

**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

and

CANACCORD GENUITY CORP.

Third Party

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**

Defendants to the Counterclaim

AND BETWEEN:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

and

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION
Defendants to the Counterclaim

**FACTUM OF THE RESPONDING PARTIES,
WEST FACE CAPITAL INC. AND GREGORY BOLAND
(BLACK CUBE'S MOTION TO STRIKE)**

June 14, 2018

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

Kent E. Thomson (LSUC# 24264J)
Tel: 416.863.5566
Email: kentthomson@dwpv.com

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

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

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendants (Plaintiffs by
Counterclaim), West Face Capital Inc. and
Gregory Boland

TO: **SERVICE LIST**

**FACTUM OF THE RESPONDING PARTIES,
WEST FACE CAPITAL INC. AND GREGORY BOLAND
(BLACK CUBE'S MOTION TO STRIKE)**

PART I ~ OVERVIEW

1. This motion by Black Cube asks the Court the following question. Where a defendant is alleged to have participated in a conspiracy to undermine the integrity of the justice system, and this extraordinary conduct is the very conduct that is alleged to have caused tortious harm to the plaintiff, can the allegations in the claim pleading the material facts of that conduct be struck out as being “scandalous, frivolous or vexatious” as those words are meant in Rule 25.11?

2. The answer is clearly “No”. Rule 25.11 does not protect a defendant from the embarrassment caused by its own behaviour, where that behaviour is relevant to and probative of a reasonable cause of action. For the purposes of Rule 25.11, relevant material facts can never be scandalous. Otherwise a party could avoid being sued over a scandal of its own making. Our Courts would not countenance such an absurd result.

3. In its Counterclaim, West Face and Boland have sued Black Cube over its involvement in a global conspiracy, including in particular over its perpetration of various sting operations against individuals connected to West Face and Boland. In its Factum, Black Cube defines the allegations relating to its sting of Justice Newbould as the “**Newbould Allegations**”. However, it is important to not let this label facilitate a false dichotomy between the allegations relating to the sting against Justice Newbould and the allegations relating to the stings against others. The Counterclaim explicitly alleges, among other things, that the “ultimate targets of this orchestrated attack on Justice Newbould were West Face and Boland” and that the purpose and effect of the sting was to delay the hearing of Catalyst’s appeal in the Moyse Action, to delay the outcome of the Defendants’ motions to strike in the VimpelCom Action, to cast a cloud of doubt

and uncertainty over West Face's victory in the Moyse Action, and to shroud West Face and Boland in contention and controversy, all for the purpose and with the effect of causing harm to West Face's business and Boland's reputation.¹ In other words, the Newbould Allegations are directly and materially relevant to the damages claimed by West Face and Boland. For the purposes of this motion, this allegation must be accepted as true unless it is patently incapable of proof – and that is certainly not the case, given that the singular reason why Justice Newbould was targeted (as opposed to another judge) was because it was his decision that had exonerated West Face, and strongly criticized Catalyst's principals, in the Moyse Action.

4. There is another reason why Black Cube cannot possibly succeed on this motion. Even if one were to disregard the Newbould Allegations' relevance to certain causes of action asserted by West Face and Boland against Black Cube itself, the Newbould Allegations are also directly and materially relevant to West Face's requests for punitive damages and for a declaration that the Catalyst Defendants are vexatious litigants. While the embarrassing nature of these allegations may be unfortunate for Black Cube and the other Counterclaim Defendants, West Face and Boland intend to prove the pleaded facts regarding the sting against Justice Newbould in support of such relief. At the pleadings stage, this Court cannot say that these allegations are not material to the relief sought by West Face and Boland, or that the prejudicial effect of the allegations outweighs their probative value. Indeed, it is hard to think of more relevant facts than a party's attempt to undermine the reputation of a retired senior judge solely because he had decided a case against them, with respect to whether that party had acted in a manner that offended the court's sense of decency (warranting punitive damages) or in a manner disintitling the party to unfettered access to the very court system they attacked.

¹ Counterclaim, at para. 90.

PART II ~ SUMMARY OF FACTS

5. The Counterclaim was issued December 29, 2017, and was amended in response to the Notices of Motion filed by Black Cube and the Catalyst Defendants. The current version of the Counterclaim is the Amended Fresh as Amended version filed May 22, 2018. It responds to Catalyst's and Callidus's Statement of Claim in the so-called "Wolfpack" action against West Face, Boland, and numerous other defendants. West Face and Boland have denied all of the allegations against them.

6. The Counterclaim pleads an insidious, co-ordinated, and systematic campaign that the Counterclaim Defendants pursued to harm, defame, and interfere with the business interests of West Face and Boland in retaliation for West Face's business and litigation successes at Catalyst's expense. The Counterclaim Defendants' conspiracy sought, among other things, to reverse or undermine West Face's successes in ongoing legal proceedings by Catalyst against West Face, thereby continuing to shroud West Face and Boland in contention and controversy in a manner harmful to their business interests.

7. Black Cube, a private investigative firm staffed with former Mossad and Israeli Defence Force intelligence operatives, is alleged to have had a crucial role in the conspiracy:

33. The conspiracy of the Counterclaim Defendants against West Face and Boland fell into two broad categories:

(a) **The Black Cube Campaign:** The Catalyst Defendants retained or caused to be retained Black Cube, a private investigative firm staffed with former Mossad and Israeli Defence Force intelligence operatives, to conduct a series of "stings" against current and former West Face employees, and against Justice Newbould. The purpose and effect of these stings was to elicit by unlawful means confidential and privileged information of West Face, to attack unfairly the honour, integrity and conduct of Justice Newbould and to discredit and embarrass West Face, Boland, and other enemies of

Catalyst, Callidus and their principals, either real or perceived. The Catalyst Defendants and other Counterclaim Defendants also conspired to use the fruits of the Black Cube Campaign for the express and predominant purpose of harming and embarrassing both West Face and Boland...²

8. On this motion, Black Cube implicitly acknowledges that West Face and Boland have pleaded reasonable causes of action against it (Black Cube is not seeking to strike out the Counterclaim in its entirety, nor is it seeking to strike out any particular cause of action). However, there are two groups of allegations in the Counterclaim that Black Cube would prefer not to have to face at the pleadings stage. These are the allegations relating to Black Cube's sting operations against: (1) the sexual assault victims of Harvey Weinstein (the "**Weinstein Allegations**"); and (2) Justice Newbould (the "**Newbould Allegations**"). Black Cube argues that these allegations should be struck out pursuant to Rule 25.11.

A. The Weinstein Allegations

9. The Weinstein Allegations impugned by Black Cube are contained in only two paragraphs of the Counterclaim, paragraphs 92 and 93.³ The Weinstein Allegations plead that West Face only uncovered the Black Cube Campaign as a result of widespread media coverage concerning – as Black Cube describes it in its own Factum – “Black Cube’s retainer by disgraced Hollywood executive Harvey Weinstein”.⁴

10. The Weinstein Allegations are pleaded as part of the factual narrative explaining how West Face uncovered the Black Cube Campaign. These facts are material to the covert, insidious manner in which Black Cube operated, which is an essential element of West Face's claim for punitive damages. They also provide a crucial connection between Black Cube and West

² Counterclaim, at para. 33.

³ All paragraph references are to the Counterclaim, unless otherwise expressly stated.

⁴ Black Cube's Factum, at para. 3.

Face, and absent a confession by Black Cube, may be a key component of how West Face proves Black Cube's involvement.

B. The Newbould Allegations

11. The Newbould Allegations impugned by Black Cube are not specified in Black Cube's Factum, likely because the word "Newbould" is used more than 100 times in the Counterclaim. The allegations relating to His Honour are inextricably linked to the other allegations in the pleading in a manner that would make parsing them out impractical if not impossible. In substance, however, the impugned Newbould Allegations relate to the sting operation conducted upon Justice Newbould by operatives of Black Cube in September 2017, and the related attempts by the Counterclaim Defendants to: (i) use the fruits of the sting operation in Catalyst's ongoing proceedings against West Face; and (ii) cause false and defamatory news articles to be published about Justice Newbould, West Face, and Boland. The Newbould Allegations sought to be struck out by Black Cube could be interpreted to include the allegations in paragraphs 32, 33(a), 34(d), 40, 41, 42, 90, 91, 95, 96, 101-110, 173(h), 175, 184(a), 189(a), 189(d), and 196-198.

12. The Newbould Allegations make clear that the sting against Justice Newbould was not, as Black Cube contends, "substantively distinct" from the balance of the "Black Cube Campaign" or conspiracy against West Face and Boland. For example, the Counterclaim explicitly alleges that:

- (a) West Face and Boland were the "ultimate targets" of the sting against Justice Newbould. Black Cube was attacking Justice Newbould in order to undermine his

judgment against Catalyst and in favour of West Face, and thereby harm West Face by calling into question its acquisition of WIND Mobile;⁵ and

- (b) Justice Newbould was “an innocent victim”, given that the ultimate objectives of the sting against him were not merely to harm and discredit His Honour, but to use the so-called “fresh evidence” generated by the sting operation for two principal reasons: first, to undermine West Face’s position in Catalyst’s various ongoing proceedings against it, thereby continuing to shroud West Face and Boland in contention and controversy; and second, for use in the ongoing Defamation Campaign against West Face and Boland.⁶ Both of these intended goals of the sting against Justice Newbould would accomplish the Catalyst Defendants’ goal of harming West Face and Boland’s reputation and relationships with potential and actual investors.

13. Moreover, the alleged circumstances surrounding the sting against Justice Newbould also make clear that it was part and parcel of the Counterclaim Defendants’ overall “global”, “orchestrated”, and “co-ordinated” attack on West Face and Boland. To provide a few examples only:

- (a) as alleged in paragraph 104, on September 17, 2017 (the day before the failed sting operation against Justice Newbould), Virginia Jamieson, at the direction of the Catalyst Defendants, emailed Christie Blatchford, a prominent journalist at the *National Post*, promising an exclusive story on Justice Newbould. In the very same email, Jamieson alleged that West Face was involved in a “wolfpack” of companies

⁵ Counterclaim, at paras. 32, 41, 90,

⁶ Counterclaim, at paras. 6, 27, 32, 33, 34(d), 90, 101-110, 173, 189(d),

that was unlawfully conspiring to harm various public market participants (the “wolfpack” allegations being one of the three central underlying themes of the alleged Defamation Campaign);

- (b) as alleged in paragraphs 129-174, beginning on or about September 19, 2017 (the day after the failed sting against Justice Newbould), a series of false and defamatory Internet Postings about West Face and Boland began to appear in a variety of locations on the Internet;
- (c) as alleged in paragraphs 131(a), 172(c), and 173(g), one of the fictional and misleading usernames created by the Counterclaim Defendants for the purpose of publishing false and defamatory material was “Judge Frank Newbould”; and
- (d) as alleged in paragraph 175, the Counterclaim Defendants disseminated copies of edited, distorted or otherwise falsified recordings and/or transcripts of the stings conducted by Black Cube, including the one against Justice Newbould, to the news media, in an effort to have false and defamatory stories published to the detriment of West Face and Boland.

C. Relevance of the Weinstein and Newbould Allegations

14. The Weinstein and Newbould Allegations are directly and materially relevant to much of the relief sought by West Face and Boland in paragraph 1 of the Counterclaim, including:

- (a) general damages totalling \$500 million;
- (b) an Order requiring the Counterclaim Defendants to deliver up to West Face all originals and copies of all documents (including recordings, transcripts, etc.) that

contain, summarize or reflect the contents of the stings conducted by operatives of Black Cube involving current or former employees of West Face or Justice Newbould; and

- (c) punitive and aggravated damages totalling \$50 million.

15. In addition, the Newbould Allegations are directly relevant to West Face and Boland's request for a declaration under section 140 of the *Courts of Justice Act* that the Catalyst Defendants are vexatious litigants. Attacking the judicial system itself is a hallmark of a vexatious litigant.

16. Finally, for reasons set out further below, the Newbould Allegations are relevant to the pleadings of malice at paragraph 27, 44, 67, 111, 114, 117, 125, 133, 142, 148, 155, 161, 169, 176, 184(e), and 188 of the Counterclaim.

17. In sum, the Weinstein and Newbould Allegations are highly relevant, material, and probative of West Face and Boland's claims, causes of actions, and prayers for relief. They are not an offshoot of the Counterclaim that should be "pruned" by this Court at the pleadings stage; they are at the very root of West Face and Boland's claims.

PART III ~ STATEMENT OF ISSUES, LAW & AUTHORITIES

A. General Principles of Pleadings and Motions Under Rule 25.11

18. The foundational rules of pleading are set out in Rule 25, and in particular Rules 25.06(1), (2), (8) and (9). These Rules provide:

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

(2) A party may raise any point at law in a pleading, but conclusions at law may be pleaded only if the material facts supporting them are pleaded.

...

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.

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.⁷

19. Thus, our rules of pleading not only entitle but in fact require Ontario litigants to plead all material facts on which they rely for their claims and defences. Furthermore, where the nature of an act or a condition of mind is alleged (such as malice, as in this case), or where the pleading claims relief for special damages (such as punitive damages, as in this case), then the pleading is permitted to, and indeed must, contain full particulars.

⁷ *Rules of Civil Procedure*, R.R.O. Reg. 1994 [the *Rules*], R. 25.06(1), (2), (8), and (9).

20. Provided these foundational rules are met, Ontario litigants are given a wide latitude in how they choose to plead their case. It is not for the court, at the pleadings stage, to “prune the case” and limit the allegations.

21. In seeking to strike portions of West Face’s Counterclaim, Black Cube relies on Rule 25.11, and specifically on subparagraphs (a) and (b) thereof. These Rules provide:

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; [or]

(b) is scandalous, frivolous or vexatious;...⁸

22. While paragraph Rule 25.11(b) empowers the court to strike out portions of a claim that are “scandalous, frivolous or vexatious”, those words must be interpreted *in the context of a claim which necessary involves allegations of wrongdoing*. A relevant and material allegation may not be struck under paragraph 25.11(b) even if, *outside* the context of the pleading, the allegation could be considered to be “scandalous” (or frivolous or vexatious). As succinctly stated by the Ontario Court of Appeal in the seminal 2008 decision of *Quizno’s Canada Restaurant Corp. v. KileelDevelopments Ltd.*: “A pleading cannot be ‘scandalous’ if it is relevant”.⁹

23. In the more recent 2016 decision of *Dosanjh v. Maple Leaf Sports & Entertainment Ltd.*, Master Short confirmed that this principle continues to apply:

While the allegations ... cast the Defendant in a bad light, that is not enough to have the pleading struck. I adopt Master MacLeod’s observation in *[Toronto (City) v. MFP Financial Services Ltd.]*:

⁸ Rules, R. 25.11.

⁹ *Quizno’s Canada Restaurant Corp. v. KileelDevelopments Ltd.*, [2008] O.J. No. 3674 (C.A.) at para. 14 [*Quizno’s*], West Face’s Book of Authorities, Tab 10.

“However embarrassing an allegation may be, it will not be struck out under Rule 25.11(b) as scandalous, frivolous or vexatious if it is material.”¹⁰

24. Paragraph 25.11(a) also empowers the court to strike out portions of a claim, but only if those allegations may prejudice or delay the fair trial of the action. As noted by the Court of Appeal in *Quizno’s*, the court should only strike out relevant allegations under paragraph 25.11(a) in very limited circumstances, where the allegations are of “marginal probative value” *and* “their probative value is outweighed by their prejudicial effect”.¹¹ The Court of Appeal further warned that the power to strike relevant allegations under paragraph 25.11(a) must be exercised “with considerable caution”.¹² This is because it is generally not appropriate at the pleadings stage to engage in what is essentially a trial judge’s exercise in determining the ultimate admissibility of evidence at trial (*i.e.*, weighing probative value against prejudicial effect).

25. Moreover, it is important to note that allegations may be relevant and probative “material facts” for the purposes of the *Rules* even if they are only relevant to one aspect of the relief sought. For example, our courts have held that allegations that are probative of punitive damages alone should not be struck under Rule 25.11, simply because they are relevant only to such damages.¹³

26. One case that provides an informative example of the breadth of relevance allowed for under Rule 25.11 is *2198707 Ontario Inc. v. 2259329 Ontario Inc.*¹⁴ In that case, the plaintiff and defendant were both “smoke and gift” shop businesses owned by members of the same family.

¹⁰ *Dosanjh v. Maple Leaf Sports & Entertainment Ltd.*, [2016] O.J. No. 6595 (S.C.J.) at para. 44 [*Dosanjh*], West Face’s Book of Authorities, Tab 5.

¹¹ *Quizno’s*, at para. 15, West Face’s Book of Authorities, Tab 10.

¹² *Quizno’s*, at paras. 15-16, West Face’s Book of Authorities, Tab 10.

¹³ *Hodson v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 4378 (Div. Ct.) [*Hodson*], West Face’s Book of Authorities, Tab 7. See also *Dosanjh*, at paras. 36-45, West Face’s Book of Authorities, Tab 5.

¹⁴ *2198707 Ontario Inc. v. 2259329 Ontario Inc.*, [2013] O.J. No. 3920 (S.C.J.) [*219 Ontario Inc.*], West Face’s Book of Authorities, Tab 1.

The corporate plaintiff, 2198707 Ontario Inc. (“**219**”), was owned and controlled by the individual plaintiff Chaitali Modi. The corporate defendant, 2259329 Ontario Inc. (“**225**”) was owned and controlled by Chaitali’s uncle, the defendant Jayesh Modi. The plaintiffs sued the defendants for unjust enrichment and breach of trust, claiming that Jayesh held the shares of 225 in trust for Chaitali. In their statement of defence, the defendants alleged that there was no trust relationship, and that the plaintiffs’ claim of an alleged trust agreement was only made by the plaintiffs in retaliation to an allegation by Jayesh’s daughter, Nidhi, that she had been sexually assaulted by Chaitali’s husband, Yogesh.

27. For perhaps understandable reasons, the plaintiffs took issue with sexual assault allegations being injected into what was otherwise a commercial case, and moved to have the offending paragraphs of the defence dismissed under Rule 25.11.

28. Despite the obvious seriousness and scandalous nature of allegations of sexual assault being made among family members, Justice Ricchetti refused to strike the impugned paragraphs of the defence. His Honour reasoned as follows:

The facts regarding the sexual assault, its report to the police, the timing of the bringing of the claim and prior lack of any action by the Plaintiffs consistent with a trust agreement, might be considered by a trier of fact to be highly relevant to the issue as to whether there existed a trust agreement and to the credibility of the Plaintiffs on this issue...

These allegations are made because they are relevant as to the existence of the trust agreement...¹⁵

29. Justice Ricchetti further considered the law under Rule 25.11 as set out by the Court of Appeal in *Quizno’s*, and was satisfied that the sexual assault allegations were of more than

¹⁵ 219 Ontario Inc., at paras. 18-19, West Face’s Book of Authorities, Tab 1.

marginal probative value, that there was little prejudicial effect on the plaintiffs, and that they would not prejudice the fair trial of the action.¹⁶

30. The Court should bear these principles in mind when considering whether it is appropriate, at this preliminary stage, to strike out the Weinstein and Newbould Allegations that are so central to the conspiracy pleaded in the Counterclaim. These allegations are more than “simply a compilation of bare allegations” and it would therefore be a reversible error to strike them out under Rule 25.11.¹⁷

B. The Newbould Allegations Should Not Be Struck or Amended

31. On this motion, Black Cube attempts to marginalize the relevance of its own conduct relating to Justice Newbould by mischaracterizing the Newbould Allegations actually made in the Counterclaim:

- (a) In paragraphs 21 & 22 of its Factum, Black Cube argues (half-heartedly) that the Newbould Allegations are “scandalous” and should be struck under Rule 25.11(b) because they were inserted “purely for colour”, and purportedly “in order to tarnish Black Cube and turn the court against it”.
- (b) In paragraphs 23 to 31 of its Factum, Black Cube argues that the Newbould Allegations should be struck under Rule 25.11(a) because they “have little probative value” but carry “substantial prejudicial effect”.

32. These arguments frankly have no place in the Commercial List. The Court cannot be “turned” or “prejudiced” against a party by mere pleadings. This is not a jury trial.

¹⁶ 219 *Ontario Inc.*, at paras. 21-26, West Face’s Book of Authorities, Tab 1.

¹⁷ 728654 *Ontario Inc. (c.o.b. Locomotive Tavern) v. Ontario*, [2005] O.J. No. 4227 (C.A.), at para. 5, West Face’s Book of Authorities, Tab 2.

33. Moreover, the Newbould Allegations are directly relevant to numerous causes of action pleaded, and relief sought, in the Counterclaim. However embarrassing or harmful to Black Cube's reputation they may be, the Newbould Allegations cannot be struck out if they are relevant and have more than mere marginal probative value.

34. The Newbould Allegations are highly relevant and probative in any number of ways, as follows.

(i) **The Newbould Allegations Are Relevant and Probative to the Very Existence of the Conspiracy**

35. The Newbould Allegations are relevant to and probative of the very existence of the alleged conspiracy, including both of the Black Cube Campaign and the Defamation Campaign. If West Face and Boland are able to prove the Newbould Allegations at trial, the trier of fact may well consider the fact that the Counterclaim Defendants ran a sting operation against Justice Newbould to be highly probative of whether the Counterclaim Defendants entered into the overarching conspiracy to destroy the reputations of West Face and Boland.

36. In that respect, the Newbould Allegations are analogous to impugned allegations that Justice Epstein (as she was then) once refused to strike out in *Ballard v. Stavro*:

The pleading describes the formation and execution of a master plan. To ascertain whether a cause of action has been made out one must look at the whole picture rather than at a series of isolated events. In doing so it is clear that the whole picture could not be presented without including all of the defendants and all of the claims, as pleaded.¹⁸

37. Striking out the Newbould Allegations would force West Face and Boland to proceed without the ability to obtain discovery of the whole picture, or to present the entire

¹⁸ *Ballard v. Stavro*, [1997] O.J. No. 3577 (S.C.J. (Commercial List)), at para. 37 [*Stavro*], West Face's Book of Authorities, Tab 3.

landscape to the judge at trial. As noted by Justice Epstein: “The judge hearing the case should be in a position to examine the entire chronology...”.¹⁹ As in *Stavro*, the Counterclaim should be allowed to proceed as pleaded.

(ii) The Newbould Allegations Are Relevant and Probative to Whether It Was the Counterclaim Defendants Who Published the False and Defamatory Internet Postings

38. The Newbould Allegations are also relevant to and probative of whether it was actually the Counterclaim Defendants who published the false and defamatory Internet Postings about West Face and Boland. First, the sting against Justice Newbould occurred precisely when the Internet Postings began to appear on the Internet. Second, while the Counterclaim Defendants used various false usernames to conceal their involvement in the Internet Postings, one of these fictitious users – “Samantha Beth” – was the same individual, with the same IP address, who drafted a blog post about Justice Newbould’s “corruption”, and who was involved in posting other defamatory online posts about West Face and Boland. Third, the Defendant to the Counterclaim, Emmanuel Rosen was involved in the failed attempt to induce Christie Blatchford to publish false and defamatory articles about Justice Newbould. Mr. Rosen is also alleged to have been involved in the publication and dissemination of the false and defamatory articles about West Face and Boland.²⁰ Thus, proving the identities of those responsible for the now very public sting against Justice Newbould will go a long way towards proving who was behind the Internet Postings.

¹⁹ *Stavro*, at para. 38, West Face’s Book of Authorities, Tab 3.

²⁰ Counterclaim, at paras. 42, 103 & 173.

(iii) The Newbould Allegations Are Relevant and Probative of the Claims of Malice, Harm Suffered, and Punitive Damages

39. The Newbould Allegations are also materially relevant and probative of West Face and Boland's claims of malice, harm suffered, and for very substantial awards of aggravated and punitive damages.

40. Malice requires an intention to harm the plaintiff. The Newbould Allegations are relevant to that question. Surely if the Catalyst Defendants and Black Cube were willing to attack the integrity of a retired sitting judge in order to harm West Face and Boland, it is an important fact for assessing their state of mind.

41. The Newbould Allegations are also directly relevant to the damages suffered by West Face and Boland. The Newbould Allegations were central to delaying the appeal of the Moyse Action, and the determination of the VimpelCom Action, which kept the cloud of litigation and controversy hanging over West Face for an extended period of time. Quite apart from this delay, the sting on Justice Newbould also associated West Face — a business that depends on its reputation for integrity — with scandal, controversy and wrongdoing. If an investor is choosing where to entrust its funds, it is reasonable to conclude it will be less likely to choose West Face when it is subject to constant attacks by an opponent that has no scruples in attacking innocent parties that come into West Face's orbit.

42. Finally, for an award of punitive damages to be made against a defendant, the defendant's misconduct must be so malicious, oppressive and high-handed that it offends the court's sense of decency.²¹ The Newbould Allegations are material facts upon which West Face and Boland intend to rely, and upon which they should be permitted to rely, at trial in

²¹ *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, West Face's Book of Authorities, Tab 13.

demonstrating their entitlement to punitive damages against Black Cube and the other Counterclaim Defendants.

43. Similar reasoning was applied by the Divisional Court in *Hodson v. Canadian Imperial Bank of Commerce*. In that case, the plaintiffs claimed damages for wrongful dismissal, including punitive damages arising from the bad faith conduct of the defendant. In support of the punitive damages claim, the plaintiffs alleged that the defendant had in the past engaged in similar bad faith conduct and been previously subject to punitive damages awards for that conduct. The defendant argued that these pleadings should be struck out because it involved the prospect of re-trying the previous cases that had been before the courts, leading to unfairness, prejudice, and delay. Ultimately, however, given the plaintiff's request for punitive damages, the Divisional Court held that the impugned allegations did not offend Rule 25.11 – they were not “merely” argumentative or scandalous, nor “inserted only for colour”.²² Rather, they were proper pleadings with respect to which the plaintiffs were entitled to proceed.

(iv) The Newbould Allegations Are Relevant and Probative of the Request that the Catalyst Defendants be Declared Vexatious Litigants

44. The Newbould Allegations are also relevant to and probative of the request in the Counterclaim that the Catalyst Defendants be declared vexatious litigants. In paragraph 197, West Face and Boland explicitly allege that the Catalyst Defendants' attempted sting on Justice Newbould constitutes an outright and highly improper attack on the proper administration of justice.

45. Jurisprudence respecting vexatious litigants makes it abundantly clear that the harassment and oppression of other parties, brought for purposes other than the assertion of

²² *Hodson*, at para. 21, West Face's Book of Authorities, Tab 7.

legitimate rights, as well as persistently taking unsuccessful appeals from judicial decisions, are highly relevant and probative of whether a party is a vexatious litigant. Moreover, vexatious litigant cases advise that “the court must look at the whole history of the matter and not just whether there was originally a good cause of action”.²³

46. Furthermore, in *McTeague v. Kalevar*, the Ontario Superior Court of Justice expressly relied on the respondent’s conduct vis-à-vis judges who had decided cases against him in determining that he was a vexatious litigant. This conduct included the fact that he had: (i) delivered “scornful rebukes to judges”; (ii) “acted contemptuously towards the Courts and their decisions; and (iii) “accused judges of being racist, biased, incompetent, and has called for their removal from the bench”.²⁴

C. The Newbould Allegations Have Little Prejudicial Effect, If Any

47. Finally, Black Cube’s bald assertions that the Newbould Allegations will prejudice a fair and expeditious trial of the Counterclaim should be disregarded.

48. As a starting point, it should be noted that the fact that particular allegations may increase the scope of discovery and result in a more complex, lengthy and costly trial is *not* in and of itself sufficient to strike the allegations if they are otherwise relevant and of potential probative value.²⁵

²³ *Golfnorth Properties Inc. v. Vacca*, [2018] O.J. No. 2706 (S.C.J.), at para. 20, West Face’s Book of Authorities, Tab 6, citing *Re Lang Michener et. al. and Fabian et. al.*, [1987] O.J. No. 355 (H. Ct.), West Face’s Book of Authorities, Tab 11.

²⁴ *McTeague v. Kalevar*, [2005] O.J. No. 314 (S.C.J.), at paras. 8 & 58-60, West Face’s Book of Authorities, Tab 8.

²⁵ *Brown v. Spagnuolo*, [2012] O.J. No. 1613 (S.C.J.), at para. 26, West Face’s Book of Authorities, Tab 4, citing *National Public Relations Inc. v. Hill & Knowlton Canada Ltd.*, [2010] O.J. No. 5392 (S.C.J.), at para. 20, West Face’s Book of Authorities, Tab 9.

49. Black Cube argues that allowing the Newbould Allegations to stand will “embarrass all concerned, from the parties to the court, to the witnesses”,²⁶ and that the trial of these issues will accomplish nothing. However noble this argument may appear, this Court should see this argument for what it actually is: a thinly veiled threat to further embarrass this very Court by forcing Justice Newbould to testify and “scrutinizing” every word he may have said. This is, frankly, a shocking argument to appear in a written Factum, and this Court should not be swayed by Black Cube’s argument for at least four reasons:

- (a) First, as pleaded in the Counterclaim, the Counterclaim Defendants have already provided reporters and news agencies with edited, distorted or otherwise falsified recordings and/or transcripts of their sting operation on Justice Newbould, in an effort to cause these various news agencies to publish false and defamatory articles about Justice Newbould and West Face. Contrary to the argument in its Factum, Black Cube has not demonstrated any credible interest in protecting Justice Newbould or this Court from embarrassment.
- (b) Second, any “embarrassment” caused will be of Black Cube’s own making, not West Face or Boland’s, nor Justice Newbould’s. It was not West Face or Boland who conducted the deceitful sting operation upon a retired and highly respected judge of this Court, for shocking and abusive purposes. Put bluntly, it would be an ironic result if an unlicensed foreign spy agency operating illegally in Ontario were permitted to act with impunity in conducting sting operations targeting this Court’s judges, simply because it would be too “embarrassing” to then litigate any claims stemming from those sting operations.

²⁶ Black Cube’s Factum, at para. 27.

- (c) Third, it is difficult to see why Justice Newbould’s words would need to be put under the microscope. What Justice Newbould did or did not say is of little relevance, if any, to the Counterclaim, which is about the conduct of Black Cube and the other Counterclaim Defendants. It is the fact of the sting occurring that is relevant, not the contents or results of that sting. This Court is more than capable of preventing Black Cube from harassing Justice Newbould in this manner, whether on discovery or at trial.
- (d) Fourth, the Newbould Allegations do not “considerably expand the scope of the proceeding without any corresponding benefit to the trier of fact”.²⁷ The benefits to the trier of fact are, as set out above, that the Newbould Allegations go to the very heart of the Counterclaim in many ways. Moreover, given that the sting allegations against Justice Newbould were an integral part of the overarching orchestrated strategy, it is difficult to see how removing them would reduce the scope of the proceeding in any meaningful way.

50. Finally, Black Cube argues that the Newbould Allegations raise issues of litigation privilege, which could jeopardize a fair trial. In fact, the Newbould Allegations do not raise any questions of litigation privilege whatsoever, let alone “very complex and difficult questions”.²⁸ The Newbould Allegations do not raise any questions of litigation privilege on their face, Black Cube does not explain in its Factum how questions of litigation privilege arise from the Newbould Allegations, and there is no evidence on this motion that litigation privilege issues do, in fact, arise.

²⁷ Black Cube’s Factum, at para. 29.

²⁸ Black Cube’s Factum, at para. 29.

51. Moreover, while it is difficult to glean from Black Cube's Factum who even holds the litigation privilege in question, presumably it is the Catalyst Defendants. It is for the Catalyst Defendant to assert such a privilege, but they have not done so. On the contrary, in a *National Post* article dated November 24, 2017 referred to in and thereby incorporated by reference into the Counterclaim, a spokesperson authorized to speak for Catalyst took the position, publicly, that Catalyst had no prior knowledge of or involvement in the sting by Black Cube against Justice Newbould. Similarly, in a letter dated November 29, 2017 and filed with the Court of Appeal and placed on the public record in the Moyse Action at the insistence of Catalyst's counsel Brian Greenspan, Catalyst again took the position that it had no foreknowledge of Black Cube's activities. While West Face does not accept Catalyst's position in this regard, it does estop the Catalyst Defendants (or Black Cube) from asserting litigation privilege over Black Cube's activities. Any potential "litigation privilege" Catalyst may have held over its retainer of Black Cube (which is strongly denied) has been waived, and indeed denied, by the Catalyst Defendants.

52. It is also difficult to imagine how Black Cube could establish that the Newbould Allegations are any more onerous for them to deal with on discovery than the remaining allegations in the Counterclaim. As set out above, the sting operation against Justice Newbould was part of the same conspiracy on behalf of the same client and under the same retainer. Unless the "dirty ops" against Justice Newbould were truly hermetically sealed within Black Cube's operations and documents, the parties will presumably obtain discovery of all of the relevant facts and documents behind the Newbould Allegations in any event.

53. To quote Justice Morawetz from his reasons in *Tucker v. Sequest Capital Corp.*, the “potential prejudice to the defendants is minimal”.²⁹ Conversely, and as were the impugned allegations in the *Quizno’s* case, the Newbould Allegations are “considerably more than ‘of marginal probative value’” and go “to the very heart”³⁰ of the Counterclaim. They cannot and should not be struck out under Rule 25.11.

D. The Weinstein Allegations Should Not Be Struck or Amended

54. In paragraphs 92-93 of the Counterclaim, West Face alleges that it only learned of the conduct of Black Cube complained of in this proceeding as a result of the media coverage pertaining to Black Cube’s involvement in the Weinstein scandal. More specifically, West Face alleges that it only learned of Black Cube’s involvement after certain West Face employees recognized Black Cube operative Stella Penn Pechanac, who was publicly identified in the media coverage of the Weinstein scandal, as one of the individuals who had solicited and met with them under false pretences.³¹

55. Black Cube argues that the Weinstein Allegations were inserted “purely for colour”, because “[it] matters not how West Face learned of Black Cube’s involvement” in the stings against West Face’s current and former employees.³² This is incorrect. The factual allegations relating to “how” West Face learned of Black Cube’s involvement in this matter are relevant and indeed material facts that can and should be pleaded, for at least two important reasons.

²⁹ *Tucker v. Sequest Capital Corp.*, [2013] O.J. No. 5515 (S.C.J. (Commercial List)), West Face’s Book of Authorities, Tab 12.

³⁰ *Quizno’s*, at para. 19, West Face’s Book of Authorities, Tab 10.

³¹ Counterclaim, at paras. 92-93.

³² Black Cube’s Factum, at para. 18.

56. First, at the pleadings stage, neither West Face nor this Court can know what will be required of West Face to prove its case at trial. Black Cube has yet to file a Statement of Defence to the Counterclaim, and therefore has not admitted any involvement whatsoever in the conduct complained of in the Counterclaim. West Face may well be required to prove its case at trial by having its witnesses testify that certain operatives of Black Cube contacted and met with them under false pretences. The only way the witnesses will be able to identify these individuals as operatives of Black Cube is through the media's public identification of Ms. Penn Pechanac's involvement in the Weinstein scandal. In these circumstances, the parallels between the Weinstein and West Face operations by Black Cube are more than simply evidence – they are the material facts.

57. Second, the facts relating to how West Face learned of Black Cube's involvement in this matter are also material to the overarching themes of the Counterclaim establishing West Face's request for very substantial awards of aggravated and punitive damages. West Face alleges throughout the Counterclaim that Black Cube's conduct was part of an insidious campaign involving intentionally deceitful conduct, false pretences, fake aliases, surreptitious recordings, and sophisticated attempts to conceal their own involvement. The fact that West Face had no previous interactions with Black Cube, and only learned of Black Cube's attack on West Face indirectly, through Black Cube's very public involvement in the Weinstein scandal, is materially relevant to West Face's request for punitive damages. Equally relevant is Black Cube's propensity for unethical conduct, when assessing the Catalyst Defendants' choice to retain them.

58. On a final note, Black Cube's concerns regarding its potential discovery obligations regarding its engagement and/or conduct in the Weinstein matter are grossly overblown. The principle of proportionality on discovery will apply regardless of whether the

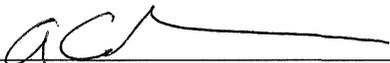
current allegations in the Counterclaim are allowed to stand, or whether the allegations in the Counterclaim are amended in the manner suggested by Black Cube (*i.e.*, by removing Mr. Weinstein's name, but leaving intact a pleading that West Face learned of Black Cube's conduct as a result of media coverage of Black Cube on an unrelated matter). As with the Newbould Allegations, it is the fact of the Weinstein operation – not its content – that is relevant.

59. For these reasons, West Face respectfully requests that this aspect of Black Cube's motion be dismissed, and that the Weinstein Allegations be allowed to stand.

PART IV ~ ORDER REQUESTED

60. West Face and Boland respectfully request that the motion of Black Cube be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June, 2018.



Davies Ward Phillips & Vineberg LLP

SCHEDULE “A”

LIST OF AUTHORITIES

1. *2198707 Ontario Inc. v. 2259329 Ontario Inc.*, [2013] O.J. No. 3920 (S.C.J.)
2. *728654 Ontario Inc. (c.o.b. Locomotive Tavern) v. Ontario*, [2005] O.J. No. 4227 (C.A.)
3. *Ballard v. Stavro*, [1997] O.J. No. 3577 (S.C.J. (Commercial List))
4. *Brown v. Spagnuolo*, [2012] O.J. No. 1613 (S.C.J.)
5. *Dosanjh v. Maple Leaf Sports & Entertainment Ltd.*, [2016] O.J. No. 6595 (S.C.J.)
6. *Golfnorth Properties Inc. v. Vacca*, [2018] O.J. No. 2706 (S.C.J.)
7. *Hodson v. Canadian Imperial Bank of Commerce*, [2001] O.J. No. 4378 (Div. Ct.)
8. *McTeague v. Kalevar*, [2005] O.J. No. 314 (S.C.J.)
9. *National Public Relations Inc. v. Hill & Knowlton Canada Ltd.*, [2010] O.J. No. 5392 (S.C.J.)
10. *Quizno’s Canada Restaurant Corp. v. Kileel Developments Ltd.*, (2008), 92 O.R. (3d) (C.A.)
11. *Re Lang Michener et. al. and Fabian et. al.*, [1987] O.J. No. 355 (H. Ct.)
12. *Tucker v. Seaquest Capital Corp.*, [2013] O.J. No. 5515 (S.C.J. (Commercial List))
13. *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Courts of Justice Act, R.S.O. 1990, c. C.43

Vexatious proceedings

140 (1) Where a judge of the Superior Court of Justice is satisfied, on application, that a person has persistently and without reasonable grounds,

- (a) instituted vexatious proceedings in any court; or
- (b) conducted a proceeding in any court in a vexatious manner,

the judge may order that,

- (c) no further proceeding be instituted by the person in any court; or
- (d) a proceeding previously instituted by the person in any court not be continued,

except by leave of a judge of the Superior Court of Justice. R.S.O. 1990, c. C.43, s. 140 (1); 1996, c. 25, s. 9 (17).

(2) Repealed: 1998, c. 18, Sched. B, s. 5 (2)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

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.

THE CATALYST CAPITAL GROUP
INC. et al.

Plaintiffs

WEST FACE CAPITAL INC. et al.

Plaintiffs by Counterclaim

-and-

-and-

WEST FACE CAPITAL INC. et al.

Defendants

THE CATALYST CAPITAL GROUP
INC. et al.

Defendants to the Counterclaim

-and-

CANACCORD GENUITY CORP.

Third Party

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT TORONTO

FACTUM

DAVIES WARD PHILLIPS & VINEBERG LLP

155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC# 24264J)

Email: kentthomson@dwpv.com
Tel: 416.863.5566

Matthew Milne-Smith (LSUC# 44266P)

Email: mmilne-smith@dwpv.com
Tel: 416.863.5595

Andrew Carlson (LSUC# 58850N)

Email: acarlson@dwpv.com
Tel: 416.367.7437

Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendants (Plaintiffs by Counterclaim),
West Face Capital Inc. and Gregory Boland