

Court of Appeal File No. \_\_\_\_\_  
Court File No. CV-17-587463-00CL

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and  
CALLIDUS CAPITAL CORPORATION

Plaintiffs (Appellants)

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 (Respondents)

**NOTICE OF CROSS-APPEAL  
OF THE RESPONDENTS, WEST FACE CAPITAL INC. AND GREGORY BOLAND**

**THE RESPONDENTS, WEST FACE CAPITAL INC. AND GREGORY BOLAND,**  
**CROSS-APPEAL** in this appeal and ask, if the appeal by The Catalyst Capital Group Inc.  
("Catalyst") and Callidus Capital Corporation ("Callidus") from the Order of the  
Honourable Justice McEwen (the "Motions Judge") dated December 2, 2021 (the  
"Order") is allowed in whole or in part, that:

1. The main action in these proceedings (the “**Wolfpack Action**”) be dismissed as against West Face Capital Inc. (“**West Face**”) and Gregory Boland (“**Boland**”), pursuant to section 137.1 of the *Courts of Justice Act* (the “**CJA**”);
2. West Face and Boland be awarded damages in an amount to be determined as against Catalyst and Callidus on the basis that the Wolfpack Action was brought against West Face and Boland in bad faith or for an improper purpose, pursuant to section 137.1(9) of the *CJA*;
3. The appeal be dismissed as against West Face and Boland on the following bases, and to the extent necessary that the Reasons for Decision of the Motions Judge be varied to provide that:
  - (a) there are *no* grounds to believe that the Wolfpack Action has substantial merit *as against West Face or Boland*;
  - (b) there *are* grounds to believe that West Face and Boland have valid defences to the claims made against them in the Wolfpack Action;
  - (c) there are *no* grounds to believe that any of West Face and Boland’s conduct was actuated by malice; and
  - (d) Catalyst and Callidus suffered *no* harm as a result *of the expressions made by West Face and Boland*;
4. West Face and Boland be awarded the costs of this cross-appeal; and
5. Such further and other relief as this Honourable Court permits.

**THE GROUNDS FOR THIS CROSS-APPEAL** are as follows:

6. The Motions Judge reached the correct result as a result of the public interest analysis under section 137.1 of the *CJA*. This Notice of Cross-Appeal is being filed solely out of an abundance of caution. West Face and Boland do not believe, as a matter of law, that they (or any other Respondent) are required to file a Notice of Cross-Appeal in order to preserve their right to maintain or make any argument on the appeal as to why the appeal should be dismissed and/or why the Order of the Motions Judge should not be set aside or varied. West Face and Boland are filing this Notice of Cross-Appeal solely to ensure that they will not be met with any argument by Catalyst and Callidus that West Face and Boland are somehow not permitted to raise the following arguments at the return of the appeal for why the *result* of the Motions Judge should be upheld.

**A. The Merits-Based Hurdle Under Section 137.1(4)(a)**

7. In his Reasons for Decision, the Motions Judge made two narrow errors of law that infected his reasoning:

- (a) By interpreting this Court's decision in *Rutman v. Rabinowitz*, 2018 ONCA 80 not to require all defendants' knowledge of and agreement to the alleged conspiracy, the Motions Judge erred in holding that West Face and Boland could be liable as joint tortfeasors in respect of torts they did not commit and for which Catalyst and Callidus failed to demonstrate the requisite elements of vis-à-vis West Face and Boland;
- (b) By interpreting the Supreme Court of Canada's direction in *1704604 Ontario Limited v. Pointes Protection Association*, 2002 SCC 22 to forbid motions

judges from conducting a “deep dive” into the full factual record on a motion under section 137.1 of the *CJA*, the Motions Judge erred in accepting the speculative and unsubstantiated allegations of Catalyst and Callidus over the sworn evidence put forward by West Face and Boland denying those allegations.

8. As a result of these two core errors of law, the Motions Judge made further errors of law and of mixed fact and law in respect of his analysis of the “**Merits Based Hurdle**” under section 137.1(4) of the *CJA*, in holding:

(a) under section 137.1(4)(a) of the *CJA*, that there were “grounds to believe” that the claims made in the Wolfpack Action had “substantial merit” as *against West Face and Boland*, in circumstances where there was no factual basis in the record of any wrongdoing by West Face and Boland, and where such claims have no real prospect of success as against West Face and Boland at trial; and

(b) under section 137.1(4)(b) of the *CJA*, that there were “grounds to believe” that West Face and Boland had no “valid defences” to the claims made against them in the Wolfpack Action.

(i) **There is No Substantial Merit to Catalyst’s and Callidus’s Claims of Defamation and Injurious Falsehood as Against West Face and Boland**

9. The Motions Judge erred in holding that there was “substantial merit” to Catalyst’s and Callidus’s claims of defamation and injurious falsehood as against West Face and Boland.

10. On the motion below, Catalyst and Callidus did not even *allege* that West Face and Boland had made any defamatory statements and/or injurious falsehoods. Their Affiant, James Riley, conceded in cross-examination that all of West Face and Boland's impugned email communications with the other Defendants concerning Catalyst and Callidus were unobjectionable.

11. Rather, Catalyst's and Callidus's claims for defamation and injurious falsehood as against West Face and Boland were based entirely on the statements published by the Wall Street Journal (the "**WSJ**") on August 9, 2017 (the "**WSJ Article**").

12. In both the "**Defamation Action**" and the Wolfpack Action, the Motions Judge correctly held that Catalyst and Callidus had failed to establish that their claims of defamation and injurious falsehood had "substantial merit" as against the "**Dow Jones Defendants**", including Rob Copeland ("**Copeland**").

13. Nevertheless, by incorrectly interpreting and applying *Rutman*, the Motions Judge erred in holding that because West Face and Boland had collected, exchanged and supplied true, accurate, fair and entirely public information about Catalyst and Callidus to other parties, and because Boland had had phone calls with some of the other Defendants, there was a "real prospect of success" that West Face and Boland could be held liable as joint tortfeasors of Jeffrey McFarlane ("**McFarlane**"), in respect of the allegedly defamatory and false statements made by McFarlane to Copeland that were quoted and published in the WSJ Article.

14. Further, by incorrectly applying *Pointes*, the Motions Judge disregarded the unequivocal sworn Affidavit evidence of West Face and Boland that while they had had

entirely proper communications with some of the other Defendants, they had no role whatsoever in the publication of the allegedly defamatory and/or falsely injurious statements made by others. The Motions Judge did not need to do a “deep dive” to accept this evidence and erred by accepting Catalyst and Callidus’s speculative allegations over this evidence.

15. For similar reasons, and again by incorrectly interpreting and applying *Rutman*, the Motions Judge erred in holding that West Face and Boland had no “valid defences” to the claims made against them in the Wolfpack Action.

16. Indeed, the Motions Judge held that because he had determined that McFarlane had no “valid defences” in respect of the alleged defamatory statements and injurious falsehoods made by McFarlane to Copeland and which were quoted and published in the WSJ Article, it followed that West Face and Boland also had no “valid defences” to the claims of defamation and injurious falsehood, even though none of West Face’s and Boland’s impugned expressions were even alleged to be defamatory or false.

**(ii) There is No Substantial Merit to Catalyst’s and Callidus’s Claims of Predominant Purpose and Unlawful Means Conspiracy as Against West Face and Boland**

17. The Motions Judge erred in holding that there was “substantial merit” to Catalyst’s and Callidus’s claims of defamation and injurious falsehood as against West Face and Boland.

18. The Motions Judge erred in holding that evidence of communications between West Face and Boland and the other Defendants constituted sufficient “grounds to

believe” that West Face and Boland had an agreement or common design with the other Defendants.

19. West Face and Boland (and all of the other Moving Defendants) unequivocally denied in sworn Affidavit evidence (which was not impeached despite extensive cross-examinations on those Affidavits) that there was any agreement or common design between them and any other party.

20. Again, by incorrectly applying *Pointes*, the Motions Judge disregarded the unequivocal sworn Affidavit evidence of West Face and Boland (and all of the other Wolfpack Defendants) that while they had had entirely proper communications, they had no agreement or common design. The Motions Judge did not need to do a “deep dive” to accept this evidence and erred by accepting Catalyst and Callidus’s speculative allegations over this evidence.

21. Moreover, in respect of the claim of unlawful means conspiracy, there were no reasonable grounds to believe that West Face and Boland had committed any unlawful act. Indeed, West Face and Boland were not even alleged to have made a defamatory statement or injurious falsehood, and while West Face and Boland were alleged to have participated and encouraged a “short selling” attack on Catalyst and Callidus, the uncontradicted sworn evidence was that West Face and Boland had not held a short position in Callidus’s shares for more than two years prior to the publication of the WSJ Article.

**(iii) There is No Substantial Merit to Catalyst’s and Callidus’s Unlawful Means Tort Claim as Against West Face and Boland**

22. The Motions Judge erred in holding that there was “substantial merit” to Catalyst’s and Callidus’s unlawful means tort claims as against West Face and Boland.

23. The Motions Judge’s analysis of the unlawful means tort was based on his flawed analysis of Catalyst and Callidus’s claims of defamation and predominant purpose conspiracy.

24. In particular, and by again incorrectly interpreting and applying *Rutman* (or an analogous analysis), the Motions Judge erred in holding that the alleged defamatory statements made by another Defendant (namely, McFarlane) could constitute “unlawful means” by West Face and Boland, simply because West Face and Boland had engaged in entirely proper communications with other Defendants.

25. Similarly, the Motions Judge erred in holding that West Face and Boland had the requisite intent to injure Catalyst’s and Callidus’s economic relations, simply because they had engaged in entirely proper communications with other Defendants who *may* have had such an intent.

**B. The Harm Analysis Under the Public Interest Hurdle**

26. As the first step of the three-step analysis of the “**Public Interest Hurdle**” under section 137.1(4)(b) of the *CJA*, the Motions Judge was required to determine whether Catalyst and Callidus had suffered harm caused by the impugned expressions (the “**Harm Analysis**”).



27. As correctly noted by the Motions Judge, Catalyst and Callidus were required to not only point to the existence of harm, but provide evidence that the harm was “caused by the moving party’s expression”. With respect to West Face and Boland’s motion in the Wolfpack Action under section 137.1 of the *CJA*, the relevant expressions were the expressions made by West Face and Boland.

28. As further correctly noted by the Motions Judge, in the Wolfpack Action, Catalyst and Callidus alleged that they had “suffered harm as a result of the WSJ Article and Whistleblower Complaints”. In other words, Catalyst and Callidus alleged that they had suffered harm as a result of impugned expressions *made by parties other than West Face and Boland*.

29. Indeed, Catalyst and Callidus did *not* allege (let alone demonstrate) that they had suffered any harm as a result of the impugned expressions *made by West Face and Boland*. In fact, on the motion below (and on this appeal), in arguing that West Face and Boland had not met their “**Threshold Burden**” under section 137.1(3), Catalyst and Callidus *accept* that West Face and Boland did *not* make the *only* expressions that were alleged to have caused them any harm.

30. The Motions Judge correctly held that the Wolfpack Action as against West Face and Boland arose from impugned expressions made by West Face and Boland relating to matters of public interest, and that they had therefore satisfied their Threshold Burden.

31. However, the Motions Judge ultimately erred in his Harm Analysis concerning West Face and Boland’s motion by failing to consider whether there was any evidence that the impugned expressions made by West Face and Boland had caused Catalyst and

Callidus any harm. Instead, the Motions Judge merely adopted the Harm Analysis that he had conducted in the Defamation Action, which (for good reason) did not analyze whether any of the impugned expressions made by West Face and Boland had caused Catalyst and Callidus any harm.

32. The reality is that while Catalyst and Callidus had impugned West Face and Boland's expressions concerning Catalyst and Callidus, there is no evidence that any of West Face and Boland's expressions caused Catalyst and Callidus any harm whatsoever, and in fact their Affiant Mr. Riley conceded in cross-examination that none of West Face and Boland's expressions were in any way wrongful or improper.

January 19, 2022

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Plaintiffs

-and- **WEST FACE CAPITAL INC. et al.**  
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PROCEEDING COMMENCED AT  
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GREGORY BOLAND**

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