

CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2021 ONSC 1310
COURT FILE NO.: CV-17-587463-00CL
DATE: 20210219

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

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|------------------------------|---|---|
| THE CATALYST CAPITAL GROUP |) | |
| INC. and CALLIDUS CAPITAL |) | <i>David C. Moore, Kenneth G. Jones, John E.</i> |
| CORPORATION |) | <i>Callaghan, Benjamin Na and Matthew</i> |
| |) | <i>Karabus for the Plaintiffs and for Newton</i> |
| Plaintiffs |) | <i>Glassman, James Riley and Gabriel De Alba,</i> |
| |) | <i>Defendants by Counterclaim</i> |
| – and – |) | |
| |) | |
| WEST FACE CAPITAL INC., |) | |
| GREGORY BOLAND, M5V |) | <i>Kent E. Thomson, Matthew Milne-Smith,</i> |
| ADVISORS INC. C.O.B. ANSON |) | <i>Andrew Carlson and Maura O’Sullivan for</i> |
| GROUP CANADA, ADMIRALTY |) | <i>West Face Capital Inc. and Gregory Boland</i> |
| ADVISORS LLC, FRIGATE |) | |
| VENTURES LP, ANSON |) | <i>Linda M. Plumpton, Andrew Bernstein and</i> |
| INVESTMENTS LP, ANSON |) | <i>Leora Jackson for M5V Advisors c.o.b.</i> |
| CAPITAL LP, ANSON |) | <i>Anson Group Canada, Admiralty Advisors</i> |
| INVESTMENTS MASTER FUND LP, |) | <i>LLC, Frigate Ventures LP, Anson</i> |
| AIMF GP, ANSON CATALYST |) | <i>Investments LP, Anson Capital LP, Anson</i> |
| MASTER FUND LP, ACF GP, MOEZ |) | <i>Investments Master Fund LP, AIMF GP,</i> |
| KASSAM, ADAM SPEARS, SUNNY |) | <i>Anson Catalyst Master Fund LP, ACF GP,</i> |
| PURI, CLARITYSPRING INC., |) | <i>Moez Kassam, Adam Spears and Sunny Puri</i> |
| NATHAN ANDERSON, BRUCE |) | <i>(collectively, the “Anson Defendants”)</i> |
| LANGSTAFF, ROB COPELAND, |) | |
| KEVIN BAUMANN, JEFFREY |) | <i>Devin Jarcaig for Bruce Langstaff</i> |
| MCFARLANE, DARRYL LEVITT, |) | |
| RICHARD MOLYNEUX, GERALD |) | <i>Phil Tunley, Jennifer Saville, Alexi Wood</i> |
| DUHAMEL, GEORGE WESLEY |) | <i>and Lillian Cadieux-Shaw for Rob Copeland</i> |
| VOORHEIS, BRUCE LIVESEY and |) | |
| JOHN DOES #4-10 |) | <i>Kevin Baumann in person</i> |
| |) | |
| Defendants |) | |
| – and – |) | |
| |) | |
| CANACCORD GENUITY CORP. |) | |
| |) | |
| Third Party |) | |

AND BETWEEN:)
)
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)

*John Adair and Michael Darcy for B.C.
Strategy Ltd. d/b/a Black Cube and B.C.
Strategy U.K. Ltd. d/b/a Black Cube*

AND BETWEEN:)
)
BRUCE LANGSTAFF)
)
Plaintiff by Counterclaim)

- and -)

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

HEARD: Costs Submissions in Writing

RULING ON COSTS

C. BOSWELL J.

[1] As motions go, this one played out on a grand scale. Multiple parties. Thousands of pages of materials. Three days of arguments.

[2] It was more or less a disclosure motion; one side wanting more productions than the other side was willing to give. It engaged assertions of privilege, both solicitor-client and litigation privilege. And it included a segue into the statutory scheme for identifying and terminating anti-SLAPP proceedings. It was argued by Black Cube that the court lacked the jurisdiction to hear the motion because it was a statutorily prohibited interlocutory step within an anti-SLAPP motion.

[3] The productions in issue are records created during the planning and implementation of a strategy designed to undermine the integrity of a judgment rendered in an earlier action between Catalyst and West Face, to promote Catalyst through mainstream and social media venues and to undermine West Face and Mr. Boland in those same venues.

[4] On January 11, 2021 I released a 55 page ruling in which I found that the court had the jurisdiction to hear the motion and, having heard it, that the plaintiffs' claims of privilege were, for the most part, not sustainable. I invited the parties engaged in the motions to make submissions on costs and set a timetable for them to do so.

[5] The following is my ruling on the costs issue.

The Governing Principles

[6] An award of costs, and the amount of the award, are in the court's discretion. That discretion is grounded in section 131 of the *Courts of Justice Act*, R.S.O. 1990 c. C.43. Its exercise is guided by Rule 57.01 of the *Rules of Civil Procedure*.

[7] Rule 57.01 lists a number of factors for the court to consider in the assessment of costs which include, but are not limited to the following:

- (a) the complexity of the proceeding;
- (b) the importance of the issues;
- (c) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;
- (d) whether any step in the proceeding was improper, vexatious or unnecessary or taken through negligence, mistake or excessive caution;
- (e) the principle of indemnity; and,
- (f) the concept of proportionality, which includes at least two factors:

- i. the amount claimed and the amount recovered in the proceeding; and,
- ii. 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.

[8] The weight to be applied to any of the enumerated, or other, factors in any given assessment may vary. It is, however, now well-settled that the overarching principles to be observed in the exercise of the court's discretion to fix costs are fairness, proportionality and reasonableness: see *Beaver v. Hill*, 2018 ONCA 840; *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.); and *Moon v. Sher* (2004), 246 D.L.R. (4th) 440 (C.A.).

[9] Parties will inevitably file cost outlines that reflect their docketed time in a number of categories. The application of the overarching principles of fairness and reasonableness dictates, however, that the assessment of costs is not to be conducted as a mechanical exercise. In *Gratton-Masuy Environmental Technologies Inc. (c.o.b. Ecoflow Ontario) v. Building Materials Evaluation Commission*, [2003] O.J. No. 1658, at para. 17, the Divisional Court expressed the principle as follows:

The amount at which costs are to be fixed is not simply an arithmetic function dependent on the number of hours worked and the hourly rates employed but, rather, the party paying the costs should be subjected to an order which is fair and predictable...

[10] By convention, costs will be awarded to a successful party and will generally be measured on a partial indemnity basis: *Bell Canada v. Olympia & York Developments Limited et. al.* (1994), 17 O.R. (3d) 135 (C.A.). In special circumstances, costs may be awarded on a higher scale, but those cases are exceptional. None of the parties here is seeking costs on any scale other than partial indemnity.

[11] One of the parties seeking costs is Mr. Baumann, a self-represented litigant. Self-represented litigants are not entitled to costs assessed on the same basis that a party who retained counsel is. See *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.). Costs may be assessed in favour of a self-represented litigant, provided he or she can demonstrate that he or she has performed functions that a lawyer would otherwise perform and that he or she has incurred an opportunity cost by foregoing remunerative employment. *Fong*, at para. 26. See also *Zbogar v. Dhall*, 2020 ONSC 7760 (Div. Ct.) at para. 4.

The Positions of the Parties

[12] The moving parties – West Face, the Anson Defendants and Mr. Baumann – all seek their costs on a partial indemnity basis.

[13] West Face and Mr. Boland seek \$110,000.00 on an all-inclusive basis. They assert that this motion was complex, important and involved a substantial amount of work. They point to the history of the proceedings between the parties which have given rise to millions of dollars in

costs. They say the Catalyst parties would have every expectation of paying very substantial costs in the event of a loss.

[14] The Anson Defendants seek \$22,799.13, all-in. They too point to the enormity of the litigation on the whole and the significant issues involved in this motion in particular.

[15] Mr. Baumann seeks \$8,665.00 all-in.

[16] The plaintiffs do not dispute that the moving parties were successful or that, except for Mr. Baumann, they are entitled to their partial indemnity costs. They propose, however, that a more reasonable cost award in favour of West Face is \$75,000.00 all-in. They do not appear to take serious issue with the costs claimed by the Anson Defendants. In terms of Mr. Baumann, the plaintiffs assert that he has failed to adduce any evidence upon which the court could assess his lost opportunity. The plaintiffs urge the court to award nothing to Mr. Baumann.

Analysis

[17] A short list of simple factual conclusions inform the costs awarded on this motion. In particular:

- (a) This motion, as I described in my reasons for decision, was complex and grounded in a “labyrinthine factual context”. The law relating to the contours of solicitor-client and litigation privilege is generally well-settled, but the law in relation to the court’s jurisdiction to hear motions interlocutory to an anti-SLAAP motion is not. Moreover, there was an immense amount of work necessary to piece together all of the facts necessary to support the existence, nature and discoverability of the documents in issue;
- (b) The stakes in the underlying action are enormous – almost a half a billion dollars;
- (c) The stakes in the motion were significant. The productions in issue involved thousands of documents and certainly included some that will no doubt attract a great deal of attention in this and perhaps other litigation;
- (d) The motion was strenuously litigated, in the same way that all other litigation between these parties has been strenuously litigated;
- (e) The moving parties were resoundingly successful;
- (f) The principal protagonists are deep-pocketed and are experienced with litigation, its risks and its costs; and,
- (g) The concepts of proportionality and reasonableness must be assessed on the basis that this litigation is in the premier league, to borrow a football reference. The entire thing is unfolding on a super scale.

[18] The costs sought by West Face on this motion would stop most Canadians in their tracks. They are, from the perspective of the average working Canadian, arresting. But considered through the lens of judicial experience, I will candidly say that they are less than I expected West Face would seek. In my view, they are also likely to be squarely within the amount that Catalyst would have anticipated paying in the event of a loss, if not at the low end of what Catalyst would have expected.

[19] In light of all of the circumstances of this case, I have no hesitation in finding that the amount sought by West Face, \$110,000, is fair, proportionate and reasonable. West Face shall have their costs fixed in that amount.

[20] The costs sought by the Anson Defendants are considerably lower, as they should be. West Face did most of the heavy lifting on this motion. That said, counsel to the Anson Defendants had to expend considerable effort in preparing for and arguing the motion. I fix their costs at \$20,000, all inclusive.

[21] Mr. Baumann sensibly mirrored much of the material filed by the Anson Defendants. I have no doubt that it nevertheless took him many hours to prepare for and attend the motion. Having said that, he has not provided an evidentiary basis upon which I could determine his opportunity costs. I award him, in the result, costs fixed at \$2,000, which represent his disbursements and an estimate of the fees he incurred to have a lawyer review his materials for him.

[22] In the result, the plaintiffs are to pay costs to West Face, fixed at \$110,000, the Anson Defendants, fixed at \$20,000 and Mr. Baumann, fixed at \$2,000 within 30 days.



Boswell J.

Released: February 19, 2021