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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W 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, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10

Defendants

A N D B E T W 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

FACTUM OF THE RESPONDING PARTIES (PLAINTIFFS BY COUNTERCLAIM) WEST FACE CAPITAL INC. AND GREGORY BOLAND

(RE: Catalyst Defendants' Partial Anti-SLAPP Motion returnable May 17-21, 2021)

May 12, 2021

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Defendant to the Counterclaim

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Defendants

and

CANACCORD GENUITY CORP.

Third Party

A N D B E T W 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

A N D B E T W E N:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

and

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Defendants to the Counterclaim

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PART I ~ OVERVIEW

1. The Counterclaim of West Face and Gregory Boland is the very antithesis of a Strategic Lawsuit Against Public Participation. It was only commenced as a last resort after West Face and Boland had been attacked relentlessly by Glassman and his accomplices over a period of years, including through the commencement and prosecution of multiple meritless and abusive Claims that the Catalyst Defendants made every effort to publicize. Their goal in doing so was to shroud the business of West Face in controversy and scandal. The Catalyst Defendants were well aware that if they called into question again and again the reputations of West Face and Boland for honesty, integrity and proper and ethical business conduct, the inevitable result would be to undermine the ability of West Face to attract and retain investors. They knew that ultimately, if they persisted, the business of West Face would be destroyed.

2. Regrettably, the Catalyst Defendants succeeded in achieving their objective. West Face and Boland were highly successful and well-regarded participants in the investment industry before they "crossed swords" with Glassman and Catalyst over the acquisition of WIND Mobile in September, 2014. In the months and years that followed, they were met with unrelenting retaliation. As a direct result of the conduct at issue in their Counterclaim, West Face and Boland have now been effectively driven out of business.

3. In their Counterclaim, West Face and Boland seek: (i) vindication in a public and transparent judicial proceeding; (ii) to expose to careful scrutiny by this Court, by participants in the capital markets and by members of the public, the insidious conduct the Catalyst Defendants engaged in; and (iii) to hold the Catalyst Defendants to account for the enormous harm they have caused.

4. In its seminal Decision in *Pointes Protection*, the Supreme Court of Canada made clear that the anti-SLAPP provisions are intended to weed out at an early stage "lawsuits initiated against

individuals or organizations that speak out or take a position on an issue of public interest" in circumstances where the Claim at issue "is merely a facade for the plaintiff, who is in fact manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party ... from participating in public affairs".[1] The Court made equally clear that these provisions are *not* intended to prevent the prosecution of legitimate, meritorious claims.

5. The Catalyst Defendants could hardly be further from the category of defendants the anti-SLAPP provisions are intended to protect. They have not identified a single case in which the anti-SLAPP provisions have been relied upon by a Court to strike out or dismiss Claims in circumstances remotely similar to those at issue here, or that involve harm of the nature or magnitude suffered by West Face and Boland. There is, in fact, no such case. For the reasons explained below, this motion is ill-conceived, devoid of merit and should be dismissed.

PART II ~ SUMMARY OF THE FACTS

A. The Motivation of the Catalyst Defendants to Destroy West Face and Boland

6. In September 2014, a consortium of investors led by West Face acquired WIND Mobile from VimpelCom, after Catalyst walked away from its own negotiations with VimpelCom and allowed its exclusivity arrangements with VimpelCom to expire. The West Face consortium sold WIND in February 2016 at a $1.3 billion profit. In the "**Moyse Action**", Catalyst alleged baselessly that West Face had obtained confidential information concerning its regulatory strategy from Brandon Moyse (a former junior analyst at Catalyst) and had misused that information in acquiring WIND. Following a full trial in the Commercial List in June 2016, Justice Newbould dismissed Catalyst's claims and allegations in their entirety. In doing so, Justice Newbould vindicated West Face, made findings of

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[1] *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22 at para. 2, Responding Book of Authorities of West Face and Gregory Boland ("**WF's RBOA**"), Vol. 1, Tab 1.

credibility against all of the principals of Catalyst, including Glassman, and held that Catalyst had only itself to blame for its failure to acquire WIND.[2] Findings made by Justice Newbould were fatal not only to Catalyst's claims against West Face in the **Moyse Action**, but also to all of Catalyst's claims in the **VimpelCom Action**.[3] Catalyst's appeal to the Court of Appeal from the Decision of Justice Newbould was dismissed from the bench without hearing from counsel for West Face or Moyse. The VimpelCom Action was dismissed by Justice Hainey, and by the Court of Appeal, as an abuse of process that was barred by the doctrines of issue estoppel, cause of action estoppel and collateral attack.[4]

7. Callidus went public in April 2014 at $14 per share. By the Fall of 2014, its shares were trading at over $20 per share. At that time, West Face determined correctly that the public markets were overvaluing the shares of Callidus, and accumulated a short position in the company.[5] That position was taken in a perfectly proper and lawful fashion, and was closed out by no later than June 2015. Nevertheless, having just sued West Face in the Moyse Action, Glassman and Catalyst lashed out again by making contrived allegations of market manipulation and impropriety against West Face in the so-called "**Veritas Action**". Although that Action was commenced with considerable

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2 See the "**Newbould Decision**" at *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, *further reasons at* 2016 ONSC 6285 ("**Newbould Costs Endorsement**"), *aff'd* 2018 ONCA 283, *further reasons at* 2018 ONCA 447, *leave to appeal ref'd* [2018] S.C.C.A. No. 295, WF's RBOA, Vol. 2, Tab 7, as well as the Affidavit of Greg Boland sworn November 8, 2019 (the "**First Boland Affidavit**"), at paras. 20-42, Motion Record of West Face dated November 8, 2019, ("**WF's MR**"), Vol. 1, Tab B, pp. 24-31; and the "**Boswell Ruling**" at *The Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125 at paras. 31-52, *leave to appeal ref'd,* 2021 ONSC 2061, WF's RBOA, Vol. 2, Tab 9, providing summaries of that Action.

3 See, *e.g.*, Newbould Decision, at paras. 9-13 & 126-131, WF's RBOA, Vol. 2, Tab 7. Justice Newbould's 49-page Decision was detailed, comprehensive, analytic, and wholly grounded in the evidence presented at trial. Despite Glassman's subsequent full-frontal assault on Justice Newbould's integrity (discussed below), his Judgment was ultimately upheld by the Court of Appeal and the Supreme Court of Canada. See also First Boland Affidavit, at paras. 20-42, WF's MR, Vol. 1, Tab B, pp. 24-31. His Decision is also now regarded as the leading case on the tort of spoliation in Canada. See, *e.g.*, *Bucknol v. 2280882 Ontario Inc.,* 2018 CarswellOnt 15474 (S.C.J.) at para. 110, WF's RBOA, Vol. 1, Tab 5.

4 *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471, *aff'd* 2019 ONCA 354, *leave to appeal ref'd* [2019] S.C.C.A. No. 284, WF's RBOA, Vol. 2, Tab 8. See also First Boland Affidavit, at paras. 58-63, WF's MR, Vol. 1, Tab B, pp. 38-39. See also the Boswell Ruling, at paras. 31-34, 113-116 & 276, WF's RBOA, Vol. 2, Tab 9 for Justice Boswell's summary of the VimpelCom Action.

5 Multiple internal analyses of Callidus's business, including by its current CEO, Patrick Dalton, have determined that Callidus's business model was, indeed, fatally flawed and that its wounds were self-inflicted. See, *inter alia*: (i) the "**Dalton Report**", WF's 2nd Supp. MR, Vol. 4, Tab 47; and the "**Sutin Affidavit**", WF's MR, Vol. 4, Tab B82.

fanfare in June 2015, Catalyst and Callidus have taken no steps to proceed with it in years.[6]

8. Glassman could not tolerate losing WIND to West Face, or that West Face had determined as early as the Fall of 2014 that Callidus was a "house of cards"' with a perilous future. He vowed to destroy West Face and Boland in revenge, and said as much to a room full of people in late 2014.[7]

9. All of the conduct that Glassman and the other Catalyst Defendants engaged in during the period thereafter – including by issuing all of the Statements at issue in this Motion – must be viewed against that important backdrop. They are elements of a carefully coordinated **Scheme** engaged in by the Catalyst Defendants and by others associated with them, over a period of years, to destroy the business of West Face, including by: (i) making and publicizing repeated allegations of grave misconduct; (ii) taking steps to ensure that their allegations of wrongdoing were well-publicized; and (iii) calling seriously into question the legitimacy of Decisions made by Justice Newbould in the Moyse Action that vindicated West Face and Boland. It is again worth noting that West Face and Boland only commenced this Counterclaim after being sued four times in four years by the Catalyst Defendants, and only after they had engaged in the unprecedented conduct set out below.

B. Catalyst's Post-Judgment Comments of August 19, 2016 and Press Release of October 13, 2016

10. The first two Statements that the Catalyst Defendants seek to have "dismissed" from the Counterclaim (in respect of defamation only) were made by or on behalf of Catalyst in the wake of Justice Newbould's Decisions in the Moyse Action. These were Catalyst's "**Post-Judgment Comments**" of August 19, 2016 and its "**October 13, 2016 Press Release**". Both Statements were issued in direct response to Justice Newbould's Decisions in the Moyse Action, and impugned His

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6 First Boland Affidavit, at paras. 44-57, WF's MR, Vol. 1, Tab B, pp. 31-37.

7 Affidavit of Gregory Boland dated May 29, 2020 ("**Boland Responding Affidavit**"), at para. 7, Responding Motion Record of West Face dated May 29, 2020 ("**WF's RMR**"), Vol. 1, Tab 1, pp. 4-5; Boland Cross-Exam 2020-12-09, pp. 37-39, qq. 109-112, WF's 3rd Supp. MR, Vol.1, Tab 3, pp. 28-30. Boland's evidence concerning Glassman's vow was not challenged in cross-examination nor refuted by Riley in his Reply Affidavit.

Honour's integrity and conduct.

11. Justice Newbould released his Decision concerning the merits of the Moyse Action on August 18, 2016. The following day, on August 19, 2016, Catalyst directed its public relations consultant, Dan Gagnier, to email a statement to Emily Jackson of the *Financial Post* accusing Justice Newbould of having displayed "severe indications of possible bias", and asserting that "additional evidence [had come] out that [was] supportive of [Catalyst's] case against Globalive, West Face, VimpelCom and other parties" (*i.e.*, the VimpelCom Action).[8]

12. These statements were false and defamatory, and were made to implement the Scheme of the Catalyst Defendants by attacking and undermining the legitimacy of Justice Newbould's Decision:

(a) First, the supposed "additional evidence" had been disclosed in the Moyse Action months before trial. Indeed, this very evidence had been considered by Justice Newbould, who nonetheless made findings of fact that eviscerated Catalyst's claims both in the Moyse Action and in the VimpelCom Action;[9] and

(b) Second, as Justice Boswell found in his recent ruling: "*There was nothing in the judgment of Justice Newbould that would suggest he was biased*".[10]

13. Although Catalyst appealed Justice Newbould's decision shortly after these comments were made, it never alleged bias within its appeal proceeding during the period of approximately 19 months that that proceeding remained pending.[11] Catalyst had responsible counsel who knew that there was no proper or good faith basis for such a serious accusation.

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8 Email from Dan Gagnier to Emily Jackson dated August 19, 2016, WF's RMR, Vol. 1, Tab 1D, p. 252; Financial Post Article by Emily Jackson "Catalyst Capital Group Inc. to Appeal after Judge Dismisses Wind Mobile lawsuit" dated August 19, 2016, WF's RMR, Vol. 1, Tab 1E, p. 255; Responding Boland Affidavit, paras. 17-19, WF's RMR, Vol. 1, Tab 1, p. 11.

9 See Boland Responding Affidavit, at paras. 34-37, WF's RMR, Vol. 1, Tab 1, pp. 19-21. Riley Cross-Exam 2020-10-26, pp. 46-52, qq. 135-155, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 47-53. See also Undertaking Chart of Riley, No. 9, q. 147, WF's 2nd Supp. MR, Vol. 1, Tab 4, pp. 276-277.

10 Boswell Ruling, at para. 354, WF's RBOA, Vol. 2, Tab 9.

11 Boland Responding Affidavit, at paras. 26-33, WF's RMR, Vol. 1, Tab 1, pp. 15-19. See also Riley Cross-Exam 2020-10-26, pp. 51-52, qq. 150-155, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 52-53; Undertaking Chart of Riley, No. 12, q. 155, WF's 2nd Supp. MR, Vol. 1, Tab 4, pp. 277-278.

14. On October 7, 2016, Justice Newbould released his Costs Endorsement in respect of the Moyse Action. He awarded West Face costs of over $1.2 million on a substantial indemnity basis and made further adverse findings against Catalyst and Glassman.[12] On October 13, 2016, West Face issued a press release that quoted from and expressed satisfaction with the Costs Endorsement.[13] Catalyst responded by issuing its own inflammatory press release in which it repeated the very accusations of misconduct against West Face that Justice Newbould had just rejected – namely that West Face had engaged in "questionable conduct" and acted unlawfully and improperly in acquiring WIND. Catalyst impugned West Face's "actions, character and values", and stated that Catalyst's rights had been "trampled on". Catalyst accused Justice Newbould of "mishandling" or "wilfully ignoring" the evidence, and of making "over 30 errors of fact". Catalyst also accused West Face of additional "potentially unlawful actions… regarding Callidus". That additional accusation of impropriety was made even though the Costs Endorsement of Justice Newbould and press release of West Face had nothing to do with Callidus.[14]

C. Catalyst's Q2 2017 Investor Letters of August 16, 2017

15. On August 9, 2017, the *Wall Street Journal* published the "**WSJ Article**".[15] Two days later, Glassman received the now-infamous "**Vincent Hanna Email**" from an anonymous source that

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12 Newbould Costs Endorsement at paras. 7, 10, 11 & 17, WF's RBOA, Vol. 2, Tab 7.2; Responding Boland Affidavit, paras. 20-23, WF's RMR, Vol. 1, Tab 1, pp. 12-13.

13 West Face Press Release dated October 13, 2016, WF's RMR, Vol. 1, Tab 1G, p. 267. Riley conceded in cross-examination that West Face's press release consisted entirely of: (i) factually correct statements; (ii) accurate accounts of and direct quotes from the decisions of Justice Newbould; and (iii) statements relating to West Face and in respect of which Riley has no evidence to the contrary. Riley Cross-Exam 2020-10-26, pp. 52-57, qq. 156-171, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 53-58. See also Boland Responding Affidavit, at paras. 13-37, WF's RMR, Vol. 1, Tab 1, pp. 10-21.

14 Catalyst Press Release dated October 13, 2016, WF's RMR, Vol. 1, Tab 1H, p. 270. See also Boland Responding Affidavit, at paras. 13-37, WF's RMR, Vol. 1, Tab 1, pp. 10-21.

15 The WSJ Article reported on the fact that a number of individuals had filed whistleblower complaints to securities regulators concerning the Catalyst Defendants. As set out in the West Face Parties' Moving Party Factum, West Face and Boland: (i) were not referred to, directly or indirectly, in the WSJ Article; (ii) had had no involvement in the preparation or filing of the whistleblower complaints in question; (iii) did not inform the WSJ (or any other media outlet) about the existence or substance of the whistleblower complaints; (iv) were not sources for any of the facts or information in the WSJ Article; (v) did not cause or participate in the publication of the WSJ Article in any way; (vi) had not held a short position in Callidus for more than two years preceding the publication of the WSJ Article; and (vii) did not encourage or induce anyone to short shares of Callidus in connection with the WSJ Article.

made wild, unsubstantiated and unequivocally false allegations that West Face and Boland had participated in a "cabal" to target Callidus and others in an unlawful "short and distort" campaign.[16]

16. Although the Catalyst Defendants concealed for more than three years their subsequent correspondence with "Vincent Hanna", their communications were finally revealed on the eve of the hearing of this motion after Justice McEwen intervened.[17] Those communications, and the ensuing cross-examinations of Riley and Glassman, revealed that the Catalyst Defendants:

(a) knew immediately that "Vincent Hanna" was a pseudonym, but did not learn Vincent Hanna's true identity – an investor named Danny Guy – until August 23, 2017;

(b) were immediately skeptical of Guy and his highly questionable private investigator, Derrick Snowdy, who Guy held out as the person that could substantiate the salacious allegations made in the Vincent Hanna Email; and

(c) ultimately determined that Guy and Snowdy had no relevant substantiating documentation, and were completely lacking in professionalism and credibility.[18]

17. None of these significant frailties mattered to the Catalyst Defendants. On August 16, 2017, Catalyst emailed a letter to all of the investors in each of its Funds (the "**Q2 2017 Investor Letters**"). Many of those investors were also actual or potential investors of West Face. The Q2 2017 Investor Letters alleged that: (i) Catalyst had discovered "new facts helpful" to Catalyst's case against West Face in the WIND Litigation; and (ii) these "new facts" related not only to West Face's "stand-alone behaviour but also to possible market manipulation involving West Face and others in Callidus".[19]

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16 Email from Vincent Hanna to Newton Glassman dated August 11, 2017, WF's RMR, Vol. 1, Tab 1O, p. 363. See also Boland Responding Affidavit, at paras. 38-57, WF's RMR, Vol. 1, Tab 1, pp. 21-29.

17 See the "**McEwen Privilege Decision**" at *The Catalyst Capital Group Inc. v. West Face Capital Inc. et. al.*, 2021 ONSC 1140, *leave to appeal ref'd* 2021 ONSC 2072, WF's RBOA, Vol. 2, Tab 10.

18 WhatsApp messages between Danny Guy and Newton Glassman dated August 23, 2017 to November 17, 2017, WF's 2nd Supp. MR, Vol. 4, Tab 37, pp. 1077 & 1097-1100. See also *Canadian National Railway Company v. Holmes*, 2014 ONSC 593 at paras. 1, 2, 9-24 & 34-40, WF's RBOA, Vol. 1, Tab 6; Riley Cross-Exam 2021-04-22, pp. 932-933, qq. 2672-2673, & pp. 1010-1015, qq. 2858-2867, WF's 2nd Supp. MR, Vol. 2, Tab 5, pp. 347-348 & 425-430; Memo of Tom Klatt dated August 26, 2017, WF's 2nd Supp. MR, Vol. 4, Tab 36; Glassman Cross-Exam 2021-05-03, pp. 95-105, qq. 220-231, WF's 2nd Supp. MR, Vol. 3, Tab 15, pp. 818-828; and Glassman Cross-Exam 2021-05-03, pp. 56-59, qq. 140-147, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 87-90.

19 To be clear, contrary to the Affidavit of James Riley sworn December 5, 2019 (the "**First Riley Affidavit**"), Catalyst did not merely make these statements in the Q2 2017 Investor Letter that Catalyst sent to its investors in Catalyst Fund II and II-PP, which was the

Neither of these statements was remotely true:[20]

(a) The supposed "new facts" relating to WIND were the very same documents that: (i) West Face had disclosed to Catalyst during the discovery process in the Moyse Action; and (ii) Justice Newbould had considered during the trial of that action, and determined did not support Catalyst's claims or allegations; and

(b) West Face played no role whatsoever in any scheme to manipulate the markets.

18. Riley conceded in cross-examination that the sole basis for the assertion made by Catalyst in its Q2 2017 Investor Letters was the Vincent Hanna email.[21] That email had nothing to do with WIND. Moreover, before this Statement was made on August 16, 2017, neither Glassman, Riley, nor anyone else at Catalyst or Callidus had taken any steps whatsoever to verify the truth of the allegations made in the Vincent Hanna Email. At that point, they: (i) had never spoken to "Vincent Hanna", or even determined who he was; (ii) had never met with or spoken to Guy or Snowdy; and (iii) had received no documentation or information that corroborated any of the allegations made in the Vincent Hanna Email.[22] Once they conducted a modicum of due diligence in the period after these Letters were sent to all of Catalyst's many investors, they quickly concluded that what Guy and Snowdy had provided was, to use Glassman's words, "less valuable that what my dogs left for

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only letter Riley referred to or attached to his Affidavit. Catalyst made these same false and defamatory statements in separate letters to each of its Funds (II, III, IV and V). See First Riley Affidavit, at paras. 103-109, Catalyst's MR, Vol. 1, Tab B, pp. 55-58; Glassman Cross-Exam 2021-05-03, pp. 44-52, qq. 101-127, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 75-83; Redacted Catalyst Q2 Quarterly Letter to Fund III and Covering Email dated August 16, 2017, WF's 3rd Supp. MR, Vol. 3, Tab 6, pp. 686-695; Redacted Catalyst Q2 Quarterly Letter to Fund IV and Fund IV-PP and Covering Email dated August 16, 2017, WF's 3rd Supp. MR, Vol. 3, Tab 7, pp. 696-705; Redacted Catalyst Q2 Quarterly Letter to Fund V and Covering Email dated August 16, 2017, WF's 3rd Supp. MR, Vol. 3, Tab 8, pp. 706-715; Unredacted Catalyst Q2 Quarterly Letter to Fund II and Fund II-PP, Catalyst's MR, Tab B44, pp. 708-736.

20 Boland Responding Affidavit, at paras. 34-57, WF's RMR, Vol. 1, Tab 1, pp. 19-29. Riley gave no evidence or explanation whatsoever in his Affidavit concerning what the supposed "new facts" regarding WIND were. He relied entirely on the Vincent Hanna Email, which said nothing about WIND. See Riley Affidavit, at paras. 103-109, Catalyst's MR, Vol. 1, Tab B, pp. 55-58.

21 During cross-examination, Riley conceded that the Vincent Hanna Email said nothing about WIND, and that Catalyst's "new facts" relating to WIND arose from the very same "additional evidence" that Catalyst had referred to a year earlier in its statement to Emily Jackson on August 19, 2016. Riley Cross-Exam, 2020-10-26, pp. 213-216, qq. 710-219, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 214-217. See also Riley Cross-Exam 2021-04-22, pp. 894-895, qq. 2566-2568, WF's 2nd Supp. MR, Vol. 2, Tab 5, pp. 309-310.

22 Glassman Cross-Exam 2021-05-03, pp. 34-42, qq. 69-94 & pp. 50-52, qq. 121-126, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 65-73 & 81-83.

me on our lawn this [morning]".[23]

19. Remarkably, the Catalyst Defendants nonetheless *continue* to rely principally on the Vincent Hanna Email in their efforts to support the defamatory statements in their Q2 2017 Investor Letters. They assert a fiduciary duty to keep their investors informed of relevant matters. However, there is no fiduciary duty to provide false, misleading, unsubstantiated, speculative and salacious information to investors. No responsible investment manager could or would have relied on the Vincent Hanna Email to "inform" its investors of anything. Catalyst's supposed commitment to its fiduciary duties is an obvious smokescreen.[24] Tellingly, this "duty" apparently did not extend to disclosing to the investors the highly suspect source of this information, nor to acknowledging that the supposedly "new facts" conveyed by "Vincent Hanna" concerning "market manipulation involving West Face" turned out to be worthless. The reality is that the Catalyst Defendants seized on the flimsy opportunity they were presented with by the Vincent Hanna Email to make further public accusations of misconduct against West Face and Boland.

D. Glassman Hires an Army of Spies to Manufacture Evidence

20. By August 2017, Catalyst's appeal in the Moyse Action was scheduled to be heard by the Court of Appeal on September 26 and 27, 2017. In a recent Ruling, Justice Boswell summarized accurately what happened next:

> [12] While the appeal was pending, **agents of Catalyst** engaged in a systematic effort to unearth fresh evidence **that might undermine the integrity of [Justice Newbould's] [J]udgment in favour of West Face, to diminish the public reputation of West Face** and to promote the public image of Catalyst. **Some of their tactics were ethically dubious**.[25]

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23 WhatsApp messages between Danny Guy and Newton Glassman dated August 23, 2017 to November 17, 2017, WF's 2nd Supp. MR, Vol. 4, Tab 37, pp. 1097-1100.

24 Boland's evidence concerning what a responsible investment manager would have done upon receiving the Vincent Hanna Email is self-evidently correct. See Boland Responding Affidavit, at para. 54, WF's RMR, Vol. 1, Tab 1, pp. 26-27.

25 Boswell Ruling, at para. 12, WF's RBOA, Vol. 2, Tab 9.

21. The "agents of Catalyst" that assisted it in carrying out its "ethically dubious" Scheme were Black Cube and Psy Group. Black Cube is a private investigation firm based in Israel comprised of former members of the Israeli Defence Force and Mossad.[26] Now insolvent, Psy Group was an Israeli public relations firm notorious for planting misinformation. Its motto was "Shape Reality".[27]

22. The "systematic effort" engaged in by the Catalyst Defendants, Black Cube and Psy Group had the express purposes of: (i) undermining the legitimacy of Justice Newbould's Judgment in favour of West Face in the Moyse Action by falsely and publicly accusing His Honour of being a corrupt anti-Semite; and (ii) continuing to shroud West Face and Boland in controversy and scandal, including by disseminating baseless allegations against them of impropriety and misconduct.[28]

23. Glassman arranged for the retainers of Black Cube and Psy Group through a web of misleading artifices designed to prevent his own lawyers from understanding the insidious plan that he and they were about to implement.[29] On September 6, 2017, Glassman flew to London, England for a "pitch meeting" with his friend Yossi Tanuri and representatives of Black Cube.[30] The next day, on September 7, 2017, Black Cube emailed Tanuri a draft Letter of Engagement that provided for the payment to Black Cube of a base fee of $1.5 million USD as well as additional "success fees".[31] The amounts of the success fees were not specified in that draft agreement. Nor were the circumstances in which the success fees would be payable. In the days that followed, Glassman filled in that gap. In doing so, he placed a bounty on the head of Justice Newbould. Glassman first asked

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26 Black Cube Marketing Materials, WF's RMR, Vol. 2, Tab 1V, p. 406.

27 Psy Group Marketing Materials, WF's RMR, Vol. 2, Tab 1U, p. 397. See also Boland Responding Affidavit, at paras. 58-59, WF's RMR, Vol. 1, Tab 1, p. 29 and Boswell Ruling at paras. 28-29, WF's RBOA, Vol. 2, Tab 9.

28 Boswell Ruling at para. 9(d) and more generally paras. 53-106, WF's RBOA, Vol. 2, Tab 9; Boland Responding Affidavit, at paras. 8-10, WF's RMR, Vol. 1, Tab 1, pp. 5-7; Affidavit of Philip Elwood sworn May 12, 2020 ("**Elwood Affidavit**"), at para. 11, WF's RMR, Vol. 2, Tab 2, p. 625.

29 See also Riley Cross-Exam 2021-04-22, pp. 938-939, qq. 2683-2685 & pp. 953-956, qq. 2716-2725, WF's 2nd Supp. MR, Vol. 2, Tab 5, pp. 353-354 & 368-371.

30 Glassman Cross-Exam 2021-05-03, pp. 136-138, qq. 298-301, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 167-169; Affidavit of Newton Glassman sworn November 24, 2020 ("**Glassman Affidavit**"), at para. 21, WF's 3rd Supp. MR, Vol. 1, Tab 2, p. 20.

31 Emails between Tanuri and Greenspan dated September 7, 2017 and attached Letter of Engagement, WF's 3rd Supp. MR, Vol. 3, Tab 9, pp. 716-721.

DiPucchio to email to him a "Wish List of Evidence/Information" that DiPucchio regarded as important in prosecuting various pieces of litigation that the Catalyst Defendants were pursuing against West Face and Boland.[32] Glassman then created a handwritten, five tiered "Bonus Legend", and applied his bonus scheme to each item listed in DiPucchio's email. Glassman's handwritten Bonus Legend and markup of DiPucchio's email were incorporated as "Annex A" to the executed version of Black Cube's Letter of Engagement, dated September 11, 2017.[33]

24. In Glassman's own handwriting, Black Cube was to be paid $75,000 USD "per item", if its operatives could manufacture evidence that Justice Newbould: (i) was "bias[ed] against Catalyst [or] Glassman"; (ii) was an Anti-Semite; (iii) had a "deal" with West Face for his Decision in the Moyse Action; (iv) had some other "inappropriate connection" to West Face or Boland; and/or (v) had a "deal" with the Thornton Grout firm he had moved to following his retirement from the bench. Black Cube was given an urgent deadline of only nine days later – September 20, 2017 – to manufacture this so-called "evidence" in advance of the hearing of Catalyst's appeal in the Moyse Action in the Court of Appeal on September 25 and 26, 2017.[34]

25. Thus "incentivized" by Glassman, operatives of Black Cube immediately placed Justice Newbould under surveillance.[35] They "stung" Justice Newbould on September 18, 2017, including by meeting with him twice that day and recording those meetings surreptitiously without Justice Newbould's knowledge or consent. During both meetings operatives of Black Cube attempted

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32 Glassman's "Wish List" is insightful for an additional reason, in that it demonstrates just how little information or evidence the Catalyst Defendants had to substantiate ***any*** of their allegations in ***any*** of its pending or contemplated lawsuits.

33 Glassman Cross-Exam 2021-05-03, pp. 182-184, qq. 407-410, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 213-215; Annex A to the Letter of Engagement and Transcription of Same, WF's 3rd Supp. MR, Vol. 3, Tab 10, pp. 726-734. See also Riley Cross-Exam 2021-04-22 at pp. 968-970, qq. 2755-2761 & pp. 1059-1061, qq. 3010-3016, WF's 2nd Supp. MR, Vol. 2, Tab 5, pp. 383-385 & 474-476.

34 Glassman Cross-Exam 2021-05-03, pp. 195-197, qq. 430-434, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 226-228; Annex A to the Letter of Engagement and Transcription of Same, WF's 3rd Supp. MR, Vol. 3, Tab 10, pp. 726-734. See also Riley Cross-Exam 2021-04-22, at pp. 981-983, qq. 2782-2785, WF's 2nd Supp. MR, Vol. 2, Tab 5, pp. 396-398.

35 Glassman Cross-Exam 2021-05-03, pp. 186-197, qq. 413-434, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 217-228; Surveillance Report on Justice Newbould dated September 22, 2017, WF's 3rd Supp. MR, Vol. 4, Tab 13, pp. 951-957.

unsuccessfully to entrap Justice Newbould into making anti-Semitic comments.[36]

26. In the weeks that followed, operatives of Black Cube also stung numerous current and former employees of West Face (including the former General Counsel of West Face), as well as a number of other targets (the "**Stings**"). In each of the Stings, Black Cube's operatives used false aliases and stories to deceive their targets into communicating and/or meeting with them on decidedly false pretences. These communications were also recorded surreptitiously.[37]

27. On September 14, 2017, Glassman flew to New York to meet with representatives of Psy Group. Glassman has made every effort to conceal his involvement with operatives of Psy Group, and has produced almost none of his communications with or concerning them. His meeting in New York was attended by public relations consultant Phil Elwood. It is only because Elwood has made disclosure of documents and information concerning his involvement with Glassman and Psy Group that at least part of the truth concerning the conduct Glassman engaged in has been exposed.[38]

28. Contemporaneous documents produced by Elwood are powerful evidence of the malicious Scheme engaged in by Glassman and other Catalyst Defendants to attack and discredit West Face, Boland and Justice Newbould.[39] Shortly following the meeting in New York on September 16, 2017, Royi Burstien, the CEO of Psy Group, circulated to members of the Psy Group team (including Elwood) an email with a series of embedded messages from Glassman that mapped out the agreed-

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36 See, *e.g.*, Boswell Ruling, at paras. 89 & 353, WF's RBOA, Vol. 2, Tab 9; and Christie Blatchford, "Exclusive: The Judge, the Sting, Black Cube and Me" (National Post, November 24, 2017) (the "**Sting Article**"), WF's MR, Vol. 5, Tab C1, pp. 1534-1547.

37 Boland Responding Affidavit, at paras. 9-11(a) & 90-109, WF's RMR, Vol. 1, Tab 1, pp. 5-8 & 45-56; Boswell Ruling at paras. 88-93, 105-106, 297-299, 316-318, 337, 353-354 & 367-368, WF's RBOA, Vol. 2, Tab 9; Glassman Cross-Exam 2021-04-04, pp. 386-388, qq. 779-780, WF's 3rd Supp. MR, Vol. 2, Tab 5, pp. 453-455; and Timing of "Stings" Chart, WF's 3rd Supp. MR, Vol. 4, Tab 16, pp. 1190-1195.

38 Elwood Affidavit, WF's RMR, Vol. 2, Tab 2, p. 620. Remarkably, during the midst of his cross-examination, Glassman advised that he retains on his current mobile phone the full "Chaverim" WhatsApp chat conversation among Gadi Ben Efraim, Yossi Tanuri and Glassman, which to date has only been produced on a piecemeal basis, notwithstanding repeated assurances that all relevant communications have been produced. Glassman Cross-Exam 2021-05-03, p. 124, q. 267 & pp. 197-204, qq. 437-450, WF's 3rd Supp. MR, Vol. 1, Tab 4, pp. 155 & 228-235. See also excerpt of "Chaverim" WhatsApp chat, WF's 3rd Supp. MR, Vol. 4, Tab 12, pp. 949-957.

39 Boswell Ruling, at paras. 80-87, WF's RBOA, Vol. 2, Tab 9. See also the email from Royi Burstien dated September 16, 2017, WF's RMR, Vol. 2, Tab 2J, pp. 720-721. See also Boland Responding Affidavit, at paras. 64-67, WF's RMR, Vol. 1, Tab 1, pp. 31-33.

upon campaign of defamation they were about to embark upon. This email included instructions by Glassman that "NOW or VERY SOON is the perfect time to hear/see 'chatter' on social media etc of rumors of an alleged Wolfpack, rumors of west face/anson partners involvement therein, rumors of 8 or more victims, rumors of boland being looked at (not yet criminal investigation) for criminality etc."[40] Within days of Glassman's instructions to Psy Group, a wave of false and defamatory statements concerning West Face and Boland began to appear on the internet and on social media (the "**Internet Postings**"). The Internet Postings made a series of scandalous allegations that West Face and Boland were involved in criminal misconduct such as racketeering, money laundering and illegal stock manipulation. The true authors of the Internet Postings were deliberately concealed.[41] Moreover, the very same thing happened within days of a further meeting Glassman had in New York with operatives of Psy Group on October 17, 2017.

29. At approximately the same time, Glassman and Riley conspired to provide cherry-picked excerpts from the Newbould Sting to the late journalist Christie Blatchford in the hopes of persuading her to publish a highly damaging story in the *National Post*.[42] Instead, however, this experienced reporter saw through the misinformation that had been peddled to her and, in late November 2017, published a devastating story that exposed the malfeasance Glassman and Black Cube had engaged in.[43] Remarkably, the Catalyst Defendants consistently took the position with Ms. Blatchford and before the Courts that they had had no prior knowledge of or involvement in Black

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40 Email from Royi Burstien dated September 16, 2017, WF's RMR, Vol. 2, Tab 2G, pp. 706-707.

41 Boland Responding Affidavit, at paras. 71-75, WF's RMR, Vol. 1, Tab 1, pp. 35-36; Panet Affidavit, at paras. 6-8 & 26-33, WF's MR, Vol. 6, Tab D, pp. 1679-1683 & 1688-1692

42 Riley's evidence concerning *how* the Newbould Sting materials were relayed to Christie Blatchford is like something out of a John le Carré novel. Riley Cross-Exam 2021-04-22 at pp. 1033-1035, qq. 2929-2936, WF's 2nd Supp. MR, Vol. 2, Tab 5, pp. 448-450. See also the Affidavit of Christie Blatchford sworn May 21, 2019 ("**Blatchford Affidavit**"), at paras. 24 & 46, WF's MR, Vol. 5, Tab C, pp. 1519 & 1524.

43 Sting Article, WF's MR, Vol. 5, Tab C1, pp. 1534-1547; and Boswell Ruling at paras. 94-104, WF's RBOA, Vol. 2, Tab 9.

Cube's Stings on any of West Face's personnel.[44]

E. The Catalyst Parties Continue the WIND Defamation in the March Investor Letter

30. The last of the Four Statements at issue on this Motion is Catalyst's "**March Investor Letter**", which it circulated to all of its investors on or around March 19, 2018.[45] Catalyst claimed falsely that it had new "cogent evidence" related to the WIND litigation, in the form of so-called "interviews" of two former employees of West Face, Peter Brimm and Yu-Jia Zhu. Notwithstanding Catalyst's professed commitment to its fiduciary obligations to inform fully its investors, the March Investor Letter was deliberately misleading. Beyond failing to disclose that these "interviews" were actually surreptitiously recorded Stings conducted under false pretences, the March Investor Letter grossly misrepresented the substance and significance of the statements made by Brimm and Zhu.[46]

31. The Letter failed to disclose, for instance, that Brimm had made clear to the operatives of Black Cube that he had had no involvement in West Face's acquisition of WIND. Indeed, Brimm had no access to confidential information from the deal team, and knew almost nothing about the transaction other than what had been reported on by the media.[47] The Letter also failed to disclose that Zhu made perfectly clear during his Sting that there was (in his words) "no truth" to Catalyst's allegations of misconduct against West Face.[48] For obvious reasons, Catalyst never attempted to file

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44 Sting Article, WF's MR, Vol. 5, Tab C1, p. 1545; "The Night Two Alleged Spies Were Sent to Dinner and Two More Spies Showed Up", WF's MR, Vol. 5, Tab C2, p. 1551; "West Face Files Countersuit Against Catalyst Capital, Accusing Rival Firm of Conspiracy and Defamation", WF's MR, Vol. 5, Tab C3, p. 1553; Blatchford Affidavit, at paras. 60-67, WF's MR, Vol. 5, Tab C, pp. 1528-1530; Boswell Ruling at paras. 376 & 379, WF's RBOA, Vol. 2, Tab 9; Amended Reply and Defence to Counterclaim dated November 29, 2019 at paras. 85 & 90, Catalyst's MR, Vol. 1, Tab B2, pp. 233-235; Glassman Affidavit, at para. 24, WF's 3rd Supp. MR, Vol. 1, Tab 2, p. 20.

45 March Investor Letter, WF's RMR, Vol. 2, Tab 1II, p. 473. For Riley's remarkable evidence on this subject, see First Riley Affidavit, at paras. 110-120, Catalyst's MR, Vol. 1, Tab B, pp. 58-64. More importantly, see the *complete* transcripts of the Stings on Messrs. Brimm and Zhu: (i) Transcript of Black Cube Sting of Peter Brimm dated November 1, 2017, Catalyst's MR, Tab B49, p. 761; and (ii) Transcript of the Black Cube Sting of Yu-Jia Zhu dated November 1, 2017, Catalyst's MR, Tab B50, p. 796.

46 March Investor Letter, WF's RMR, Vol. 2, Tab 1II, p. 473. See also Boland Responding Affidavit, at paras. 89-90, WF's RMR, Vol. 1, Tab 1, p. 45.

47 Boland Responding Affidavit, at paras. 91-102, WF's RMR, Vol. 1, Tab 1, pp. 46-51. See also Affidavit of Peter Brimm dated December 21, 2017 (with Exhibits), at para. 23, WF's RMR, Vol. 2, Tab 1JJ, p. 486.

48 Boland Responding Affidavit, at paras. 103-109, WF's RMR, Vol. 1, Tab 1, pp. 51-56.

with the Court evidence that operatives of Black Cube gathered during their stings of Brimm or Zhu, either in the Moyse Action or in the VimpelCom Action. Instead, seriously distorted versions of the poisoned fruits of the Black Cube Campaign were promulgated solely outside of Court.[49]

PART III ~ STATEMENT OF ISSUES, LAW & AUTHORITIES

32. This Motion asks whether the Catalyst Defendants are entitled to have the West Face Parties' claims of defamation – and only of defamation – in respect of the Four Statements identified above dismissed under s. 137.1 of the CJA. They are not, for multiple reasons. The Catalyst Defendants made all of these Statements with malice as part of a broader conspiracy, the purpose of which was to make good on Glassman's threat to destroy the business of West Face and Boland. Their prolonged campaign of misconduct gave rise to *multiple* causes of action pleaded by West Face and Boland – including not only defamation, but also predominant purpose conspiracy, unlawful means conspiracy, and relief under the "Vexatious Litigant" provisions of s. 140 of the CJA. It is not the purpose of the anti-SLAPP provision to prune isolated passages from a lengthy and detailed Claim that will inevitably proceed to trial. Regardless of the outcome of the current Motion, each of these other claims concerning these very same Statements move forward.

A. The Counterclaim Arises From Expressions on Matters of Public Interest

33. The West Face Parties do not dispute that the Catalyst Defendants have met the "threshold burden" set out in s. 137.1(3) of the CJA in respect of the Four Statements.[50]

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[49] Boland Responding Affidavit, at paras. 110-113, WF's RMR, Vol. 1, Tab 1, pp. 57-58. See also Riley Cross-Exam 2020-10-26, pp. 239-241, qq. 769-771, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 240-242. In fact, Riley admitted during further cross-examination on April 22, 2021 that he is presently not in any position to say whether Black Cube was successful in acquiring any of the evidence particularized in Annex A to the Black Cube Letter of Engagement, which, of course, included evidence of any wrongdoing by West Face or Moyse in respect of the WIND transaction. Riley Cross-Exam 2021-04-22, pp. 1064-1065, qq. 3026-3032, WF's 2nd Supp. MR , Vol. 2, Tab 5, pp. 479-480.

[50] As set out in paragraphs 8(c) and 16 of the Defendants' Joint Memorandum of Law, in assessing whether the Catalyst Defendants have met their initial "threshold burden", it is of little consequence that the Catalyst Defendants' Statements were false and defamatory, part of an ongoing, multifaceted conspiracy, deleterious to the public interest, or even that they were motivated by malice. In light of this state of the law, there is no sense debating this issue.

B. The West Face Parties' Claims Have Substantial Merit and the Catalyst Defendants Have No Valid Defences

34. On this Motion, the West Face Parties must establish that there are "grounds to believe" that their claims have a "real prospect of success" at trial. They must also demonstrate that there are grounds to believe that none of the defences "put in play" by the Catalyst Defendants have "a real prospect of success".[51] The Supreme Court emphasized in *Bent v. Platnick* that this is a low threshold, and is satisfied if there is any basis in the record and law to support the position of the Plaintiff.[52] As noted above, the only claims that the Catalyst Defendants seek to have "dismissed" are the West Face Parties' claims in defamation, and only in respect of the Four Statements. The Catalyst Defendants have not "put in play" any of their defences to any of the West Face Parties' other causes of action arising from those same Statements.

35. The claims at issue have substantial merit. The elements of defamation are well known and not in dispute. To make out their claim of defamation in respect of each of the Four Statements, the West Face Parties must demonstrate – on the "grounds to believe" standard imposed by s. 137.1(4)(a)[53] – that: (i) the Catalyst Defendants published the words in question; (ii) the words refer to the West Face Parties; and (iii) the words were defamatory (*i.e.*, they would tend to lower the reputation of the West Face Parties in the eyes of a reasonable person).[54]

36. There can be no dispute that the first two elements of defamation are met in respect of each of the Four Statements. The West Face Parties need only show on this Motion that there are "grounds to believe" that the Four Statements conveyed a defamatory meaning. The Statements were all clearly defamatory in their plain and ordinary sense – every one of them accused the West Face

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51 Defendants' Joint Memorandum of Law, paras. 18-35.
52 *Bent v. Platnick* 2020 SCC 23 at para. 88, WF's RBOA, Vol. 1, Tab 2 [*Bent*].
53 Defendants' Joint Memorandum of Law, paras. 18-20, 22-24, 27, 30 & 33.
54 *Bent,* at para. 92, WF's RBOA, Vol. 1, Tab 2; *Grant v. Torstar Corp.*, 2009 SCC 61 at para. 28, WF's RBOA, Vol. 2, Tab 13 [*Torstar*]; and Joint Memorandum of Law, at para. 24.

Parties of unethical and unlawful conduct, and did so in various ways.[55] They were clearly capable (and indeed intended) to harm the reputations of West Face and Boland by accusing them of serious misconduct in relation to their acquisition of WIND as well as in the improper and illegal manipulation of the market.[56] Indeed, as set out below, one of the few matters that Boland and Glassman have agreed on over the last seven years is how extremely damaging allegations of misconduct are to an investment manager.[57] The substantial merit of the defamation claims in respect of each of these Statements is easily established.

37. With respect to each of the Four Statements, the Catalyst Defendants have asserted one or more of the following affirmative defences to defamation: (i) fair comment; (ii) qualified privilege; (iii) responsible communication of statements of fact; and (iv) failure to provide notice under the *Libel and Slander Act*. For the reasons set out below, none of these Defences applies to any of the Statements at issue.

(i) Catalyst's Post-Judgment Comments of August 19, 2016

38. Catalyst's Post-Judgment Comments were entirely unfair and do not meet any of the necessary elements of the defence of fair comment.[58] Most significantly, they were not based on true or substantially true facts. Nor were they capable of being made honestly on the actual facts:

(a) Contrary to the assertions of Catalyst, no "additional evidence" supporting any of Catalyst's claims and allegations in the new VimpelCom Action had "come out".[59] All

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55 It is worth noting that the Counterclaim has already survived a dismissed motion to strike brought by the Catalyst Defendants and Black Cube. Endorsement of Justice Dunphy dated June 15, 2018, WF's 3rd Supp. MR, Vol. 1, Tab 1, pp. 1-4.

56 Such statements are unquestionably defamatory: *Bent*, at paras. 96-98, WF's RBOA, Vol. 1, Tab 2; *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130 at paras. 165 & 166, WF's RBOA, Vol. 3, Tab 15 [*Hill*]; and *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 at paras. 62-72 & 91-93,WF's RBOA, Vol. 1, Tab 4 [*Botiuk*].

57 First Boland Affidavit, para. 10, WF's MR, Vol. 1, Tab B, pp. 20-21; Glassman Cross-Exam 2021-05-04, pp. 512-514, qq. 1049-1051 & pp. 517-518, q. 1063, WF's 3rd Supp. MR, Vol. 2, Tab 5, pp. 579-581 & 584-585.

58 For the elements of this defence (and some of the most immediately relevant ways it can be defeated), see: *WIC Radio Ltd. v. Simpson,* 2008 SCC 40 at paras. 1, 28, 49-51 & 59, WF's RBOA, Vol. 3, Tab 23 [*WIC Radio*]; *Torstar*, at para. 31, WF's RBOA, Vol. 2, Tab 13; and Joint Memo of Law at para. 25(c).

59 See Boland Responding Affidavit, at paras. 34-37, WF's RMR, Vol. 1, Tab 1, pp. 19-21; First Riley Affidavit, at paras. 74-95, Catalyst's MR, Tab B, pp. 44-51; and Riley Cross-Exam 2020-10-26, pp. 46-52, qq. 135-155, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 47-53. See also Undertaking Chart of Riley, No. 9, q. 147, WF's 2nd Supp. MR, Vol. 1, Tab 4, pp. 276-277.

of the evidence in question was considered by Justice Newbould, and in many cases was commented upon expressly in his Reasons for Judgment;[60] and

(b) Riley confirmed in his Affidavit and conceded in cross-examination that the purported "bias" Catalyst supposedly saw Justice Newbould "display" was based *solely in the Judgment itself*.[61] That could not possible have been a *bona fide* or honest belief, for at least two reasons. First, as noted by Justice Boswell: "There was nothing in the judgment of Justice Newbould that would suggest he was biased….".[62] Second, after publicly accusing Justice Newbould of bias, Catalyst never pursued those allegations before the Court at any time during the course of its appeal in the Moyse Action.[63]

39. Second, for similar reasons, the defence of responsible communication cannot apply to the Post-Judgment Comments.[64] There is *no* evidence that Catalyst was reasonably diligent in validating the accuracy of these statements before they were made, or that its efforts in gathering and communicating the impugned information was, in fact, responsible. Instead, Catalyst lashed out immediately and in a retaliatory manner within one day after Justice Newbould's Decision was released. In doing so, Catalyst made serious and entirely unfounded accusations of bias. Catalyst also intentionally misled readers with its statement regarding "additional evidence". These statements were intended to convey the misleading impression that: (i) such evidence had not been made available to or considered by Justice Newbould; (ii) as a result, Justice Newbould's Decision in West Face's favour was seriously flawed and could not be accepted or believed; and (iii) West Face had, in fact, engaged in serious misconduct when it acquired WIND.

40. Finally, the Catalyst Defendants' reliance on the provisions of the *Libel and Slander Act* is

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60 Newbould Reasons, at para. 105, WF's RBOA, Vol. 2, Tab 7.1 (see also paras. 126-131 addressing why Catalyst's negotiations *actually* failed).

61 Riley Cross-Exam 2020-10-26, pp. 51-52, qq. 150-155, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 52-53.

62 Boswell Ruling, at para. 354,WF's RBOA, Vol. 2, Tab 9.

63 Boland Responding Affidavit, at paras. 26-33, WF's RMR, Vol. 1, Tab 1, pp. 15-19. See also Riley Cross-Exam 2020-10-26, pp. 51-52, qq. 150-155, WF's 2nd Supp. MR, Vol. 1, Tab 1, pp. 52-53; Undertaking Chart of Riley, No. 12, q. 155, WF's 2nd Supp. MR, Vol. 1, Tab 4, pp. 277-278.

64 For the elements of this defence (and some of the most immediately relevant ways it can be defeated), see: *Torstar*, at paras. 111, 113-115, 125 & 126, WF's RBOA, Vol. 2, Tab 13; and Joint Memorandum of Law at para. 25(b).

misplaced. Unlike the Catalyst Defendants, the West Face Parties do not sue reporters or news organizations for reporting on matters of public interest. The West Face Parties asserted no claim against the *Financial Post* in respect of the article it published on August 19, 2016. Rather, the West Face Parties sued the Catalyst Defendants for having provided a false and defamatory statement to the *Post*, and did so only after it became clear that the Post-Judgment Comments were part of an underlying conspiracy and the launching pad for Glassman's nefarious retainer of Black Cube and Psy Group. The West Face Parties had no obligation to deliver notice under the *Libel and Slander Act* to the Catalyst Defendants in respect of the email that Gagnier sent to Emily Jackson of the *Post* on August 19, 2016. Nor did they become obligated to do so merely because the *Post* republished those comments in circumstances where no damages are claimed for such republication.[65]

(ii) Catalyst's Press Release of October 13, 2016

41. The sole defence asserted by the Catalyst Defendants in respect of their false and defamatory Press Release of October 13, 2016 is "fair comment". There are grounds to believe that that defence has no prospect of success at trial. The statements made in this Release were not based on true or substantially true facts. Nor were they capable of being honestly made on the proven facts. Indeed, the suggestion that West Face had acted unlawfully in respect of its acquisition of WIND had just been unequivocally *disproven* in the findings of Justice Newbould. Catalyst had no factual basis to impugn the West Face Parties' "actions, characters and values" or to suggest that Catalyst's rights had been "trampled on".

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[65] In the alternative, if this defence is held to apply to the Post-Judgment Comments, then it would obviously apply to the entirety of the claim against the West Face Parties in the Wolfpack Action, given that the Catalyst Parties never sent the West Face Parties notice under the *Libel and Slander Act* in respect of any of the articles published by the *Wall Street Journal*, Bruce Livesey, or any other media outlet or reporter. The Catalyst Defendants' cannot take inconsistent positions in simultaneous Motions before the Court. If their position on this issue is accepted and upheld, then their main action must be dismissed as against the West Face Parties.

(iii) Catalyst's Q2 2017 Investor Letters of August 16, 2017

42. There are grounds to believe that none of the defences raised by the Catalyst Defendants in respect of the Q2 2017 Investor Letters has a reasonable prospect of success at trial. The defence of fair comment has no application because the statements were not based on true or substantially true facts that were referred to in the publication or otherwise widely known. They were, instead, unvarnished lies. As noted above, by August 16, 2017, the Catalyst Defendants:

(a) had no "new facts" in respect of the WIND litigation. Nothing in the Vincent Hanna Email referred to the WIND transaction, and the Catalyst Defendants had themselves discovered no "new facts" since the Moyse Action had ended more than a year earlier; and

(b) had no " new facts" that West Face was involved in illegal "market manipulation". All they had was the Vincent Hanna Email, which Glassman, Riley, their investigators and lawyers swiftly realized was worthless.

43. For similar reasons, the suggestion that Catalyst's Q2 2017 Investor Letters are subject to a form of "qualified privilege" is risible.[66] This defence is not a "licence to lie".[67] Catalyst had no duty to "inform" its investors of salacious accusations Glassman had received in an uncorroborated email from an anonymous person using the name of a fictional character, whose true author he did not know at the time. As noted by Boland, no responsible investment manager could or would have placed reliance on such an email without first conducting significant due diligence concerning its provenance and *bona fides*.[68]

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66 For the elements of this defence (and some of the most immediately relevant ways it can be defeated), see: *Bent*, at paras. 121, 122, 125, 126, 128-130, 134, 135 & 138, WF's RBOA, Vol. 1, Tab 2; *Torstar*, at para. 30, WF's RBOA, Vol. 2, Tab 13; *Hill*, at paras. 143-147, 155 & 156, WF's RBOA, Vol. 3, Tab 15; *Botiuk*, at paras. 79, 80 & 82-88, WF's RBOA, Vol. 1, Tab 4; see Joint Memorandum of Law at para. 25(d).

67 *Ho v. Ming Pao Newspapers (Western Canada) Ltd.*, 2000 BCSC 8, at paras. 114-115, WF's RBOA, Vol. 3, Tab 16.

68 Responding Boland Affidavit, para. 54, WF's RMR, Vol. 1, Tab 1, pp. 26-27. Indeed, any *bona fide* duty to inform investors of the Vincent Hanna Email would include a duty to inform those investors of all of the facts surrounding that email. However, Catalyst's Q2 2017 Investor Letters did not mention: (i) the source of the information; (ii) any of the other parties in the Vincent Hanna Email who were accused of participating in the so-called "cabal"; or (iii) Catalyst's inability to verify any of the information provided by "Vincent Hanna".

44. Finally, the defence of responsible communication obviously has no application. Catalyst published its derogatory comments about West Face in the Q2 2017 Investor Letters without having conducted *any* due diligence whatsoever to determine the *bona fides* of the Vincent Hanna Email. In reality, the moment Glassman received the Vincent Hanna Email, the Catalyst Defendants leapt at the opportunity to further defame West Face, without having had any responsible basis or "duty" to do so.

(iv) Catalyst's March Investor Letter of March 18/19, 2018

45. The defences of fair comment, qualified privilege and responsible communication cannot possibly apply to the March Investor Letter in circumstances where that Letter:[69]

(a) deliberately mischaracterized the statements in question as "interviews" of West Face's former employees rather than as covert "Stings" that were conducted under false pretences; and

(b) misrepresented both the substance and the significance of statements made by Brimm and Zhu by using cherry-picked excerpts from their Stings that were carefully designed to mislead Catalyst's investors by conveying false and distorted accounts of what these former employees actually said.[70]

46. In addition, the Catalyst Defendants' "defence" that they were not served with notice under the *Libel and Slander Act* completely misconstrues the Counterclaim and is devoid of merit. The publication at issue is Catalyst's dissemination of the March Investor Letter to its hundreds of investors on or around March 19, 2018, and does not concern a subsequent *Globe and Mail* article

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69 The flaws fatally undermining these defences include: (i) the absence of any true or substantially true factual basis for these allegations; (ii) the fact that the tone and content of the letter greatly "exceeded" what was required or appropriate to fulfil any duty giving rise to a qualified privilege; and (iii) their failure to conduct even rudimentary due diligence. See *WIC Radio*, at paras. 49-51 & 59, WF's RBOA, Vol. 3, Tab 23; *Bent*, at paras. 121, 122, 125, 126, 128-130, 134, 135 & 138, WF's RBOA, Vol. 1, Tab 2; *Hill*, at paras. 143 & 155, WF's RBOA, Vol. 3, Tab 15; *Botiuk*, at paras. 82-88, WF's RBOA, Vol. 1, Tab 4; and *Torstar*, esp. at paras. 111 & 113-115, WF's RBOA, Vol. 2, Tab 13.

70 Boland Responding Affidavit, at paras. 84-113, WF's RMR, Vol. 1, Tab 1, pp. 42-58; and March Investor Letter, WF's RMR, Vol. 2, Tab 1II, p. 473.

published nearly a month later on April 17, 2018. West Face had no obligation to provide notice to Catalyst under the *Libel and Slander Act* in respect of its defamatory March Investor Letter.

C. The Existence of Malice Negates Any of the Catalyst Defendants' Applicable Defences

47. There is an additional, determinative reason that alone explains why almost all of the defences of the Catalyst Defendants have no reasonable prospect of success at trial: there are grounds to believe that each of the Four Statements was actuated by malice.[71] In this context, "malice" is evidenced by: (i) spite, ill-will or a desire to cause harm; (ii) an indirect or improper motive unconnected with the purpose of the applicable defence; (iii) a motive that conflicts with the duty that gives rise to the relevant qualified privilege; or (iv) the publication of defamatory statements knowing them to be untrue, or recklessly believing in their truth.[72] Evidence of malice includes the publication of statements that misleadingly omit or otherwise distort relevant facts.[73]

48. For years, the Catalyst Defendants have been hell-bent on destroying West Face and Boland, and have paid a large network of nefarious characters millions of dollars to assist them in doing so. The conduct of the Catalyst Defendants amply demonstrates that:

(a) their dominant purpose, including in making the Four Statements at issue, has been to cause injury to the West Face Parties (including in furtherance of the pleaded conspiracy); and/or

(b) they published each of the Four Statements knowing that they were not true, or with reckless indifference as to their truth or falsity.

49. In these circumstances, where there are grounds to believe that spite and malice have

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71 The existence of malice is irreconcilable with the defence of responsible communication, and otherwise vitiates the defences of fair comment and qualified privilege. See *Torstar*, at para. 125, WF's RBOA, Vol. 2, Tab 13; *WIC Radio*, at paras. 1 & 28, WF's RBOA, Vol. 3, Tab 23; *Bent*, at paras. 121 & 136, WF's RBOA, Vol. 1, Tab 2; *Hill*, at paras. 144-147, 155 & 156, WF's RBOA, Vol. 3, Tab 15; and *Botiuk*, at paras. 79-80, WF's RBOA, Vol. 1, Tab 4.

72 *WIC Radio*, at para. 1, WF's RBOA, Vol. 3, Tab 23; *Bent*, at paras. 121 & 136, WF's RBOA, Vol. 1, Tab 2; *Hill*, at para. 145, WF's RBOA, Vol. 3, Tab 15; and *Botiuk*, at paras. 94-103, WF's RBOA, Vol. 1, Tab 4.

73 *Creative Salmon Co. Inc. v. Staniford*, 2009 BCCA 61 at paras. 56-61, *leave to appeal ref'd*, 2009 CanLII 34733 (SCC), WF's RBOA, Vol. 2, Tab 11.

motivated the Catalyst Defendants' vendetta against the West Face Parties, it is impossible for the Catalyst Defendants to rely upon the defences referred to above at this stage of these proceedings.

D. The Public Interest Weighs in Favour of the Counterclaim Proceeding Intact

50. Finally, the West Face Parties must establish on a balance of probabilities that the harm they are likely to have suffered as a result of the conduct engaged in by the Catalyst Defendants in publishing the Statements is sufficiently serious that the public interest in permitting the Counterclaim to continue outweighs the deleterious effects on expression associated with the Four Statements. As noted by the Supreme Court: (i) harm is not limited to monetary harm, is not synonymous with damages, and is presumed in cases of defamation; (ii) in conducting this weighing exercise, the Court must consider carefully the quality of the expression at issue as well as the motivation of the party that issued it; and (iii) the task of the Court is *not* to balance abstract public interests against one another but to carefully weigh which interest is more deserving of protection in the unique context of this particular proceeding.[74]

51. The Catalyst Defendants attempt to minimize the harm its malicious campaign has wrought upon West Face and Boland by asking the Court to focus solely on the incremental harm caused by the Four Statements, considered in isolation. This is hardly an appropriate approach. The Four Statements, and the harm they caused, cannot be viewed on a standalone basis. Instead, they must be considered as inextricable components of a years-long campaign to lay ruin to West Face and Boland's investment management firm through the dissemination of repeated allegations of misconduct and impropriety.

52. Boland explained that to succeed in a competitive investment landscape, West Face must have: "(a) confidence from existing and potential investors, (b) trust from members of the investment

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[74] *Bent*, at paras. 139-144, 146-150, 163-164 & 169-174 WF's RBOA, Vol. 1, Tab 2; and Joint Memo of Law at paras. 36-50.

community, and (c) the ability to retain and attract top level investment personnel".[75] The Catalyst Defendants readily acknowledge that a fund manager's reputation for propriety is essential to its ability to succeed. Indeed, Glassman conceded in cross-examination that an "unblemished reputation for honesty and integrity and proper business conduct" is "critical for anyone that manages money".[76]

53. Through the Four Statements made in mainstream channels and to hundreds of investors, Black Cube's unlawful Stings, Psy Group's campaign of online defamation, and the widespread publication of Catalyst's repeated Claims against West Face and Boland in persistent, vexatious and abusive litigation, the Catalyst Defendants have taken direct aim at all of those necessary components for success.[77] The honesty, capability and character of West Face and Boland have been savaged. The inevitable and intended result was to undermine trust and confidence from the investment community and ruin West Face's ability to retain and attract investors.[78] As Boland noted, after Catalyst's attacks began, investors shunned West Face. They explained that they "simply could not invest with West Face while Catalyst's allegations [including those in the Four Statements] hung over our firm and me".[79] The Catalyst Defendants also made it impossible for West Face to retain a roster of top investment personnel – few individuals want to endanger their professional reputations and jeopardize their personal security and privacy by putting themselves in Glassman's crosshairs by working for his perceived arch-nemesis.[80]

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75 Responding Boland Affidavit, para. 150, WF's RMR, Vol. 1, Tab 1, p. 74.

76 See, *inter alia*, the "guiding principles" of Catalyst, touted on page 29 of the very same Q2 2017 Investor Letters in which West Face and Boland are defamed. See also the Expert Report of Catalyst's expert Mark Sunshine, which notes that confidence and reputation are of "foundational importance" (Sunshine Expert Report at 5.2, Catalyst's Responding MR, Vol. 3, Tab 4-1, p. 7249); Glassman Cross-Exam 2021-05-04, pp. 517-518, q. 1063, WF's 3rd Supp. MR, Vol. 2, Tab 5, pp. 584-585.

77 A full description of the harm suffered by West Face is included in Boland's Responding Affidavit at paras. 114-152, WF's RMR, Vol. 1, Tab 1, pp. 58-75).

78 See, *e.g.*, Boland's description of his inability to raise capital for a new fund as a direct result of the conduct of the Catalyst Parties. Boland estimates the loss of approximately $200 million in relation to just this aspect of the damage inflicted by the Catalyst Parties. Responding Boland Affidavit, paras. 135-149, WF's RMR, Vol. 1, Tab 1, pp. 69-74.

79 Responding Boland Affidavit, para. 139, WF's RMR, Vol. 1, Tab 1, p. 70.

80 Responding Boland Affidavit, para. 151, WF's RMR, Vol. 1, Tab 1, p. 75.

54. Weighed against the harm suffered by the West Face Parties is the right of the Catalyst Defendants to have made the impugned Statements. These Statements are barely deserving of protection. They were deliberately false and misleading, included gratuitous personal attacks against the West Face Parties and against Justice Newbould, and were fueled by malice. Moreover, they were components of the larger, insidious Scheme pleaded in the Counterclaim. This Court – and the public interest – cannot value what the Catalyst Defendants have done over the right of West Face and Boland's right to seek relief in respect of the full gamut of that conduct.

55. The Catalyst Parties' Motion should be dismissed. Not only have West Face and Boland clearly established the substantial merit of their claims and the absence of any valid defences, but the weighing exercise mandated by s. 137.1(4)(b) unquestionably favours the continuance of their action. In cases that are far less clear-cut than the current proceeding, anti-SLAPP motions have been rejected on these very same grounds.[81]

PART IV ~ ORDER REQUESTED

56. West Face and Boland respectfully request that this Honourable Court make an Order dismissing the Catalyst Defendants' Motion with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 12th day of May, 2021

[81] See, *e.g.*, *Bent*, paras. 90, 92, 100, 101, 120, 132, 138-144, 146-150 & 169-174, WF's RBOA, Vol. 1, Tab 2; *Subway Franchise Systems, Inc. v. C.B.C.*, 2021 ONCA 26 at paras. 1, 12, 64-75, 80-87 & 94-105, WF's RBOA, Vol. 3, Tab 22; *Nanda v. McEwan*, 2020 ONCA 431 at paras. 52-57, WF's RBOA, Vol. 3, Tab 21; *LIUNA, Local 183 v. Castellano*, 2020 ONCA 71 at paras. 11-14, WF's RBOA, Vol. 3, Tab 19; *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246 at paras. 28-50, *leave to appeal ref'd*, 2019 CanLII 94477 (SCC), WF's RBOA, Vol. 3, Tab 20; *Levant v. Day*, 2019 ONCA 244 at paras. 1 & 13-24, *leave to appeal ref'd*, 2019 CanLII 101530 (SCC), WF's RBOA, Vol. 3, Tab 18; *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163 at paras. 31-44, *leave to appeal ref'd,* 2020 CanLII 76226 (SCC), WF's RBOA, Vol. 3, Tab 17; and *Bondfield Construction Co. v. Globe and Mail Inc.*, 2019 ONCA 166 at paras. 3, 15-19 & 23-28, WF's RBOA, Vol. 1, Tab 3.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *1704604 Ontario Ltd. v. Pointes Protection Association*, 2020 SCC 22
2. *Bent v. Platnick,* 2020 SCC 23
3. *Bondfield Construction Co. v. Globe and Mail Inc*., 2019 ONCA 166
4. *Botiuk v. Toronto Free Press Publications Ltd.,* [1995] 3 S.C.R. 3
5. *Bucknol v. 2280882 Ontario Inc*., 2018 CarswellOnt 15474 (S.C.J.)
6. *Canadian National Railway Company v. Holmes*, 2014 ONSC 593
7. *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, *further reasons at* 2016 ONSC 6285, *aff'd* 2018 ONCA 283, *further reasons at* 2018 ONCA 447, *leave to appeal ref'd*, [2018] S.C.C.A. No. 295
8. *Catalyst Capital Group Inc. v. VimpelCom Ltd*., 2018 ONSC 2471, *aff'd* 2019 ONCA 354, *leave to appeal ref'd*, [2019] S.C.C.A. No. 284
9. *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 125, *leave to appeal ref'd*, 2021 ONSC 2061 (Div. Ct.)
10. *Catalyst Capital Group Inc. v. West Face Capital Inc.*, 2021 ONSC 1140, *leave to appeal ref'd*, 2021 ONSC 2072 (Div. Ct.)
11. *Creative Salmon Co. Inc. v. Staniford*, 2009 BCCA 61, *leave to appeal ref'd*, 2009 CanLII 34733 (SCC)
12. *Dyce v. Lyons-Batstone*, 2012 ONSC 490, *aff'd*, 2012 ONCA 553 *and* 2012 ONCA 626
13. *Grant v. Torstar Corp.*, 2009 SCC 61
14. *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, *leave to appeal ref'd*, 2011 CanLII 43420 (SCC)
15. *Hill v. Church of Scientology*, [1995] 2 S.C.R. 1130
16. *Ho v. Ming Pao Newspapers (Western Canada) Ltd.*, 2000 BCSC 8
17. *Lascaris v. B'nai Brith Canada*, 2019 ONCA 163, *leave to appeal ref'd,* 2020 CanLII 76226 (SCC)
18. *Levant v. Day*, 2019 ONCA 244, *leave to appeal ref'd*, 2019 CanLII 101530 (SCC)
19. *LIUNA, Local 183 v. Castellano*, 2020 ONCA 71

20. *Montour v. Beacon Publishing Inc.*, 2019 ONCA 246, *leave to appeal ref'd*, 2019 CanLII 94477 (SCC)

21. *Nanda v. McEwan*, 2020 ONCA 431

22. *Subway Franchise Systems, Inc. v. C.B.C.*, 2021 ONCA 26

23. *WIC Radio Ltd. v. Simpson*, 2008 SCC 40

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. ***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 137.1**

Prevention of Proceedings that Limit Freedom of Expression on Matters of Public Interest (Gag Proceedings)

Dismissal of proceeding that limits debate

Purposes

137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action.

Definition, "expression"

[137.1](2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity.

Order to dismiss

[137.1](3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest.

No dismissal

[137.1](4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

No further steps in proceeding

[137.1](5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

No amendment to pleadings

[137.1](6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

Costs on dismissal

[137.1](7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances.

Costs if motion to dismiss denied

[137.1](8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances.

Damages

[137.1](9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

2. ***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 138**

Multiplicity of proceedings

138 As far as possible, multiplicity of legal proceedings shall be avoided.

3. ***Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 140**

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,

That judge may order that,

(a) no further proceeding be instituted by the person in any court; or

(b) 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.

4. ***Libel and Slander Act*, R.S.O. 1990, c. L.12**

Definitions

1(1) In this Act,

"broadcasting" means the dissemination of writing, signs, signals, pictures and sounds of all kinds, intended to be received by the public either directly or through the medium of relay stations, by means of,

(a) any form of wireless radioelectric communication utilizing Hertzian waves, including radiotelegraph and radiotelephone, or

(b) cables, wires, fibre-optic linkages or laser beams,

and "broadcast" has a corresponding meaning; ("radiodiffusion ou télédiffusion", "radiodiffuser ou télédiffuser")

"newspaper" means a paper containing public news, intelligence, or occurrences, or remarks or observations thereon, or containing only, or principally, advertisements, printed for distribution to the public and published periodically, or in parts or numbers, at least twelve times a year. ("journal").

Meaning of words extended

[1](2) Any reference to words in this Act shall be construed as including a reference to pictures, visual images, gestures and other methods of signifying meaning.

Libel

What constitutes libel

2 Defamatory words in a newspaper or in a broadcast shall be deemed to be published and to constitute libel. R.S.O. 1990, c. L.12, s. 2.

Privileged reports

3 (1) A fair and accurate report in a newspaper or in a broadcast of any of the following proceedings that are open to the public is privileged, unless it is proved that the publication thereof was made maliciously:

1. The proceedings of any legislative body or any part or committee thereof in the British Commonwealth that may exercise any sovereign power acquired by delegation or otherwise.

2. The proceedings of any administrative body that is constituted by any public authority in Canada.

3. The proceedings of any commission of inquiry that is constituted by any public authority in the Commonwealth.

4. The proceedings of any organization whose members, in whole or in part, represent any public authority in Canada.

Idem

[3](2) A fair and accurate report in a newspaper or in a broadcast of the proceedings of a meeting lawfully held for a lawful purpose and for the furtherance of discussion of any matter of public concern, whether the admission thereto is general or restricted, is privileged, unless it is proved that the publication thereof was made maliciously.

Publicity releases

[3](3) The whole or a part of a fair and accurate synopsis in a newspaper or in a broadcast of any report, bulletin, notice or other document issued for the information of the public by or on behalf of any body, commission or organization mentioned in subsection (1) or any meeting mentioned in subsection (2) is privileged, unless it is proved that the publication thereof was made maliciously.

Decisions, etc., of certain types of association

[3](4) A fair and accurate report in a newspaper or in a broadcast of the findings or decision of any of the following associations, or any part or committee thereof, being a finding or decision relating to a person who is a member of or is subject, by virtue of any contract, to the control of the association, is privileged, unless it is proved that the publication thereof was made maliciously:

1. An association formed in Canada for the purpose of promoting or encouraging the exercise of or interest in any art, science, religion or learning, and empowered by its constitution to exercise control over or adjudicate upon matters of interest or concern to the association, or the actions or conduct of any persons subject to such control or adjudication.

2. An association formed in Canada for the purpose of promoting or safeguarding the interests of any trade, business, industry or profession, or of the persons carrying on or engaged in any trade, business, industry or profession, and empowered by its constitution to exercise control over or adjudicate upon matters connected with the trade, business, industry or profession.

3. An association formed in Canada for the purpose of promoting or safeguarding the interests of any game, sport or pastime to the playing or exercising of which members of the public are invited or admitted, and empowered by its constitution to exercise control over or adjudicate upon persons connected with or taking part in the game, sport or pastime.

Improper matter

[3](5) Nothing in this section authorizes any blasphemous, seditious or indecent matter in a newspaper or in a broadcast.

Saving

[3](6) Nothing in this section limits or abridges any privilege now by law existing or protects the publication of any matter not of public concern or the publication of which is not for the public benefit.

When defendant refuses to publish explanation

[3](7) The protection afforded by this section is not available as a defence in an action for libel if the plaintiff shows that the defendant refused to insert in the newspaper or to broadcast, as the case may be, a reasonable statement of explanation or contradiction by or on behalf of the plaintiff.

Report of proceedings in court

4 (1) A fair and accurate report without comment in a newspaper or in a broadcast of proceedings publicly heard before a court of justice, if published in the newspaper or broadcast contemporaneously with such proceedings, is absolutely privileged unless the defendant has refused or neglected to insert in the newspaper in which the report complained of appeared or to broadcast, as the case may be, a reasonable statement of explanation or contradiction by or on behalf of the plaintiff.

Improper matter

[4](2) Nothing in this section authorizes any blasphemous, seditious or indecent matter in a newspaper or in a broadcast.

Notice of action

5 (1) No action for libel in a newspaper or in a broadcast lies unless the plaintiff has, within six weeks after the alleged libel has come to the plaintiff's knowledge, given to the defendant notice in writing, specifying the matter complained of, which shall be served in the same manner as a statement of claim or by delivering it to a grown-up person at the chief office of the defendant.

Where plaintiff to recover only actual damages

[5](2) The plaintiff shall recover only actual damages if it appears on the trial,

(a) that the alleged libel was published in good faith;

(b) that the alleged libel did not involve a criminal charge;

(c) that the publication of the alleged libel took place in mistake or misapprehension of the facts; and

(d) that a full and fair retraction of any matter therein alleged to be erroneous,

(i) was published either in the next regular issue of the newspaper or in any regular issue thereof published within three days after the receipt of the notice mentioned in subsection (1) and was so published in as conspicuous a place and type as was the alleged libel, or

(ii) was broadcast either within a reasonable time or within three days after the receipt of the notice mentioned in subsection (1) and was so broadcast as conspicuously as was the alleged libel.

Case of candidate for public office

[5](3) This section does not apply to the case of a libel against any candidate for public office unless the retraction of the charge is made in a conspicuous manner at least five days before the election.

Limitation of action

6 An action for a libel in a newspaper or in a broadcast shall be commenced within three months after the libel has come to the knowledge of the person defamed, but, where such an action is brought within that period, the action may include a claim for any other libel against the plaintiff by the defendant in the same newspaper or the same broadcasting station within a period of one year before the commencement of the action.

Application of ss. 5 (1), 6

7 Subsection 5 (1) and section 6 apply only to newspapers printed and published in Ontario and to broadcasts from a station in Ontario.

Publication of name of publisher, etc.

8 (1) No defendant in an action for a libel in a newspaper is entitled to the benefit of sections 5 and 6 unless the names of the proprietor and publisher and the address of publication are stated either at the head of the editorials or on the front page of the newspaper.

Copy of newspaper to be admissible evidence

[8](2) The production of a printed copy of a newspaper is admissible in evidence as proof, in the absence of evidence to the contrary, of the publication of the printed copy and of the truth of the statements mentioned in subsection (1).

Where ss. 5, 6 not to apply

[8](3) Where a person, by registered letter containing the person's address and addressed to a broadcasting station, alleges that a libel against the person has been broadcast from the station and requests the name and address of the owner or operator of the station or the names and addresses of the owner and the operator of the station, sections 5 and 6 do not apply with respect to an action by such person against such owner or operator for the alleged libel unless the person whose name and address are so requested delivers the requested information to the first-mentioned person, or mails it by registered letter addressed to the person, within ten days from the date on which the first-mentioned registered letter is received at the broadcasting station.

Newspaper libel, plea in mitigation of damages

9 (1) In an action for a libel in a newspaper, the defendant may plead in mitigation of damages that the libel was inserted therein without actual malice and without gross negligence and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant inserted in such newspaper a full apology for the libel or, if the newspaper in which the libel appeared is one ordinarily published at intervals exceeding one week, that the defendant offered to publish the apology in any newspaper to be selected by the plaintiff.

Broadcast libel, plea in mitigation of damages

[9](2) In an action for a libel in a broadcast, the defendant may plead in mitigation of damages that the libel was broadcast without actual malice and without gross negligence and that before the commencement of the action, or at the earliest opportunity afterwards, the defendant broadcast a full apology for the libel.

Evidence in mitigation of damages

10 In an action for a libel in a newspaper or in a broadcast, the defendant may prove in mitigation of damages that the plaintiff has already brought action for, or has recovered damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as that for which such action is brought.

Consolidation of different actions for same libel

11 (1) The court, upon an application by two or more defendants in any two or more actions for the same or substantially the same libel, or for a libel or libels the same or substantially the same in different newspapers or broadcasts, brought by the same person or persons, may make an order for the consolidation of such actions so that they will be tried together, and, after such order has been made and before the trial of such actions, the defendants in any new actions instituted by the same person or persons in respect of any such libel or libels are also entitled to be joined in the common action upon a joint application being made by such new defendants and the defendants in the actions already consolidated.

Assessment of damages and apportionment of damages and costs

[11](2) In a consolidated action under this section, the jury shall assess the whole amount of the damages, if any, in one sum, but a separate verdict shall be taken for or against each defendant in the same way as if the actions consolidated had been tried separately, and, if the jury finds a verdict against the defendant or defendants in more than one of the actions so consolidated, the jury shall apportion the amount of the damages between and against the last-mentioned defendants, and the judge at the trial, in the event of the plaintiff being awarded the costs of the action, shall thereupon make such order as he or she considers just for the apportionment of the costs between and against such defendants.

Application

[11](3) This section does not apply where the libel or libels were contained in an advertisement.

Security for costs

12 (1) In an action for a libel in a newspaper or in a broadcast, the defendant may, at any time after the delivery of the statement of claim or the expiry of the time within which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant or the defendant's agent showing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given in favour of the defendant, that the defendant has a good defence on the merits and that the statements complained of were made in good faith, or that the grounds of action are trivial or frivolous, and the court may make an order for the plaintiff to give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order is a stay of proceedings until the security is given.

Where libel involves a criminal charge

[12](2) Where the alleged libel involves a criminal charge, the defendant is not entitled to security for costs under this section unless the defendant satisfies the court that the action is trivial or frivolous, or that the circumstances which under section 5 entitle the defendant at the trial to have the damages restricted to actual damages appear to exist, except the circumstances that the matter complained of involves a criminal charge.

Examination of parties

[12](3) For the purpose of this section, the plaintiff or the defendant or their agents may be examined upon oath at any time after the delivery of the statement of claim.

Order of judge respecting security final

13 An order made under section 12 is final and is not subject to appeal.

Verdicts

14 On the trial of an action for libel, the jury may give a general verdict upon the whole matter in issue in the action and shall not be required or directed to find for the plaintiff merely on proof of publication by the defendant of the alleged libel and of the sense ascribed to it in the action, but the court shall, according to its discretion, give its opinion and directions to the jury on the matter in issue as in other cases, and the jury may on such issue find a special verdict, if they think fit so to do, and the proceedings after verdict, whether general or special, shall be the same as in other cases.

Agreements for indemnity

15 An agreement for indemnifying any person against civil liability for libel is not unlawful.

Slander

Slander affecting official, professional or business reputation

16 In an action for slander for words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication thereof, it is not necessary to allege or prove special damage, whether or not the words are spoken of the

plaintiff in the way of the plaintiff's office, profession, calling, trade or business, and the plaintiff may recover damages without averment or proof of special damage.

Slander of title, etc.

17 In an action for slander of title, slander of goods or other malicious falsehood, it is not necessary to allege or prove special damage,

(a) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff and are published in writing or other permanent form; or

(b) if the words upon which the action is founded are calculated to cause pecuniary damage to the plaintiff in respect of any office, profession, calling, trade or business held or carried on by the plaintiff at the time of the publication,

and the plaintiff may recover damages without averment or proof of special damage.

Security for costs

18 (1) In an action for slander, the defendant may, at any time after the delivery of the statement of claim or the expiry of the time within which it should have been delivered, apply to the court for security for costs, upon notice and an affidavit by the defendant or the defendant's agent showing the nature of the action and of the defence, that the plaintiff is not possessed of property sufficient to answer the costs of the action in case judgment is given in favour of the defendant, that the defendant has a good defence on the merits, or that the grounds of action are trivial or frivolous, and the court may make an order for the plaintiff to give security for costs, which shall be given in accordance with the practice in cases where a plaintiff resides out of Ontario, and the order is a stay of proceedings until the security is given. R.S.O. 1990, c. L.12, s. 18 (1).

Examination of parties

[18](2) For the purpose of this section, the plaintiff or the defendant may be examined upon oath at any time after the delivery of the statement of claim.

Libel and Slander

Averments

19 In an action for libel or slander, the plaintiff may aver that the words complained of were used in a defamatory sense, specifying the defamatory sense without any prefatory averment to show how the words were used in that sense, and the averment shall be put in issue by the denial of the alleged libel or slander, and, where the words set forth, with or without the alleged meaning, show a cause of action, the statement of claim is sufficient.

Apologies

20 In an action for libel or slander where the defendant has pleaded a denial of the alleged libel or slander only, or has suffered judgment by default, or judgment has been given against the defendant on motion for judgment on the pleadings, the defendant may give in evidence, in mitigation of damages, that the defendant made or offered a written apology to the plaintiff for such libel or slander before the commencement of the action, or, if the action was commenced before there was

an opportunity of making or offering such apology, that the defendant did so as soon afterwards as the defendant had an opportunity.

Plaintiff's character or circumstances of publication

21 In an action for libel or slander, where the statement of defence does not assert the truth of the statement complained of, the defendant may not give evidence in chief at trial, in mitigation of damages, concerning the plaintiff's character or the circumstances of publication of the statement, except,

(a) where the defendant provides particulars to the plaintiff of the matters on which the defendant intends to give evidence, in the statement of defence or in a notice served at least seven days before trial; or

(b) with leave of the court.

Justification

22 In an action for libel or slander for words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Fair comment

23 In an action for libel or slander for words consisting partly of allegations of fact and partly of expression of opinion, a defence of fair comment shall not fail by reason only that the truth of every allegation of fact is not proved if the expression of opinion is fair comment having regard to such of the facts alleged or referred to in the words complained of as are proved.

Fair comment

24 Where the defendant published defamatory matter that is an opinion expressed by another person, a defence of fair comment by the defendant shall not fail for the reason only that the defendant or the person who expressed the opinion, or both, did not hold the opinion, if a person could honestly hold the opinion.

Communications on Public Interest Matters

Application of qualified privilege

25 Any qualified privilege that applies in respect of an oral or written communication on a matter of public interest between two or more persons who have a direct interest in the matter applies regardless of whether the communication is witnessed or reported on by media representatives or other persons.

THE CATALYST CAPITAL GROUP INC. et al. Plaintiffs	-and-	WEST FACE CAPITAL INC. et al. Defendants	-and-	CANACCORD GENUITY CORP. Third Party
WEST FACE CAPITAL INC. et al. Plaintiffs by Counterclaim	-and-	THE CATALYST CAPITAL GROUP INC. et al. Defendants to the Counterclaim		

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

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