Court of Appeal File No. C__________

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

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

AND BETWEEN

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim
(Respondents)

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 PSY GROUP INC.

Defendants by Counterclaim
(Appellants)

NOTICE OF APPEAL OF THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORTATION, NEWTON GLASSMAN, GABRIEL DE ALBA and JAMES RILEY
(Counterclaim Anti-SLAPP Motion)

The Catalyst Capital Group Inc.("Catalyst"), Callidus Capital Corporation ("Callidus"), Newton Glassman, Gabriel De Alba and James Riley (cumulatively the "Appellants") appeal to the Court of Appeal from the Order of the Honourable Justice T. McEwen (the "Motions Judge") dated December 2, 2021, made at Toronto, Ontario (the "Counterclaim Order") dismissing the Appellants' Counterclaim anti-SLAPP Motion, brought pursuant to Section 137.1 of the *Courts of Justice Act* ("CJA") in respect of claims against the Appellants based on four allegedly defamatory communications advanced in the Counterclaim by West Face Capital Inc. and Gregory Boland (the "West Face Claimants").

The Appellants request that the Order be set aside and that an order be granted:

1. allowing the Appellants' Counterclaim anti-SLAPP motion in respect of the claims specified in their Notice of Motion dated December 5, 2019, namely the four allegedly defamatory communications which the Motions Judge identified in paragraph 475 of his Reasons for Decision:

> "(a) a written statement by a spokesperson of ***Catalyst***, published in an August 19, 2016 *National Post* article (the "August 2016 Written Statement");
>
> (b) a Press Release by ***Catalyst*** issued October 13, 2016 (the "October 2016 Press Release");
>
> (c) a letter sent by ***Catalyst*** to certain Limited Partners to Funds managed by Catalyst, dated August 14, 2017 (the "First Investor Letter"); and,
>
> (d) a confidential letter sent on March 18, 2018 by ***Catalyst*** to certain of its Limited Partners, portions of which were published on April 18, 2018 by *The Globe and Mail* (the "Second Investor Letter")." (bolding and italics added)

2. ordering that the proceeding based upon the above expressions be dismissed;

3. granting the Appellants their costs of this appeal and the costs of their Counterclaim anti-SLAPP Motion below or, alternatively, in the cause;

4. such further and other relief as this Honourable Court permits.

THE GROUNDS OF APPEAL are as follows:

A. <u>Errors in the Ratio of the Motions Judge's Decision</u>

1. The Motions Judge held that it was "improper' for the Catalyst Parties to proceed with an anti-SLAPP Motion with respect to the four allegedly defamatory statements specified above, because their Counterclaim anti-SLAPP Motion did not apply to ***all*** of the ***other*** claims being advanced in the Counterclaim. According to the Motions Judge, the trial judge would have to consider whether the Appellants were liable for "other alleged defamatory comments", and as a consequence, their ***partial*** Counterclaim anti-SLAPP Motion "is not permitted".

2. In so holding, the Motions Judge committed several extricable errors of law:

   (1) The Motions Judge failed to follow the decision of the Ontario Court of Appeal Court in *Subway Franchise Systems of Canada, Inc.* v. *Canadian Broadcasting Corporation,* 2021 ONCA 25 and 2021 ONCA 26;

   (2) The Motions Judge erred in law by failing to recognize or give effect to the principle that each of the four allegedly defamatory communications constituted a separate cause of action, whether or not ***other*** viable claims were also alleged in the Counterclaim;

   (3) The Motions Judge also failed to recognize or give effect to the case law that establishes that in order to bring an anti-SLAPP Motion, the moving party must acknowledge being the author of the alleged expressions;

   (4) In the case at bar, the Appellants acknowledged that they had authored the four expressions in issue, but denied being the author of numerous ***other*** allegedly

defamatory expressions pleaded in the West Face Claimants' Counterclaim. Consequently, under the existing case law, the Appellants could not have advanced an anti-SLAPP Motion in respect of those ***other*** expressions;

(5) As a result, the practical implication of the Motions Judge's decision is that in a case where there are multiple defendants and numerous allegations of actionable defamatory communications, unless a given defendant acknowledges that it was the author of ***all*** of the communications in issue, that defendant has no capacity to bring an anti-SLAPP Motion.

3. The above conclusions and holdings are a departure from the existing case law. They create, if left uncorrected, significant and inappropriate limitations to the anti-SLAPP regime, which are contrary to established principles and the applicable statutory provisions.

B. Errors in the Alternative Holdings by the Motions Judge

4. In the alternative, the Motions Judge went on to consider whether the Appellants' Counterclaim anti-SLAPP Motion would have been successful, in case he had erred in holding that their ***partial*** anti-SLAPP Motion was improper and impermissible.

5. In this alternative analysis, the Motions Judge made several reversible errors. The errors committed by the Motions Judge included errors of law and mixed fact and law, misapprehensions of the Record, reliance upon irrelevant factors, failure to give effect to circumstances which were material to the issues, and the issuance of reasons which were internally inconsistent and contradictory in several respects.

6. These errors include the manner in which the Motions Judge dealt with the four communications in issue:

   (1) The Motions Judge erred in law by addressing and determining the potential outcome of the Appellants' Counterclaim anti-SLAPP Motion ***collectively***, instead of assessing the issues singly, having regard to the particular context and circumstances applicable to each of the four alleged defamatory statements.

   (2) The Motions Judge erred in law by holding, in substance, that statements by a losing party that they had filed a Notice of Appeal and believed that the trial Judge's decision was incorrect, are defamatory;

   (3) In arriving at this result, the Motions Judge analyzed ***all four*** of the alleged defamatory ***communications together***, and held that there were grounds to believe the West Face Claimants had a real prospect of success in respect of these communications. The Motions Judge reached this conclusion on the following basis:

> "[500] In my view, there are grounds to believe that there is indeed a "real prospect" that the West Face Parties will be able to satisfy the first element of defamation at trial. As I noted above, each of the statements at issue here essentially accuse the West Face Parties of having been engaged in unethical and unlawful business practices. <u>Despite Justice Newbould's prior ruling against Catalyst, in its statements Catalyst suggests that Justice Newbould was incorrect to reach this conclusion and that he may have been biased against Catalyst. In light of this, Catalyst's Four Statements urge the reader to disregard Justice Newbould's decision</u>.
>
> [501] Such statements are clearly capable of lowering the reputation of the West Face Parties. This is unlike the Defamation Action, where the Dow Jones Defendants merely reported that others had made allegations of wrongdoing against the Catalyst Parties that had yet to be proven. Rather, <u>in this case, Catalyst is essentially saying that Justice Newbould's decision was incorrect</u>

and that, as a result, there are still grounds for thinking that the West Face Parties were engaged in improper business practices." (underlining added)

(4) The Motions Judge further erred in law by failing to conduct an analysis of the individual claims against ***each*** of the Appellants, and the potential defences that each Appellant could assert. Instead, the Motions Judge dealt with the four claims against the Appellants ***together***, without any differentiation or separate analysis.

(5) This approach was an extricable error of law and failed to reflect that (i) the Record did not support any claims against Callidus in respect of the four expressions which were the subject of the Counterclaim anti-SLAPP Motion; (ii) there was no ***evidence*** on the Record supporting the ***personal*** claims advanced against James Riley or Gabriel De Alba, and, (iii) insofar as the Defendant Newton Glassman was concerned, the substance of the four allegedly defamatory communications was that the West Face Claimants were part of a wrongful conspiracy, which the Motions Judge had concluded was a meritorious allegation.

(6) The Motions Judge erred in law by failing to consider these circumstances, both in his assessment of the merits of the Counterclaim and the potential defences applicable to ***each*** Appellant, and by failing to consider them in his weighing of the public interest in relation to the Counterclaim.

7. The above holdings are also erroneous in law because they do not properly reflect the legal tests applicable to the claim of defamation. In addition, they create a significant and inappropriate constraint to and a chill upon a litigant's ability to comment on a court's adverse decision: the ability to express such views is an important right of expression in relation to the

judicial system. The Motions Judge erred in law in failing to recognise the importance of these expressions.

8. Further, and in any event, the above holdings are inconsistent with the recognized rights of a litigant to challenge (and to criticize) rulings of the Court. They are an erroneous infringement of the Appellants' rights under section 2(b) of the *Charter of Rights and Freedoms*.

9. The Motions Judge erred in law by holding that the West Face Claimants had met the onus of establishing damages, and reached this conclusion in a manner that is contrary to the principles set out in recent decisions issued by the Supreme Court of Canada.

10. In this regard, the Record contained detailed cogent evidence which demonstrated that the decline in the West Face Claimants' business, and their inability to attract new investors predated the impugned expressions and had no causal connection to the four expressions which were the subject of the Appellants' Counterclaim anti-SLAPP Motion, including:

    (1) West Face had a multi-year track record of poor returns in the funds which it managed;

    (2) West Face had recognized that its business model and investment practices and strategies were flawed;

    (3) West Face had issued reports to its investors which acknowledged its flawed investment model and strategies, and,

    (4) the funds managed by the West Face had been subject to extensive investor redemptions, and had experienced a significant decline in the assets under management, at a time and in circumstances that had no connection to the four

allegedly defamatory communications that were the subject of the Appellants' Counterclaim anti-SLAPP Motion.

11. In these circumstances, the Motions Judge was required to conduct an appropriate analysis of the damages claims being advanced in the Counterclaim to determine whether sufficient grounds existed to establish both (i) the existence of actionable harm and (ii) that the alleged harm had been sustained ***as a result*** of the impugned expressions, in accordance with the principles set out, inter alia, by the Supreme Court of Canada in *1704604 Ontario Limited v. Pointes Protection Association*, 2020 SCC 22 and *Bent v. Platnick*, 2020 SCC 23.

12. The only evidence adduced by the West Face Claimants consisted of mere bald anecdotal assertions that were unsupported by any documentary evidence regarding the extent of the alleged damages, and that did not address the causation issues raised by the aspects of the Record referred to above. Despite the above, the Motions Judge did not conduct the analysis of the causation issues required by the case law. Instead, the Motions Judge expressed a conclusionary opinion in which he stated, without analysis, that "it was fair to conclude" that West Face had suffered damages as a result of the impugned expressions. This approach is an extricable error of law warranting review by this Court.

13. The Motions Judge also erred in law in his determination there are grounds to believe that the Appellants have no defences to the claims advanced based on the four expressions in issue.

14. In arriving at this conclusion, the Motions Judge proceeded on the basis that the reference in the impugned expressions to "additional evidence" related ***solely*** to evidence which had emerged ***after*** the decision of the Trial Judge in the Moyse case, and that the ***only*** additional evidence relied upon by the Appellants statements and communications involving a person

identified as "Vincent Hanna". The Motions Judge's analysis of this issue erroneously failed to take into account his own findings that the Record supported that there were real and substantive grounds to believe that a conspiracy existed (including the West Face Claimants) to harm Catalyst—which was consistent with the substance of the "Vincent Hanna" communications that the Motions Judge criticized. In addition, the Motion Judge's analysis erroneously failed to consider or give effect to extensive material "additional evidence" that had come to light ***after*** the commencement of the Moyse action. These omissions from the Motions Judge's analysis are extricable errors of law.

15. The Motions Judge also erred in law by failing to recognize or give effect to evidence in the Record which was highly material to the truth of the four allegedly defamatory expressions. Their accuracy was evidenced by extensive documentary evidence, including statements made (and acknowledged to be true) by former senior executives of West Face itself.

16. The Motions Judge further erred in law by failing to recognize or give effect to the fiduciary duties which Catalyst owed to inform investors in the funds it manages about the status of the litigation with West Face and about the context and circumstances relevant to the allegations of fraud, accounting improprieties and other misconduct which were published as a result of the conspiracy against Catalyst. This error was aggravated by the Motions Judge's failure to give effect to the fact that the impugned investor communications were made pursuant to that duty. In addition, the Motions Judge erred in law by failing to consider or recognize that Catalyst had directed its investors to retain the letters to them in confidence, and that the contents of these communications were privileged: Catalyst had also stressed that it was important for its investors to maintain the privileged nature of the communications, and there

was an important common interest to respect these principles. These omissions are extricable errors of law.

17. Finally, the Motions Judge erred in law in the weighing exercise he undertook under section 137.1 (4)(b) of the CJA:

    (1) in this "weighing" analysis, the Motions Judge held that the "harm" allegedly suffered by the West Face Claimants was "sufficiently serious" to tilt his public interest analysis in their favour. This conclusion ignored the fact that the West Face Claimants' evidence of "harm" consisted of bald, narrative assertions without any ***documentary*** support and without a proper evidentiary basis to establish causation. The Motions Judge's analysis of the public interest was also based upon a holding that Catalyst's expressions were deserving of very little, if any, protection. This conclusion was erroneous in law – it ignored the fact that (i) these expressions were a litigant commenting on a public court proceeding; (ii) according to the Motions Judge, the gist of the impugned expressions by Catalyst accused the West Face Claimants of acting improperly, and that (iii) based upon the Motions Judge's findings with respect the causes of action advanced by the Appellants in the main action, there appears to be a substantial evidentiary basis to conclude that the West Face Claimants were indeed part of a continuing improper conspiracy against the Appellants;

    (2) failed to recognize or give effect to important evidence in the Record relating to the "out of court conduct" of the Appellants referred to in the Motions Judge's Reasons for Decision, which was material to the issues relating to the Counterclaim, and

which Justice Boswell had recognized could not be dealt with on the merits at this stage, and required evidentiary assessments and findings by a ***trial judge***, and,

(3) in finding in favor of the West Face Claimants under this provision in relation to the Counterclaim, the Motions Judge stated that he was relying on his comments in his analysis of the "Public Interest Hurdle in both the Defamation and Wolfpack Actions." For the reasons advanced in the appeals with respect to these parts of the Motions Judge's decision, that analysis contains several reviewable errors. These errors also taint the Motions Judge's conclusions with respect to the Counterclaim under section 137.1 (4)(b).

18. Such further grounds as counsel may advise and this Honourable Court may permit.

THE BASES OF THE APPELLATE COURT'S JURISDICTION ARE:

1. Section 6(1)(d) and 19(1.0.1) of the *Courts of Justice Act,* R.S.O. 1990 c.43.

2. Leave to appeal is not required.

January 3, 2022

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Court of Appeal File No. C__________
Superior Court File No. CV-17-587463-00CL

THE CATALYST CAPITAL GROUP et al. - and - WEST FACE CAPITAL INC. et al.
Plaintiffs (Appellants) Defendants (Respondents)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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