is to be proved; (2) to prevent the other side from being taken by surprise at the trial; (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial; (4) to limit the

> generality of the pleadings; (5) to limit and decide the issues to be tried, and as to which discovery is required; and (6) to tie the hands of the party so that he or she cannot without leave go into any matters not included.
>
> [70] In my opinion, most if not all of the evidentiary details provided by Mr. Skurka cannot be justified by the purposes of particulars. The evidentiary details are the means by which Mr. Skurka intends to prove his defence that he was not negligent or in breach of fiduciary duty and his allegation that Mr. Jacobson suffered no damages because he is not an innocent man. The above analysis reveals that much of the so-called particulars are just a responsive polemic that will just provoke a further polemic in the reply and defence to the counterclaim.

28. In the result, the statement of defence was struck out in its entirety with leave to amend.

29. In *Murray v. Star*, 2015 ONSC 4464 (leave to appeal denied at 2015 ONSC 6658), similar principles were applied with respect to segments of a statement of claim which (like the case at bar) had been inserted to provide "overview" and "background." In this case, Justice McEwan held that the inclusion of such sections in a pleading was improper:

> **13.** First, I would strike out the "Overview" section, paragraphs 9 through 30. It is difficult to pick and choose which portions of each paragraph I find offensive but, overall, it is repetitious. All of the Overview section is repeated later in the draft Further Amended Statement of Claim in detail and as well includes argument, evidence and irrelevant information. The Overview section also contains Murray's beliefs, appreciations, hindsight observations and perspective, none of which are appropriate.
>
> **14.** With respect to the "Detailed Background" section, I would strike out all of the paragraphs that the defendants deem offensive, paragraphs 31-36, 38, 40, 45-47. They include irrelevant information such as Star's relocation with his family, Murray's marital struggles and the age difference between them. Further, once again, many of the paragraphs are comprised of evidence and argument. While some background information is relevant given the pleading of the fiduciary relationship, the allegations are of marginal probative value and are outweighed by their prejudicial effect.
>
> **15.** The next pleadings that the defendants find offensive fall under the heading "Star Initiates Oppression Plan". Paragraph 48 ought to be struck. I do not find fault with proposed paragraph 49. With respect to this heading and all of the remaining headings that set out the various "Steps" of the "Oppression Plan", I do

not find the headings to be of any probative value. They do not enhance the quality of the pleading and, in my view, are designed to unduly colour the pleading and create prejudice in the mind of the reader against the defendants. This wording prejudices the fair trial of the action and all such headings ought to be struck.

16. The pleadings that follow with respect to the nine-step "Oppression Plan" paragraphs 59-70, 107-116 are replete with evidence and irrelevancies. These paragraphs too, must be struck.

17. In my view, the provisions of Rule 25.06(1) have not been met and the pleading goes beyond containing a concise statement of the material facts. I echo the comments of Master Haberman in *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp.* [2008] O.J. No. 4512 (S.C.), wherein she held at para. 20:

> Thus, while it [is] important to "tell the story" in a pleading, such that the material facts are related chronologically or in some other rational way, a pleading is intended to provide a reader with the skeleton, rather than a fully fleshed out body detailing the events. Details are generally evidence and should be avoided unless otherwise specifically required by the Rules.

18. Those comments resonate in this case. I do not propose to itemize each and every problem with the offending paragraphs, since there are many, but rather urge plaintiffs' counsel to review the pleading and redraft it in a way that the story is told setting out the material facts without detailed evidence and irrelevant statements.

30. Finally, the case of *George v. Harris*[28] provides further guidance as to the limits of what is permissible for inclusion in a court document, in the context of a motion to strike a Notice of Motion which contained conclusory allegations and argument:

> **20.** The next step is to consider the meaning of "scandalous", "frivolous" or "vexatious". There have been a number of descriptions provided in the multitude of authorities decided under this or similar rules. It is clear that a document that demonstrates a complete absence of material facts will be declared to be frivolous and vexatious. Similarly, portions of a pleading that are irrelevant, argumentative or inserted for colour, or that constitute bare allegations should be struck out as scandalous. The same applies to a document that contains only argument and includes unfounded and inflammatory attacks on the integrity of a party, and speculative,

[28] *George v. Harris*, [2000] O.J. No. 1762 (SCJ)

unsupported allegations of defamation. In such a case the offending statements will be struck out as being scandalous and vexatious. In addition, documents that are replete with conclusions, expressions of opinion, provide no indication whether information is based on personal knowledge or information and belief, and contain many irrelevant matters, will be rejected in their entirety. See: *ACIC (Canada) Inc. v. Merck & Co.* (1995), 62 C.P.R. (3d) 362 (F.C.T.D.); *Solid Waste Reclamation Inc. v. Philip Enterprises Inc.* (1991), 49 C.P.C. (2d) 245 (Ont. Ct. (Gen. Div.)); *Innovation and Development Partners/IDP Inc. v. Canada*, [1993] F.C.J. No. 6-02 (F.C.T.D.) and *Waverly (Village) v. Nova Scotia* (Acting Minister of Municipal Affairs) (1993), 16 C.P.C. (3d) 64(N.S.S.C.), aff'd (1994), 30 C.P.C. (3d) 205 (C.A.), leave to appeal to Supreme Court of Canada refused March 23, 1995.

21. From the decision in *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (1991), 3 O.R. (3d) 684 (Gen. Div.) it is also clear that headings used by a party in a document that are "unnecessarily conclusive" are equally vulnerable to attack based on improper content.

C. Application of the Above Principles to the ACC

31. It is respectfully submitted that the 90 page ACC offends many of the above principles.

32. Its contents are repetitive and in large measure constitute pleadings of arguments and evidence, not a concise statement of material facts.

33. For example, the ACC contains three lengthy sections which are stated to be "Overview" and "Background" and which add over 30 pages of narrative and colourable argument, evidence and repetition to the pleading.

34. In this regard, immediately following the prayer for relief, the ACC begins (at page 12) with a ten page section entitled "A. Overview." It contains evidence and argument, not material facts.

35. In addition, this "Overview" sets the tone for the entire document. In it, the Catalyst Defendants are accused and described as persons who:

(1) participated in an "invidious, co-ordinated and systemic campaign" of defamation (ACC, at paragraph 26);

(2) acted with "contumelious disregard" for the rights and interests of West Face and Boland (ACC, at paragraph 27);

(3) engaged in a "deplorable attack" and in a "pernicious scheme" (ACC, at paragraph 32), and

(4) engaged in a campaign(s) of "vilification" and "harassment" (ACC, paragraph 35).

36. This approach to pleading continues in the next section of the ACC ("B. Parties"), where the Catalyst Defendants, in addition to being identified (the usual purpose of this part of a claim), are characterized as having "acted throughout in a spiteful, vindictive and abusive fashion" (ACC, at paragraph 37).

37. The intemperate and colourful tone to the pleading is continued throughout the balance of the ACC, where similar terms and allegations are repeated, not just once or twice, but over and over for good measure.[29]

38. West Face and Boland are entitled to allege that the Catalyst Defendants have made defamatory statements, harmed them, or otherwise engaged in actionable conduct. However, it is respectfully submitted that the use of the type of language referred to above—coupled with the inclusion of allegations in relation to Justice Newbould referred to below—leaves no doubt that one of the main purposes of the ACC is to create prejudice against the Catalyst Defendants by the repeated use of inflammatory, judgmental and conclusory allegations.

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[29] The red numbers in the margin of Appendix B identify such language, but do not pick up all of the instances where the same words and phrases are repeated.

39. The next section of the ACC continues with seven pages of pleadings which contain arguments and evidence relating to the WIND transaction, under the heading titled "C. Background to the WIND Defamation: Catalyst's Failure to Acquire WIND".

40. Section C of the ACC begins with a statement that its purpose is "to understand why" the alleged WIND Defamation occurred. This is followed by 23 paragraphs which go on at great length about the ways and means by which Catalyst failed in its attempt to acquire WIND. It is beyond the scope of this Factum to review the contents of all of these 23 paragraphs, but it is respectfully submitted that they constitute unnecessary and impermissible argument and evidence, and if permitted to stand will significantly enlarge the scope of this action.

41. At pages 31 – 39, the ACC then continues with yet another "Background" section entitled "D. Background to the Callidus Defamation."

42. This section occupies another nine pages with over 20 lengthy paragraphs referring to issues, making arguments and setting out evidence. These paragraphs breach the basic rules of pleading. In addition, in large measure, these matters relate to another pending action in this Court: *The Catalyst Capital Group Inc. et al. v. Veritas Investment Research Corporation et al.* Court File No. CV-15-530726 ("Veritas Action"). In this regard, Section D of the ACC specifically references West Face's Statement of Defence in that case: see ACC paragraph 71, footnote 3.

43. Apart from these three stand-alone "Overview" and "Background" sections, the remaining fifty pages of the ACC contain numerous additional paragraphs which are repetitive, argumentative and which in substance plead evidence, rather than concise material facts (see, for example paragraph 60, below).

44. It is respectfully submitted that the above defects are compounded by the failure of the ACC to plead the causes of action which are sought to be put in issue in a concise, coherent, and unambiguous manner.

45. In this regard, the two primary claims alleged in the ACC—defamation and conspiracy—are interwoven throughout the pleading in a manner which is repetitive, ambiguous and at times factually inconsistent and incomprehensible.

46. For example, paragraph 88 of the ACC alleges that the Catalyst Defendants decided in August **2017** to engage in a "two pronged campaign" to discredit West Face and Boland, consisting of the "Black Cube Campaign" and the "Defamation Campaign."[30]

47. The alleged "Defamation Campaign" is the subject of 40 pages of the ACC (comprised of paragraphs112-181), which is followed by another section entitled "Conspiracy".

48. This latter section repeats the allegations in paragraph 88—referred to above—that the "Counterclaim Defendants" entered into an agreement in or about **August 2017** to act in concert to "punish, embarrass, discredit, and harm" West Face and Boland by disseminating "false and defamatory statements" about them:

> "183. The Counterclaim Defendants entered into an agreement in or about August 2017 to act in concert, by agreement, and with the common design to:
>
> (a) punish, embarrass, discredit and harm West Face and Boland by disseminating false and defamatory statements about them that attacked their honesty, integrity, business ethics and conduct. The statements in question are referred to above, and include the Post-Judgment Comments, the October 2016 Press Release, the Glassman Defamation, the First Investor Letter, the Internet Postings, the Misleading Transcripts and the March Investor Letter;" [Underlining added.]

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[30] According to the ACC, the Catalyst Defendants enlisted the assistance of the other Counterclaim Defendants in implementing **both** of these "campaigns" and the Defamation Campaign was "systemic, multifaceted and persistent." The "Black Cube" and "Defamation" Campaigns are referred to throughout the ACC, including their own separate sections (F and G, respectively).

49. However, the ACC contains no pleading of material facts showing how the Counterclaim Defendants could have agreed in August **2017** to enter into a conspiracy to harm West Face and Boland by making defamatory statements a year or so earlier, which was stated to be part of the "Defamation Campaign."[31]

50. Despite the absence of any pleading of material facts to support the *prima facie* absurdity of these allegations, paragraph 184 of the ACC then repeats the contention that all of the Counterclaim Defendants were involved throughout:

> "184. These various activities were all part of a co-ordinated strategy engaged in by the Counterclaim Defendants in furtherance of their conspiracy. They sought throughout to maximize the harm they inflicted on West Face and Boland, and used improper, unethical and unlawful conduct engaged in by operatives of Black Cube to do so. All of the Counterclaim Defendants were aware of and agreed to the overall strategy, and they all played an active role in implementing that strategy. Specifically:
>
> . . .
>
> (e) The Counterclaim Defendants, directly or indirectly, published the Post-Judgment Comments, the October 2016 Press Release, the Glassman Defamation, the First Investor Letter, the Internet Postings, the Misleading Transcripts and the March Investor Letter, and acted with malice in doing so;" [Underlining added.]

Again, no material facts are pleaded to support this bald allegation.

51. In addition, the "Overview" section referred to above identifies three principal means by which the defendants conspired to carry out the alleged "Defamation Campaign"—(1) the

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[31] Namely, the alleged defamatory statements made on **August 19, 2016** (i.e. the Post Judgment Comments" as defined and alleged in paragraph 112 of the ACC), on **October 13, 2016** (i.e. the "October 2016 Press Release" as defined and alleged in paragraph 155 of the ACC), or between **August to October 2016** through an unspecified "variety of conversations and discussions" allegedly entered into by Newton Glassman at that time (i.e., the "Glassman Defamation" as defined and alleged in paragraph 119 of the ACC).

WIND Defamation," (2) the "WolfPack Defamation," and, (3) the "Performance Defamation."[32]

52. Although paragraph 26 (b) of this Overview section refers to the "Callidus 'Short,'" nowhere does this "Overview" allege any defamatory statements by any of the Catalyst Defendants relating to Callidus.

53. However, as noted above, the ACC contains (at page 31) a heading entitled "D. Background to the Callidus Defamation" which is followed by a lengthy section running from paragraphs 67-86.

54. These paragraphs do refer to Callidus issues, and begin with the assertion (in paragraph 67) that: "to understand why the ***various* statements and allegations** of the Counterclaim Defendants are false and defamatory, **as well as why and how** the Counterclaim Defendants acted with malice in making, disseminating or causing to be made or disseminated the **statements and allegations in question**, it is necessary to understand what the Catalyst Defendants allege West Face has done" (emphasis added).

55. However, as noted above, the remaining 20 paragraphs of Section D of the ACC plead a detailed series of issues and events relevant to the Veritas Action, and in substance regurgitate evidence, arguments and defences which West Face has raised in that lawsuit. And, although paragraph 75 of the ACC refers to the commencement of the Veritas Action in June 2015, there is no allegation anywhere in Section D, or anywhere at all in the ACC, that the Catalyst Defendants have made or issued any defamatory statements about these matters, let alone any pleading of material facts in relation thereto.

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[32] Later, the section contends that this was done at least five different ways (paragraph 34 of the ACC).

56. In the result, the ACC does not identify the "various statements and allegations" making up the "Callidus Defamation," or who allegedly participated in these unspecified statements and allegations, or when they occurred.

57. There are many other examples of repetition, ambiguities, inconsistencies and inaccuracies about alleged conspiracies and defamation spread throughout the ACC. These problems occur in part because references to these terms can be found over and over and over again, from the beginning to the end of the 90 page ACC, instead of being set out in one place in a consistent or understandable pleading of concise material facts.

58. In addition, while some paragraphs of Section G of the ACC ("Defamation Campaign") contain pleadings of material facts, many contain inappropriate pleadings.

59. In this regard, leaving aside issues as to whether of the alleged defamatory statements referred to in Section G have the meanings or effects attributed to them, there are numerous instances in Section G where the necessary material facts are simply not alleged, or where the paragraphs contain pleadings of argument, evidence or irrelevant allegations.

60. Examples of where this section contains (in some cases a mixture of) impermissible pleadings of argument, evidence, or irrelevant allegations can be found in paragraphs 111, 114, 119, 120, 121, 123, 126, 127, 128, 131(a), 135, 136, 143, 149-150, 156, 164, 167, 170, 172(a)-(e), 173(a)–(g), 174, 174(a)-(c), 178, 180 and 181.

61. Following Section G, the ACC continues with a short section entitled "H. Conspiracy." Like its predecessor at pages 87-88 of the ACC ("F. Conspiracy"), the paragraphs in Section H plead conclusions, not the necessary material facts. The same can be said of

many of the paragraphs and allegations contained in Section I of the ACC ("Unlawful Means Tort").

62. In the result, it is respectfully submitted that the pleadings of defamation and conspiracy do not conform to the basic rules of pleading referred to in paragraphs 10-30 above. They also do not comply with the principles applicable to pleading the torts of defamation and conspiracy to defame, where proper pleadings are generally concluded to be of greater importance. A concise summary of these principles is contained in *Brown on Defamation*, Chapter 19, Pleadings, at paragraphs 19.2 and 19.3(1): see especially, pages 19-2 to 19-3; 19-6 to 19-7; 19-10 to 19-13; 19-21; and 19-26 to 19-31 (as highlighted in the Book of Authorities).

D. The Black Cube Campaign–the allegations referring to Justice Newbould should be struck out

63. Section F of the ACC contains 25 paragraphs (85-110) which refer at length to the "Black Cube Campaign." As is the case throughout the ACC, the allegations regarding the claims advanced in this section can be found throughout the ACC. Detailed allegations linked to this subject are located earlier (as in, for example, paragraphs 32, 33(a), 34(a), 34(c) and 41) and later in the pleading (see, for example, paragraphs 173(g), 175, 189(a), 189(d), 196 and 197 thereof).

64. In these portions of the ACC, West Face and Boland plead numerous claims, grievances, and causes or potential causes of action that could be advanced by Justice Newbould,[33] including, for example, that the purpose of the "campaign" was to "attack and discredit" Justice Newbould and/or to "fabricate" evidence and/or to publish or attempt to publish defamatory articles about Justice Newbould.

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[33] Of the 104 references to Justice Newbould in the ACC, 53 refer to these issues.

65. Elsewhere, the ACC alleges that actionable wrongs were committed against Justice Newbould as a target of the Black Cube Campaign, that the Counterclaim Defendants intended to publish false and defamatory statements about Justice Newbould, and that the Counterclaim Defendants provided distorted or otherwise falsified recordings and/or transcripts to various media outlets (without pleading any material facts as to what the falsifications or distortions were).

66. The simple fact is that the Catalyst Defendants determined, after obtaining independent legal advice, not to seek to adduce any evidence about steps taken by Black Cube in relation to Justice Newbould or any related issues—including any recordings or transcripts thereof—in the Ontario Court of Appeal, before Justice Hainey, in any other Court, or in any other proceedings.

67. It is respectfully submitted that the often repeated allegations about the Black Cube Campaign in relation to Justice Newbould have no relevance to any alleged defamation or conspiracy to defame or any other substantive or material issues raised by the ACC. Rather, it is submitted that the content of these references and their frequency in the ACC reflect an intention by West Face to inflame the Court against the Catalyst Defendants.

68. Moreover, the retention of these allegations in the ACC will inevitably result in a substantial portion of this case being devoted to a review and analysis of numerous aspects and issues of the Black Cube Campaign, including:

    (1) what was said and done in any meetings that occurred with Justice Newbould, including what former Justice Newbould himself said;

    (2) any recordings or transcripts of the meetings;

    (3) any instructions given, the reasons for, processes followed, and decisions taken in relation to the "Black Cube Campaign" as it related to Justice Newbould;

(4) the potential basis on which any evidence derived from the Black Cube Campaign in relation to Justice Newbould might have been adduced in any court proceedings;

(5) the accuracy of statements made about and the impact upon any third parties referred to in any meetings involving Justice Newbould;

(6) the circumstances relating to the trial and decision making processes in the Moyse case, and,

(7) a host of related issues.

69. In order to deal with such issues at trial, the Court would have to hear testimony from anyone and everyone involved in any meetings or interactions between Black Cube and Justice Newbould, Justice Newbould himself, any persons at Catalyst alleged to be involved, representatives of Black Cube, other third parties, and (possibly) counsel. The need to adduce such evidence—at the instance of West Face and Boland as a result of the allegations they have made in the ACC—might expose former Justice Newbould or other persons to potential reputational harm. In addition, the continued inclusion and adjudication of the allegations made by West Face and Boland could make it necessary to inquire about the decision making processes of the trial judge in the Moyse case. This is a subject matter that is not normally open for review: see *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796 (per Cory J.). Catalyst submits these things should not occur.

70. It is further submitted that proceeding in this manner would have a disproportionate impact on and would substantially delay and complicate the conduct and adjudication of this case. This too would be inappropriate.

71. Accepting (as this Court must do for the purpose of this motion) that steps were taken by Black Cube to investigate, record and deceive Justice Newbould, such steps should not

have been taken. It is respectfully submitted that to prolong the issues in relation to these matters—as West Face and Boland are trying to do by including them in the ACC—is inappropriate, unnecessary and contrary to the interests of justice.

72. In the alternative, even if the references and allegations in the ACC relating to Justice Newbould and Black Cube have any connection to any of the issues in this case, it is submitted that they are of such marginal relevance—compared to the consequences of their continued inclusion—that they should be struck out pursuant to Rules 21.01(3)(d) or 25.11.

E. The Personal Claims against Newton Glassman, Gabriel De Alba and James Riley should be struck out

73. The ACC seeks personal relief against Glassman, De Alba and Riley.

74. Personal relief against all three of these individuals is based upon the allegations found in paragraphs 37 and 38 of the ACC:

> 37. Glassman, Riley, and De Alba participated personally in the acts of misconduct pleaded and relied upon by West Face and Boland. Their conduct was itself tortious, and went well beyond the scope of any duties that may properly have been owed by them to Catalyst or Callidus. Indeed, these individuals acted throughout in a spiteful, vindictive, and abusive fashion that no responsible public company, or any company charged with the important responsibility of managing and investing the funds of others, could properly have authorized, sanctioned, or tolerated. They are personally liable to West Face and Boland for their misconduct.
>
> 38. Glassman, Riley, and De Alba used the names, positions and resources of Catalyst and Callidus in engaging in the misconduct complained of herein. In the circumstances, Catalyst and Callidus are also liable to West Face and Boland for this misconduct.

75. While the ACC contains many bald conclusions that "all of the Catalyst Defendants" are responsible for the conduct complained of, the ACC contains no pleading of material facts to support any conclusion that any of Glassman, De Alba or Riley acted other than in their

capacities as corporate officers or directors of Callidus and Catalyst. Similarly, there are no material facts pleaded to suggest that they obtained any personal benefits, or that Callidus or Catalyst were a sham, or were used as a shield to avoid liability for fraud or other similar conduct. Moreover, in the case at bar as pleaded, the acts and alleged statements complained of relate solely to the business and affairs of Callidus and Catalyst, and not to any independent actions of or personal matters involving Glassman, De Alba or Riley.

76. It is respectfully submitted that it is not enough to make a bald allegation of tortious conduct by a corporate officer or director, without pleading supporting material facts to bring the case within the established exceptions allowing such personal claims.[34]

77. In these circumstances, it is respectfully submitted that the claims against Glassman, De Alba and Riley should be struck out.

F. Additional Causes of Action

78. Section J of the ACC is entitled "Inducing Breach of Confidence and Fiduciary Duty".

79. It is respectfully submitted that the paragraphs in this section should be struck out for the following reasons.

80. First, for West Face to properly claim a breach of confidence, it is required to plead three elements:

(1) that information conveyed to the Catalyst Defendants was confidential;

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[34] The principles as to when a personal claim lies against a corporate officer or director are reviewed in many cases, including, *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.); *Scotia McLeod Inc. v. Peoples Jewellers Ltd.* (1993), 26 O.R. (3d) 481 (C.A.); *PFH Investments Limited v. Fluid Music* (unreported decision of Justice Hoy, Ont. S.C.J., dated January 23, 2009); *Piedra v. Copper Mesa Mining Corp.*, [2011] O.J. No. 1041; *Density Group Ltd. v. HK Hotels LLC*, [2014] O.J. No. 3865. See also: Shannon O'Byrne, Yemi Philip and Katherine Fraser, "The Tortious Liability of Directors and Officers to Third Parties in Common Law Canada," 2017 54-4 *Alberta Law Review* 871, 2017 CanLIIDocs 86, <http://www.canlii.org/t/6rp>.

(2) that the information was conveyed in confidence, and

(3) that the confidential information was misused by Catalyst Defendants, to the detriment of the confider.[35]

81. In *Dynamex Canada Corp v. DeSousa*, Justice Pollak considered the sufficiency of amendments to enumerate further material facts pleaded in support of a claim of breach of confidence.[36] Justice Pollak first reviewed the facts pleaded "showing the information is confidential," which included specifics as to the nature of the information at issue, reasons for the confidential nature of the specific information, details as to the individuals who were trusted with the confidential information, and a description of the manner in which the employee claimed to have breached his employer's confidence had learned the confidential information.[37] The court determined these facts to be sufficient to satisfy the first element of the cause of action.[38]

82. Justice Pollak then considered whether sufficient facts had been pleaded to demonstrate that the information was conveyed in confidence. The pleading contained bald allegations that the defendants "knew or ought to have known that the Confidential Information was confidential," and that

> "[t]he Confidential Information was communicated to [the employee] in confidence for the limited purpose of enabling [him] to further [the claimant's] interests and objectives. [He] received the Confidential Information knowing the limited purpose for which it was communicated to him and his obligation to keep the Confidential Information confidential."[39]

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[35] *Lysko v. Braley*, [2006] O.J. No. 1137 (C.A.) at para 17.

[36] *Dynamex Canada Corp v. De Sousa* [2009] OJ No 3403 at para 14.

[37] *Dynamex*, at para 14.

[38] *Dynamex*, at para 14.

[39] *Dynamex*, at para 15.

83. Justice Pollak found that the above-quoted amended pleading failed to identify sufficient facts to show that the information was conveyed in confidence, and therefore struck the pleading.[40]

84. Finally, Justice Pollak considered the amended pleading with respect to the element that the confidential information had been used to the detriment of the confider. She found that the amended pleading before her was also deficient on this point, as the claimant baldly asserted that the disclosure had occurred, and, by its disclosure to a competitor, must have been wrongly used.[41]

85. West Face has baldly asserted a claim for a breach of confidence at paragraph 25(b) of the Counterclaim as part of a list of various causes of action. The only other allegations of supposed breaches of confidence in the Counterclaim are:

(1) at paragraph 189(b), where it is asserted that "[o]peratives of Black Cube induced current and former employees of West Face to breach duties of confidence owed to West Face pursuant to employment contracts and at law…", and

(2) at paragraphs 191-193, the short, combined section where West Face has pleaded causes of action for "inducing breach of confidence and fiduciary duty."

86. As in *Dynamex*, West Face's claim for breach of confidence suffers from a complete absence of required material facts. There are no material facts pleaded in the Counterclaim to indicate: (i) what, if any, specific information was confidential; (ii) who, if anyone, received the information in confidence, or (iii) how the information was confidentially conveyed; and (iv) how the information was actually used to the detriment of West Face.

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[40] *Dynamex Canada Corp v. De Sousa*, [2009] OJ No 3403 at para 15.

[41] *Dynamex*, at para 16.

Absent precise pleadings of these material facts, the cause of action for breach of confidence should be struck out.

87. West Face also claims that the Catalyst Defendants induced Alex Singh ("Singh"), the former General Counsel of West Face, to breach his duty of confidence to West Face. There is no jurisprudence recognizing this cause of action as proper in an Ontario court. To the extent that such a claim exists in law, West Face must plead the elements of the tort of "breach of confidence," in addition to some additional standard of conduct relating to the alleged inducement.

88. Therefore, to the extent that this tort is recognized at law, West Face has failed to properly plead the cause of action of "inducing breach of confidence" because it has failed to plead the tort of "breach of confidence" properly.

89. In addition, West Face claims that the Catalyst Defendants induced Singh to breach his fiduciary duties to West Face. There is no Ontario[42] jurisprudence recognizing another cause of action which has been alleged—"inducing a breach of fiduciary duty." While some Canadian Courts have touched on the possibility of this cause of action existing, no court has conducted an analysis of its viability.[43]

90. Even though this concept is novel, the onus remains on West Face to plead material facts to support its claim,[44] including the details of the breach.[45] No such facts have been pleaded. Without such facts, even if such a cause of action exists, the claim cannot survive and should be struck.

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[42] *2027707 Ont. Ltd. v. Richard Burnside & Associates et al.*, 2017 ONSC 4022 (Ont Master) at para 21.
[43] *2027707 Ont. Ltd.*, at para 21.
[44] *2027707 Ont. Ltd.*, at para 22.
[45] *2027707 Ont. Ltd.*, at para 22.

91. Finally, the ACC continuously refers to "unlawful means." It does so in support of two separate torts: unlawful conspiracy and unlawful means. However, the test for each is not the same. For example, a mere breach of a statute does not form the basis of an unlawful means tort. Nonetheless, it is pled that Black Cube's failure to register as a private investigator was part of the "unlawful means." The pleading further fails to delineate which unlawful means applies to which tort.[46]

G. Vexatious Litigant Allegations

92. The proper time and place for West Face to have sought a remedy in respect of its complaints and allegations about the "sting" of Justice Newbould, the adjournment of the Moyse Appeal, or the "fresh evidence" issues was in the Court of Appeal, either by way of some form of relief in relation to the appeal proper, or by seeking costs of the appeal on an elevated scale. West Face did neither. In fact, its request for partial indemnity costs was reduced by the Court of Appeal.[47]

93. In any event, any proceeding to declare that the Catalyst Defendants are vexatious litigants is not properly part of this case. Catalyst lost the Moyse lawsuit. And the Vimplecom action has been stayed because, in substance, this Court has concluded that Justice Newbould made findings as to causation/damages that were binding and determinative of any cause of action Catalyst sought to assert in the Vimplecom proceeding. That does not support a finding that Catalyst (or any of the many other parties against whom such a determination is sought) is a vexatious litigant. In any event, such a proceeding, if it is to be pursued, should not be advanced as part of this action.

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[46] See *Bram Enterprises Ltd. v. A.I. Enterprises Ltd.*, [2014] SCC 12; *Canada Cement LaFarge v. B.C. Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452.

[47] *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 447

94. The paragraphs in the ACC alleging that the Catalyst Defendants are vexatious litigants should be struck out.

PART III
CONCLUSION AND ORDER SOUGHT

95. It is respectfully submitted that the omissions and defects of the ACC are so frequent that it is inappropriate to simply strike out portions of the ACC. Rather, the entire ACC should be struck out.

96. Presumptively, the law is that West Face and Boland should be granted leave to deliver a fresh pleading. This permission should not extend to the allegations relating to Black Cube and Justice Newbould or to the vexatious litigant claims.

97. Catalyst seeks an order giving effect to these conclusions.

June 6, 2018

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Meridian Credit Union Limited v. Rymer*, 2018 ONSC 2893 (SCJ)
2. *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (SCJ)
3. *Prestige Toys Ltd v. Smith*, 2011 ONSC 8003 (SCJ)
4. *Cerqueira v. Ontario*, 2010 ONSC 3954 (CanLII) (SCJ)
5. *Mudrick v. Mississauga Oakville Veterinary Emergency Professional Corp.* [2008] O.J. No. 4512 (Master)
6. *Somerleigh v. Lakehead Region Conservation Authority*, [2005] O.J. No. 3401 (SCJ)
7. *B (A) v. Halton Children's Aid Society*, 2016 ONSC 6195 (Ont Master)
8. *Sachedina v. De Rose*, 2017 ONSC 6560 (SCJ)
9. *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (Gen. Div.)
10. *McCarthy Corp. v. KPMG LLP*, 2006 CanLII 11919 (SCJ)
11. *McCarthy Corp. v. KPMG LLP*, [2007] O.J. No. 32 (SCJ)
12. *Jacobson v. Skurka* (2015), 125 O.R. (3d) 279 (SCJ)
13. *Murray v. Star*, 2015 ONSC 4464 (SCJ)
14. *George v. Harris*, [2000] O.J. No. 1762 (SCJ)
15. *Mackeigan v. Hickman*, [1989] 2 S.C.R. 796
16. *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (C.A.)
17. *Scotia McLeod Inc. v. Peoples Jewellers Ltd.* (1993), 26 O.R. (3d) 481 (C.A.)
18. *PFH Investments Limited v. Fluid Music* (unreported decision of Justice Hoy, Ont. SCJ, dated January 23, 2009)
19. *Piedra v. Copper Mesa Mining Corp.*, [2011] O.J. No. 1041 (C.A.)
20. *Density Group Ltd. v. HK Hotels LLC*, [2014] O.J. No. 3865 (C.A.)

SCHEDULE "B"

RELEVANT STATUTES

1. Rules of Civil Procedure, 1.03(1)

1.03 (1) In these rules, unless the context requires otherwise,

"action" means a proceeding that is not an application and includes a proceeding commenced by,

(a) statement of claim,

(b) notice of action,

(c) counterclaim,

(d) crossclaim, or

(e) third or subsequent party claim; ("action")

2. Rules of Civil Procedure, 21.01(1)(b), 21.01(3)(c) and (d)

21.01 (1) A party may move before a judge,

. . .

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

. . .

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

. . .

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process
(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

3. Rules of Civil Procedure, 25.06

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law
(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

Condition Precedent
(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence. R.R.O. 1990, Reg. 194, r. 25.06 (3).

Inconsistent Pleading
(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative. R.R.O. 1990, Reg. 194, r. 25.06 (4).

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. R.R.O. 1990, Reg. 194, r. 25.06 (5).

Notice
(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material. R.R.O. 1990, Reg. 194, r. 25.06 (6).

Documents or Conversations
(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material. R.R.O. 1990, Reg. 194, r. 25.06 (7).

Nature of Act or Condition of Mind
(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

Claim for Relief
(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. R.R.O. 1990, Reg. 194, r. 25.06 (9).

4. Rules of Civil Procedure, 25.11

25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

(c) is an abuse of the process of the court. R.R.O. 1990, Reg. 194, r. 25.11.

Commercial List Court File No: CV-17-587463-00CL
Court File No: CV-17-586096

THE CATALYST CAPITAL GROUP INC. et al.
Plaintiffs

and

WEST FACE CAPITAL INC. et al.
Defendants

ONTARIO

SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at TORONTO

FACTUM
(Motion to Strike)
The Catalyst Capital Group Inc., Callidus Capital Corporation, Newton Glassman, Garbriel De Alba and James Riley

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