

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION  
Plaintiffs  
and

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON  
GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON  
INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP,  
AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM  
SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE  
LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL  
LEVITT, RICHARD MOLYNEUX and JOHN DOES #1-10  
Defendants

**FACTUM OF THE DEFENDANT, ROB COPELAND  
(MOTION RETURNABLE JULY 11, 2018)**

June 27, 2018

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## **PART I - OVERVIEW**

1. On November 7, 2017, the Plaintiffs commenced a claim against Rob Copeland (“Copeland”) and 21 other Defendants (the “Claim”). The Claim suffers from several fatal flaws and must be struck in its entirety.

2. The Claim fails to comply with the basic form of pleadings required in the *Rules of Civil Procedure*. It fails to comply with the rules of pleading under Rule 25.06, fails to plead the material facts necessary for establishing the causes of action pleaded, and does not contain the basic facts necessary for Copeland to understand the claim against him. Rather, the Claim contains bald allegations of defamation, fraud, misrepresentation, malice and intent, which are unsupported by full particulars.

3. Copeland served a Demand for Particulars. Despite a court order, the Plaintiffs have failed to answer it.

4. The failings in drafting permeate the entire Claim and cannot be excised. As such, the entire Claim must be struck.

## **PART II - SUMMARY OF FACTS**

5. The Plaintiff, The Catalyst Capital Group Inc. (“Catalyst”) is a corporation with its head office located in Toronto, Ontario. Catalyst is the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as “special situations investments for control”.<sup>1</sup>

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<sup>1</sup> Statement of Claim issued November 7, 2017 (the “Claim”) at para 2, Motion Record of Rob Copeland dated June 29, 2018 (“Copeland Motion Record”), Tab 2 p 13.

6. The Plaintiff, Callidus Capital Corporation (“Callidus”) is a corporation with its head office located in Toronto, Ontario. Callidus is a publicly traded asset-based lender that provides capital on a bridge basis to meet the financing requirement of companies that cannot access traditional lending sources.<sup>2</sup>

7. The Defendant, Rob Copeland, is a reporter with the Wall Street Journal and resides in New York, New York.<sup>3</sup>

8. On November 7, 2017, the Plaintiffs commenced the Claim against Copeland and 21 other Defendants, in addition to John Does 1-10, seeking damages of \$450 million for defamation, injurious falsehood, causing loss by unlawful means, civil conspiracy and unjust enrichment, and seeking special damages and punitive and/or aggravated damages of \$5 million.

9. According to the Claim, Copeland worked with the other Defendants to defame, cause loss by unlawful means, and conspire against the Plaintiffs.

10. On January 15, 2018, Copeland Served a Demand for Particulars and Request to Inspect Documents.<sup>4</sup> On May 23, 2018, this Court ordered the Plaintiffs to respond to the Demand for Particulars by June 15, 2018.<sup>5</sup> The Plaintiffs never responded.

### **PART III - STATEMENT OF ISSUES, LAW AND AUTHORITIES**

11. The only issue that must be determined by this Court is whether the Claim ought to be struck in its entirety against Copeland because it fails to conform to the basic form of pleadings in

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<sup>2</sup> Claim at para 3, Copeland Motion Record, Tab 2 p 19.

<sup>3</sup> Claim at para 25, Copeland Motion Record, Tab 2 p 22.

<sup>4</sup> Demand for Particulars and Request to Inspect Documents of Rob Copeland dated January 12, 2018, Copeland Motion Record, Tab 3 p 47.

<sup>5</sup> Endorsement of Mr. Justice Hainey dated May 23, 2017, Copeland Motion Record Tab 4 59.



that it does not provide a concise statement of material facts, it draws conclusions of law without providing the material facts to support these conclusions, and is frivolous, vexatious, and an abuse of process.

**A. THE TEST ON A RULE 21.01 MOTION TO STRIKE**

12. Rule 21.01(1)(b) permits a party to move before a Judge “to strike out a pleading on the ground that it discloses no reasonable cause of action or defence”.<sup>6</sup> Case law has established that in a motion brought under Rule 21.01(1)(b) “the court must be satisfied that it is plain and obvious that the allegations pleaded are incapable of supporting a cause of action and that the claim cannot succeed”.<sup>7</sup>

**B. THE CLAIM FAILS TO COMPLY WITH THE BASIC RULES OF PLEADINGS**

13. Rule 25.06 provides that “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”.<sup>8</sup> A material fact is one that is necessary to establish the elements in a cause of action.<sup>9</sup> If a minimal level of material fact disclosure is not provided, the remedy is to strike out the pleading, as opposed to order particulars.<sup>10</sup>

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<sup>6</sup> *Rules of Civil Procedure*, RRO Reg 194, r 21.01(1)(b).

<sup>7</sup> *Harris v GlaxoSmithKline Inc*, 2010 ONSC 2326 at para 36, aff’d 2010 ONCA 872, Book of Authorities of Rob Copeland (“Copeland BOA”) Tab 4.

<sup>8</sup> *Rules of Civil Procedure*, RRO Reg 194, r 25.06.

<sup>9</sup> *Parker v Pfizer Canada Inc*, 2011 ONSC 5169 at para 27, Copeland BOA Tab 8.

<sup>10</sup> *Morris v Makos*, [2006] OJ No 2919 (Ont SCJ) at para 5, citing *Copland v Commodore Business Machines Ltd* (1985), 52 OR (2d) 586, Copeland BOA Tab 6; see also *Grant v Canada (Attorney General)*, [2005] OJ No 3796 (Ont SCJ) at para 69, Copeland BOA Tab 3.

14. In *Ontario v Satschko*, this Court found that the plaintiff breached Rule 25.06(1) by intermixing evidence with factual assertions and that many of the plaintiff's claims were not clearly asserted. In reaching its conclusion, the Court quoted:

However, the Plaintiffs have failed to organize the facts that have been pleaded so that the causes of action are clearly identifiable and are supported by facts material to the establishment of those causes of action. Moreover, the pleadings do not adequately connect the Plaintiffs to many of the events pleaded nor do they adequately identify the roles allegedly played by individual Defendants. Finally, the claims do not properly set out how the individual Defendants are alleged to have caused harm to the Plaintiffs and the specific nature of the harm. [*Aristocrat Restaurants Ltd. (c.o.b. Tony's East) v. Ontario*, [2003] O.J. No. 5331 (S.C.J.), at paras. 76-77].<sup>11</sup>

15. The same is true in this case, as set out in detail below.

16. Moreover, Rule 25.06(8) states that full particulars are required when “fraud, misrepresentation, breach of trust, malice or intent is alleged”. Its purpose is to ensure that bald allegations of this nature, totally devoid of any detail, should not be permitted even at this early stage of the action; “full” means sufficient material facts to permit a defendant to respond in a meaningful way at the pleading stage.<sup>12</sup>

17. In this matter, the Claim alleges defamation, injurious falsehood, causing loss by unlawful means, civil conspiracy and unjust enrichment. As such, the Claim must contain all the material facts the Plaintiffs require to prove these claims. It does not, and therefore must be struck.

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<sup>11</sup> [2007] OJ No 4908 (Ont SCJ) at para 68, aff'd 2009 ONCA 64, Copeland BOA Tab 7.

<sup>12</sup> *Resolute Forest Products Inc et al v 2471256 Canada Inc*, 2014 ONSC 3996 at para 14, Copeland BOA Tab 9.

(i) ***The Claim indiscriminately lumps together Copeland and the other Defendants***

18. The Claim indiscriminately lumps together Copeland and the other Defendants as co-conspirators equally and jointly liable for every claim. For example:

- (a) Copeland is lumped in with Defendants Boland, Kassam, Spears, Puri, Anderson and Langstaff as the “Individual Defendants”, defined in paragraph 26 of the Statement of Claim;
- (b) Copeland is lumped in with Defendants Wolfpack Conspirators, the Guarantor Conspirators and Langstaff as the “Conspirators”, defined in paragraph 32 of the Statement of Claim;
- (c) There is no basis pleaded for holding Copeland liable for the torts allegedly committed by the other Defendants;
- (d) There is no basis pleaded for holding Copeland liable for breaches of subsections 126.1 and 126.2 of the *Securities Act* and related regulations allegedly committed by the other Defendants. In any event, neither sections 126.1 nor 126.2 of the *Securities Act* create civil liability; and
- (e) The allegation of a conspiracy among all of the “Conspirators” is incapable of proof, as the Statement of Claim does not allege facts, circumstances or particulars from which a trier of fact would be able to infer that all of the “Conspirators” intended or desired to inflict injury upon the Plaintiffs. The alleged motives for the conspiracy, even if assumed to be true, do not apply to Copeland. It is patently ridiculous that Copeland would have been motivated to conspire with the other

Defendants in order to “drive down the price of Callidus Shares to artificially low levels” so that he would, in turn, profit personally from this action.

19. The Plaintiffs are simply guessing at the involvement of Copeland; this does not meet the requirement of pleading a concise statement of material facts.

**(ii) *The Plaintiffs have failed to plead the necessary elements of each cause of action pleaded in the Claim***

Defamation

20. As stated by the Ontario Court of Appeal, defamation occupies a somewhat unique position in the context of pleadings: “pleadings in defamation cases are more important than in any other class of actions. The statement of claim must contain a concise statement of the material facts.”<sup>13</sup> The most obvious concern in vague pleadings regarding defamation is the inability of a defendant to properly respond to the allegation. The Plaintiffs must, at a minimum, describe with reasonable certainty, clarity, particularity and precision:

- (a) The allegedly defamatory words;
- (b) Who, between the multiple defendants, the Plaintiffs allege uttered the allegedly defamatory words;
- (c) To whom the allegedly defamatory words were spoke; and
- (d) When the allegedly defamatory words were spoken.

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<sup>13</sup> *Lysko v Braley*, [2006] OJ No 1137 (ON CA) at para 91, Copeland BOA Tab 5.

21. The Plaintiffs have failed to plead instances of defamation with the particularity required by law. For example:

- (a) No particulars are provided as to which of the words complained of in paragraph 71 of the Statement of Claim are said to give rise to each of the alleged defamatory meanings; and
- (b) No particulars are provided as to which of the words in the Article are said to give rise to each of such alleged defamatory meanings set out in Subparagraphs 112 i. to xiii. of the Claim.

*Injurious falsehood*

22. The elements of a claim of injurious falsehood are:

- (a) The publication of false statements reflecting adversely on the plaintiff's business, property, or title to property;
- (b) The statements are made maliciously without just cause or excuse;
- (c) The statements are calculated to induce persons not to deal with the plaintiff; and
- (d) The plaintiff suffered damages.<sup>14</sup>

23. The Plaintiffs have not pleaded the necessary elements of the tort of injurious falsehood and have provided bald allegations only.

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<sup>14</sup> *Lysko v Braley*, [2006] OJ No 1137 (ON CA), para 133, Copeland BOA Tab 5.

Tort of unlawful means

24. The tort of intentional interference with economic relations, also known as the “unlawful means” tort, has a narrow scope. It is limited to three-party situations in which the defendant commits an unlawful act against a third party which intentionally causes economic harm to the plaintiff. To properly plead a claim for the unlawful means tort, a plaintiff must plead material facts that, if proven, would establish:

- (a) An intention by the defendant to injure the plaintiff;
- (b) The defendant’s interference with the plaintiff’s economic interests are by unlawful means;
- (c) The unlawful means are directed at a third party who has or would have an actionable civil claim against the defendant if it suffered a loss as a result; and
- (d) The defendant’s conduct resulted in economic loss to the Plaintiff.<sup>15</sup>

25. The Plaintiffs have not pleaded the necessary elements of the tort of unlawful means. In particular, the Statement of Claim provides no particulars of how the words complained of “deceived third-party market participants” or how Copeland specifically “interfered with Callidus’s and Catalyst’s economic relations”.

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<sup>15</sup> *The Vinyl Company Inc v Magnolia Windows and Doors, LLC*, 2018 ONSC 2561 at para 23, citing *Bram Enterprises Ltd v AI Enterprises Ltd*, 2014 SCC 12, Copeland BOA Tab 10.

Civil conspiracy

26. In *Aristocrat Restaurants Ltd v Ontario*<sup>16</sup> Epstein J. (as she was then) identified the elements of tortious conspiracy as follows:

- (a) An agreement between two or more persons to injure the plaintiff by specific acts;
- (b) The defendants acted in furtherance of the agreement;
- (c) The predominant purpose of the agreement was to injure the plaintiff (or the defendant's conduct was unlawful, directed toward the plaintiff, and the defendant knew or should have known that injury to the plaintiff was likely); and
- (d) The plaintiff was injured as a result of the conspiracy.

27. The Plaintiffs have not pleaded these necessary elements. In particular, the Claim fails to plead the requisite particulars of the cause of action in conspiracy as it relates to Copeland. There are no facts, circumstance or particulars from which a trier of fact would be able to infer that Copeland entered into an agreement with one or more the Defendants to injure the Plaintiffs, acted in furtherance of this agreement, “dominated and controlled the corporate entities” and “caused them to engage in the tortious and unlawful conduct”, as described in the Claim. To the extent that the Plaintiffs’ claim of conspiracy is premised on an alleged unlawful act of defamation, it is necessary to plead the defamation with particularity, as described above.

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<sup>16</sup> [2003] OJ No 5331 (Ont SCJ) at para 39, Copeland BOA Tab 1.

Unjust enrichment

28. The test for unjust enrichment is well established in Canada. The cause of action requires three elements:

- (a) An enrichment of the defendant,
- (b) A corresponding deprivation of the plaintiff, and
- (c) An absence of juristic reason for the enrichment.<sup>17</sup>

29. The Plaintiffs have not pleaded the necessary elements of the tort of unjust enrichment. In particular, the Statement of Claim provides no particulars of how Copeland allegedly received a benefit from the alleged short selling scheme.

**PART IV - ORDER REQUESTED**

30. The Claim's flaws go to its very heart and affect the fundamental elements of the Claim and the causes of action pleaded. Accordingly, Copeland requests that this Honourable Court strike the entire Claim.

31. Copeland requests the costs of this motion as well as the costs of this action.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 27<sup>th</sup> day of June 2018



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Jennifer P. Saville  
ST. LAWRENCE BARRISTERS LLP

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<sup>17</sup> *Garland v Consumers' Gas Co*, 2004 SCC 25 at para 30, Copeland BOA Tab 2.



## SCHEDULE “A”

### LIST OF AUTHORITIES

1. *Aristocrat Restaurants Ltd v Ontario*, [2003] OJ No 5331 (Ont SCJ).
2. *Garland v Consumers’ Gas Co*, 2004 SCC 25.
3. *Grant v Canada (Attorney General)*, [2005] OJ No 3796 (Ont SCJ).
4. *Harris v GlaxoSmithKline Inc*, 2010 ONSC 2326; aff’d 2010 ONCA 872.
5. *Lysko v Braley*, [2006] OJ No 1137 (ON CA).
6. *Morris v Makos*, [2006] OJ No 2919 (Ont SCJ).
7. *Ontario v Satschko*, [2007] OJ No 4908 (Ont SCJ), aff’d 2009 ONCA 64.
8. *Parker v Pfizer Canada Inc*, 2011 ONSC 5169.
9. *Resolute Forest Products Inc et al v 2471256 Canada Inc*, 2014 ONSC 3996.
10. *The Vinyl Company Inc v Magnolia Windows and Doors, LLC*, 2018 ONSC 2561.

**SCHEDULE “B”**

**TEXT OF STATUTES, REGULATIONS & BY - LAWS**

Rules of Civil Procedure

**WHERE AVAILABLE**

*To Any Party on a Question of Law*

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

- (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or
- (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).

(2) No evidence is admissible on a motion,

- (a) under clause (1) (a), except with leave of a judge or on consent of the parties;
- (b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

*To Defendant*

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

**Jurisdiction**

- (a) the court has no jurisdiction over the subject matter of the action;

**Capacity**

- (b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

**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).

### **MOTION TO BE MADE PROMPTLY**

**21.02** A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

### **FACTUMS REQUIRED**

**21.03 (1)** On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum 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. 5.

(3) The responding party's factum 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. 5.

### **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. 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).

## **STRIKING OUT A PLEADING OR OTHER DOCUMENT**

**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.

**57.01** (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

- (0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;
- (0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;
- (a) the amount claimed and the amount recovered in the proceeding;
- (b) the apportionment of liability;
- (c) the complexity of the proceeding;
- (d) the importance of the issues;
- (e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (f) whether any step in the proceeding was,
  - (i) improper, vexatious or unnecessary, or
  - (ii) taken through negligence, mistake or excessive caution;
- (g) a party's denial of or refusal to admit anything that should have been admitted;
- (h) whether it is appropriate to award any costs or more than one set of costs where a party,
  - (i) commenced separate proceedings for claims that should have been made in one proceeding, or
  - (ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and
- (i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

## **COSTS OF A MOTION**

### ***Contested Motion***

**57.03** (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

- (a) fix the costs of the motion and order them to be paid within 30 days; or
- (b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment. O. Reg. 284/01, s. 16.

(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just. R.R.O. 1990, Reg. 194, r. 57.03 (2).

THE CATALYST CAPITAL GROUP INC. et al.  
Plaintiffs

-and- WEST FACE CAPITAL INC. et al.  
Defendants

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

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

PROCEEDING COMMENCED AT  
TORONTO

**FACTUM OF THE DEFENDANT, ROB COPELAND  
(MOTION RETURNABLE JULY 11, 2018)**

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