Court File No. C61665

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC. and
CALLIDUS CAPITAL CORPORATION

Plaintiffs/
Appellants

and

VERITAS INVESTMENT RESEARCH CORPORATION and
WEST FACE CAPITAL INC.

Defendants/
Respondents

APPELLANTS' FACTUM

March 24, 2016

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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. This appeal concerns the burden a defendant is required to meet in order to demonstrate that a claim against it is so radically defective that it is certain to fail.

2. The Appellants are Catalyst Capital Inc. ("Catalyst"), a private equity investment firm, and Callidus Capital Corporation ("Callidus"), a publicly traded specialty debt fund that is majority owned by Catalyst.

3. In this action, the Appellants allege, among other things, that the respondents West Face Capital Inc. ("West Face") and Veritas Investment Research Corporation ("Veritas") defamed Catalyst and Callidus through publication of "research reports" that contained false and misleading statements about the appellants. The Appellants also allege that Veritas and West Face engaged in a conspiracy and unlawfully interfered with their economic relations.

4. The defendants each brought motions to strike portions of the claim. West Face's motion sought to strike all of the claims against it without leave to amend. Veritas' motion was more restricted: it sought to strike the conspiracy and unlawful interference claims against it without leave to amend, but it did not seek to strike the defamation claim.

5. The motions were heard together by Justice Akhtar (the "Motions Judge"). The Motions Judge dismissed Veritas' motion in its entirety and almost all of West Face's motion.

6. The Motions Judge granted a small part of West Face's motion by striking one paragraph from the claim without leave to amend. In so doing, the Motions Judge erred by, among other things, referring to an absence of evidence as justification to strike the paragraph, notwithstanding that no evidence was admissible because the motion was brought under Rule 21. The Motions

Judge also failed to correctly apply a long line of cases that permitted defamation claims to survive a Rule 21 motion to strike in similar circumstances.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

7. The question on appeal is whether the court below erred in striking the Appellants' claim that they were defamed by publication of defamatory statements to unnamed third parties, in circumstances where the plaintiffs named other parties to whom the same statements were made.

8. The motions below were Rule 21 motions. No evidence was admissible. The allegations in the statement of claim (the "Claim") are taken to be true. While documents incorporated by reference in the pleadings may be referred to and reviewed by the Court to understand the pleadings, they are not to be treated as evidence.[1]

9. The main issue on appeal is whether, taking the claim as pleaded, the claim against West Face with respect to its publication of defamatory statements to third parties is so deficient as to warrant an order striking that claim without leave to amend.

10. The Appellants also appeal the costs award from the motions below. The court below declined to award costs to either party notwithstanding the Appellants' overwhelming success on the motions and without seeking submissions on the point.

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[1] *1746357 Ontario Inc. v. Land Construction Co.*, 2010 ONSC 3224 at ¶9; Appellants' Book of Authorities ("ABOA"), Tab 1.

PART III - SUMMARY OF FACTS

A. The Parties

11. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".[2]

12. Callidus is a publicly traded asset-based lender that provides capital on a bridge basis to meet the financing requirements of companies that cannot access traditional lending sources. [3]

13. Callidus engages in asset-based lending by lending to corporate businesses and taking security against the assessed or appraised value of working capital and an identifiable portfolio of assets, which may included accounts receivable, inventory, equipment, real estate, and other assets.[4]

14. In April 2014, Callidus made an initial public offering ("IPO") of approximately forty per cent of its issued and outstanding shares. Prior to the IPO, Callidus was wholly owned by Catalyst. Investment funds managed by Catalyst continue to own or control approximately sixty per cent of the issued and outstanding shares of Callidus.[5]

15. Veritas is an equity research company with its headquarters located in Toronto, Ontario. Veritas prepares and publishes investment research reports, which it distributes to its subscriber clients.[6]

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[2] Claim, ¶2; Appeal Book and Compendium ("Appeal Book"), Tab 4, p. 3.
[3] Claim, ¶3; Appeal Book, Tab 4, p. 3.
[4] Claim, ¶4; Appeal Book, Tab 4, pp. 3-4.
[5] Claim, ¶5; Appeal Book, Tab 4, p. 4.
[6] Claim, ¶6; Appeal Book, Tab 4, p. 4.

16. West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. West Face competes with Catalyst in the special situations for control investment industry.[7]

B. West Face Targets Callidus for a Short-Selling Strategy

17. Short-selling is an investment strategy whereby an investor borrows shares in a publicly traded corporation and then sells the borrowed shares to third parties. A short sale strategy anticipates that the shares will decline in value, at which point the investor will buy back shares at the lower price and return them to the party from which it originally borrowed shares. Selling borrowed shares in this fashion is known as "selling short".[8]

18. If the shares decline in value as anticipated, the difference between the higher price at which the investor sold the shares and the lower price at which the investor bought them back represents a profit to the investor. If, instead of declining in value as anticipated by the investor, the shares appreciate in value, then the investor loses money on the investment. At some point, in order to cap its losses, the investor will buy back the shares at a higher price and return them to the lender. Because, in theory, the potential price gain of any stock is unlimited, the potential loss on a short-selling strategy is infinite.[9]

19. In mid-October 2014, West Face commenced a short-selling strategy against Callidus without conducting in-depth research to support the risks associated with such a strategy.[10]

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[7] Claim, ¶7; Appeal Book, Tab 4, p. 4.
[8] Claim, ¶17; Appeal Book, Tab 4, p. 6.
[9] Claim, ¶18-19; Appeal Book, Tab 4, p. 6.
[10] Claim, ¶20; Appeal Book, Tab 4, p. 7.

C. West Face and Veritas Conspire to Publish Defamatory Statements about Callidus

20. On or about December 17, 2014, three partners of West Face met with representatives of Veritas. The West Face partners in attendance were Greg Boland, West Face's CEO and co-Chief Investment Officer ("Boland"); Peter Fraser, West Face's other co-Chief Investment Officer; and Anthony Griffin. The Veritas representatives in attendance included Anthony Scilipoti, Veritas' President and CEO; Dimitry Khmelnitsky and Taso Georgopolous.[11]

21. At this meeting, Boland informed the Veritas representatives that West Face had produced a negative report about Callidus and that West Face had engaged in a short selling strategy with respect to Callidus. Boland arranged for West Face to share its report with Veritas for the purpose of inducing Veritas into publishing a second negative report on Callidus.[12]

22. At the December 17, 2014 meeting and/or in future communications and/or correspondence, the Defendants entered into a conspiracy to defame Callidus and Catalyst and to interfere with Callidus' economic relations by publishing false and defamatory statements about Callidus so as to induce a broad sell-off of Callidus shares (the "Conspiracy").[13]

23. The Defendants intended to create the impression that they had separately and independently published negative reports about Callidus for the purpose of deceiving market participants into believing that a negative consensus was building regarding Callidus. In fact, unbeknownst to the public, including market participants, the Defendants were acting jointly and in concert.[14]

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[11] Claim, ¶21; Appeal Book, Tab 4, p. 7.
[12] Claim, ¶22; Appeal Book, Tab 4, p. 7.
[13] Claim, ¶23; Appeal Book, Tab 4, p. 7.
[14] Claim, ¶24; Appeal Book, Tab 4, pp. 7-8.

24. Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.[15]

25. On or about April 16, 2015, Veritas published a report impugning Callidus and Catalyst to market participants (the "Veritas Report"). The Veritas Report was distributed to Veritas' subscribers and is available for download from its website by its customers.[16]

D. The Defendants Defamed Catalyst and Callidus

26. The West Face Report makes the following false and defamatory statements about Callidus and Catalyst to the effect that:

(a) Callidus claims not to have realized losses on principal on Callidus-originated loans;

(b) Six of the loans Callidus has outstanding are in restructuring, bankruptcy or court proceedings;

(c) Callidus' loan book contained approximately $235 million in loan commitments that have undisclosed strong indicators of material impairment;

(d) Callidus secures its loans against undeveloped mining assets;

(e) Callidus' customers typically have negative cash flow, are in bankruptcy or are severely distressed;

(f) Callidus' public disclosure misstates the value of its loan impairment provisions;

(g) Callidus has misrepresented the quality of its loan book to its investors;

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[15] Claim, ¶25; Appeal Book, Tab 4, p. 8.
[16] Claim, ¶26; Appeal Book, Tab 4, p. 8.

(h) Impairments in any single loan in Callidus' loan book would have a meaningful impact on its earnings and book value;

(i) Callidus is at risk of a 20% write-down of its "identified" loan book;

(j) Prior to and after the IPO, Catalyst increased the size of Callidus' loan book by taking on lower-quality loans;

(k) Callidus claims it can loan $1 billion to distressed borrowers without incurring any loan losses;

(l) Callidus is similar to a U.S. business development corporation ("BDC"); and

(m) West Face obtained its information from publicly available sources.[17]

27. The Veritas Report makes the following false and defamatory statements about Callidus and Catalyst to the effect that:

(a) Eight of the loans Callidus originated since 2012 are in restructuring;

(b) Callidus' loan book contained approximately $235 million in loan commitments that have undisclosed strong indicators of material impairment;

(c) Callidus' customers typically have negative cash flow, are in bankruptcy or are severely distressed;

(d) Callidus' public disclosure misstates the value of its loan impairment provisions;

(e) Callidus has misrepresented the quality of its loan book to its investors;

(f) Callidus' auditors are unable to verify the fair value of loans at any given point in time and are unable to challenge its loan loss provisioning;

(g) Catalyst profited from its non-arm's length relationship with Callidus at the expense of Callidus' shareholders by, among other things, selling loans to Callidus at inflated values;

(h) Catalyst, as a "new" manager of Callidus, has increased the size of Callidus' loan book by taking on lower quality loans;

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[17] Claim, ¶27; Appeal Book, Tab 4, pp. 8-9.

(i) Prior to and after the IPO, Catalyst increased the size of Callidus' loan book by taking on lower-quality loans;

(j) Callidus claims it can loan $1 billion to distressed borrowers without incurring any loan losses;

(k) Callidus is similar to a U.S. business development corporation ("BDC"); and

(l) Veritas obtained its information from publicly available sources.[18]

E. Callidus Sought Retractions of the Reports

28. Between December 15, 2014 and January 28, 2015, outside counsel for Callidus and West Face exchanged correspondence regarding the West Face Report. In this exchange of correspondence, Callidus' counsel repeatedly asked to see a copy of the West Face Report because Callidus believed that the West Face Report contained false and defamatory statements about Callidus which required correction so as not to mislead the public market.[19]

29. By letters dated April 24 and 27, 2015, Callidus requested a retraction of the Veritas Report. Callidus informed Veritas that its report contained incorrect and/or misleading statements that, if left uncorrected, risked misleading investors in Callidus and Catalyst and the wider market. Veritas refused to retract its report.[20]

30. In the Claim, Catalyst pleads that:

(a) The Defendants acted maliciously and with a reckless disregard for the truth;

(b) The West Face Report and the Veritas Report were published by the Defendants to harm Callidus and Catalyst by inducing market participants to sell their Callidus shares and/or lower their estimates of Callidus' future performance;

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[18] Claim, ¶28; Appeal Book, Tab 4, p. 9-10.
[19] Claim, ¶29; Appeal Book, Tab 4, p. 10.
[20] Claim, ¶31-32; Appeal Book, Tab 4, p. 10.

(c) The defamatory statements were made by the Defendants to gain financially from their conduct – West Face sought to profit from its short selling strategy and Veritas sought to gain financially by increasing its subscriber base through the publication of a seemingly "contrarian" report on a publicly traded company;

(d) The Defendants published their reports in an attempt to bring Callidus' and Catalyst's reputations in the financial industry into disrepute;

(e) The Defendants deceived third-party market participants into believing that Callidus' share price was overvalued and that Callidus was at risk of significant future losses. The Defamatory Comments were made to induce these market participants to sell their Callidus shares, thereby lowering its share price for a prolonged period of time; and

(f) The Defendants' interference with Callidus' economic relations with its investors impaired Callidus' ability to raise capital.[21]

F. The Motions Below

31. West Face and Veritas brought separate Rule 21 motions to strike all or part of the claims against them. West Face sought to strike the claim against it in its entirety, whereas Veritas sought only to strike the conspiracy and interference with economic relations claims. Veritas did not seek to strike the defamation claim against it.[22]

32. The Motions Judge dismissed both of the motions to strike the conspiracy and interference with economic relations claims in their entirety.

33. With respect to the defamation claim against West Face, the Motions Judge rejected West Face's argument that the Claim does not disclose a coherent body of fact to establish a claim for

[21] Claim, ¶33-39; Appeal Book, Tab 4, pp. 11-12.
[22] Veritas' Notice of Motion is at Tab 5 of the Appeal Book. West Face's Notice of Motion can be found at Tab 6.

defamation. In particular, the Motions Judge held that the Claim satisfied the accepted criteria for pleading a claim for defamation.[23]

34. However, the Motions Judge struck paragraph 25 of the Claim, which pleads:

> Beginning in November 2014, and continuing to March 2015, on specific dates known only to West Face, West Face distributed a report impugning Callidus and Catalyst to market participants (the "West Face Report"). The West Face Report was distributed to third parties, the identities of which are known to West Face.

35. The Motions Judge concluded that, notwithstanding that the rest of the pleading established a claim for defamation against West Face, paragraph 25 should be struck without leave to amend because the allegations in this paragraph could not be confirmed in an evidentiary manner. The Motions Judge held that Catalyst "is unable to produce any, let alone uncontradicted, evidence of publication".[24]

36. On the issue of costs, the Motions Judge's reasons were restricted to one brief paragraph:

> With respect to costs, this is an unusual case. There were several legitimate arguments that required resolution and, in the result, there was a division of success between the parties. As a result, I find that this is one of the rare cases in which a costs order would not be appropriate. Accordingly, no order for costs is made.[25]

37. Notably, the Motions Judge's determination that this was one of the "rare cases" in which a costs order would not be appropriate was made in the absence of any submissions from the parties on the issue.

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[23] Reasons for Judgment of Justice Akhtar dated January 5, 2016 ("Reasons"), ¶20; Appeal Book, Tab 3, p. 5.
[24] Reasons, ¶25-28; Appeal Book, Tab 3, pp. 6-7.
[25] Reasons, ¶48; Appeal Book, Tab 3, p. 12.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

38. The issues before this Court are whether the Motions Judge erred in striking paragraph 25 of the Claim and whether the Motions Judge erred in awarding no costs to the Appellants.

A. The Test on a Rule 21 Motion and Standard of Review

39. A party invoking rule 21.01(1)(b) has a heavy onus. The moving party must demonstrate a "radical defect" in the claim that makes it "certain to fail" even if all allegations are proven.[26]

40. The bar for striking a pleading is extremely high. The Supreme Court has set out the following principles that govern this type of motion:

(a) the power should only used in plain and obvious cases;

(b) if there is a chance that the claim might succeed, then the plaintiff should not be "driving from the judgment seat";

(c) the facts as pleaded by the plaintiff are assumed to be true;

(d) a claim should not be struck due to the novelty of the cause of action or the potential for the defendant to present a strong case; and

(e) if there is any uncertainty, the claim should be permitted to proceed to trial.[27]

41. Ontario courts have repeatedly applied these principles to permit all but the most frivolous and unmeritorious claims to proceed. The threshold for sustaining a pleading is not high – a "germ" or "scintilla" of a cause of action will be sufficient.[28]

42. This Court has recently held that a Rule 21 motion is not the appropriate vehicle to develop and/or extend the scope of unsettled law.[29] If the law is unsettled, then the motion to strike should

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[26] *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959 ("*Hunt*"], at ¶32-34; ABOA, Tab 2.
[27] *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263 at ¶14-15; ABOA, Tab 3.
[28] *1597203 Ontario Ltd. v. Ontario*, 2007 CarswellOnt 3782 at ¶12 (SCJ); ABOA, Tab 4.
[29] *Gutowski v. Clayton*, 2014 ONCA 921, at ¶28; ABOA, Tab 5.

be dismissed so that the claim can proceed to a determination on the merits at trial with the benefit of a full evidentiary record.[30]

43. No evidence is admissible on motions brought under rule 21.01(1)(b). By their nature, such motions deal with matters of law. Accordingly, the Motions Judge's decision is reviewable on the correctness standard. No deference is owed.[31]

B. The Errors of the Motion Judge

44. The Motion Judge's decision to strike paragraph 25 of the Claim was the product of three errors:

(a) he erred by failing to consider whether the pleading was sufficiently detailed for West Face to know the case to which it must respond;

(b) he erred by failing to apply the long line of cases that dismissed Rule 21 motions in defamation cases where a plaintiff claims defamation in respect of named and unnamed recipients of the impugned publication; and

(c) he erred in referring to the absence of evidence to support the allegations in paragraph 25.

C. The Motions Judge Erred by Failing to Consider West Face's Ability to Defend the Claim

45. A defamation claim cannot proceed as a "fishing expedition" to seek out a cause of action. A plaintiff cannot make vague allegations for the purpose of using discovery to probe for a factual foundation to the alleged defamation. These principles are intended to avoid an unfair situation whereby the defendant cannot know the case it must meet, and is therefore deprived of the ability to properly defend the claim.

46. That unfairness is not present in this case.

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[30] *Law Society of Upper Canada v. Ernst & Young*, 2003 CarswellOnt 2508 at ¶50 (CA); ABOA, Tab 6.
[31] *Giroux v. Conseil Scolaire Catholique de District Centre Sud*, 2010 ONCA 66 at ¶2; ABOA, Tab 7.

47. The Motions Judge correctly held that the Appellants had pleaded all of the constituent elements of the tort of defamation to make out a *prima facie* cause of action against West Face. Thus, it cannot be said that the Appellants are embarking on a "fishing expedition" to seek out a cause of action.

48. Notably, the defamation claim is pleaded in the context of an alleged short-selling strategy whereby West Face intentionally misled investors for the purpose of inducing them to sell their Callidus shares to drive down the share price. A key component of a short-selling strategy is that the short-seller "talks down" the stock by distributing negative statements about the target corporation (in this case, Callidus).

49. In this context, it is not a "fishing expedition" to allege that West Face distributed its report to persons known to it – publication to third parties operating in the securities industry is an essential element of the allegation that West Face embarked on a short-selling strategy based on false information about Callidus and Catalyst. The "universe" of these unnamed third parties is limited and their identities are readily known to West Face.

50. The policy behind the general rules applicable to defamation pleadings does not require paragraph 25 to be struck, as it cannot be said that West Face will suffer any prejudice if paragraph 25 of the Claim is allowed to survive.

D. The Motions Judge Erred by Failing to Properly Apply Binding Precedent

51. A plaintiff will not be deprived of its cause of action, ostensibly valid, where the particulars are not within its knowledge and are well within the knowledge of the defendant. The failure to name all of the persons to whom publication is made, and/or all of the times and places when the publication was made, is not automatically fatal to a defamation claim.

52. In the leading case of *Paquette v. Cruji*, the former police chief of Napanee sued his successor, alleging that the defendant made slanderous comments about the plaintiff's competence. The plaintiff's claim set forth the substance of the words spoken but did not name the time and place of the speaking nor the persons to whom the words were spoken. The defendant demanded particulars and the reply confined the time to a two-year period and identified two persons in particular and "others" not known to the plaintiff but known to the defendant, and later furnished more particulars about the identity of these unknown others, without naming them.[32]

53. The defendant's motion to strike the claim for failing to disclose a cause of action was dismissed. In his reasons, Justice Grange held:

> It is true and has been said over and over again — see for example Odgers Digest of the Law of Libel and Slander, (6th ed.), at p. 504, that pleadings in a defamation action are more important than in any other class of action. It is also generally true as put by Gatley on Libel and Slander, (7th ed.), para. 1015 that "... the defendant is entitled to particulars of the date or dates on which, and of the place or places where, the slander was uttered. The defendant is also entitled to be told the names of the person or persons to whom the slander was uttered, ..." and that the Court will not permit the plaintiff to proceed to use discovery as a "fishing expedition" to seek out a cause of action. See *Gaskin v. Retail Credit Co.*, [1961] O.W.N. 171 (H.C.); *Collins v. Jones*, [1955] 1 Q.B. 564, [1955] 2 All E.R. 145 (C.A.). **There are, however, limitations to the strictness of pleading. Our Courts have always refused to strike out a claim where the plaintiff has revealed all the particulars in his possession and has set forth a prima facie case in his pleading** — see *Winnett v. Applebe* (1894), 16 P.R. 57 (C.A.), and *Lynford v. U.S. Cigar Stores Ltd.* (1917), 12 O.W.N. 68 (H.C.). In the latter case Falconbridge C.J.K.B. refused to strike out a statement of claim wherein the plaintiff had been unable to set forth the exact words of an allegedly defamatory letter which had resulted in loss of employment quoting with approval the words of Odgers Libel and Slander, (5th ed.), at p. 624:

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[32] *Paquette v. Cruji*, 1979 CarswellOnt 455 at ¶2-5 (SCJ); ABOA, Tab 8.

> If the plaintiff does not know the exact words uttered, and cannot obtain leave to interrogate before statement of claim, he must draft his pleading as best he can and subsequently apply for leave to administer interrogatories, and, after obtaining answers, amend his statement of claim, if necessary.
>
> [...]
>
> The plaintiff maintains he was slandered by the defendant by communication to persons unknown (but associated with particular institutions) at times unknown (though within a specified time span). He sets forth the words used. **He has stated everything he knows. If he proves the facts pleaded he will have established a prima facie case. The law will always protect a defendant from a frivolous action but it should not deprive a plaintiff of his cause of action, ostensibly valid, where the particulars are not within his knowledge and are well within those of the defendant.** If the plaintiff should fail to prove any of the 16 slanders specifically alleged there is always a remedy in costs.[33] [Emphasis added.]

54. This reasoning has stood the test of time and was cited with approval by this Court.[34]

55. Here, the Motions Judge determined that the Appellants' defamation claim against West Face was *prima facie* valid. The Appellants should not be deprived of their cause of action with respect to publication to unnamed parties where the particulars of the recipients of the impugned report are not within their knowledge, but are easily ascertainable and well within the knowledge of West Face. In these circumstances, it was an error for the Motions Judge to strike paragraph 25 of the Claim without leave to amend.

E. The Motions Judge Erred by Referring to an Absence of Evidence

56. The Motions Judge referred to this Court's decision in *Guergis v. Novak* to justify striking paragraph 25 of the Claim:

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[33] *Paquette*, *supra*, at ¶8 and 10.
[34] *Lysko v. Braley*, 2006 CarswellOnt 1758 at ¶93 (CA); ABOA, Tab 9. *Rozen v. Jones*, 2009 CarswellOnt 3485 at ¶12 (SCJ); ABOA, Tab 10.

> I would add that *Guergis* does not assist Catalyst in its argument. There the court, emphasized, at para. 52, that:
>
> > The right to plead that a defamatory statement was made to certain unnamed persons is restricted to the case where a plaintiff has made out a prima facie case that the statement was made to a named person and has produced uncontradicted evidence of publication to other persons. [Emphasis added, citation omitted].
>
> Since Catalyst was unaware of the details of publication to any of the unnamed third parties, **it is unable to produce any, let alone uncontradicted, evidence of publication**, as stipulated in *Guergis*. Absent that evidence, Catalyst cannot group defendants together without clarifying what they actually said and did or hope that some liability might end up attaching to one or more of them: see *Hyprescon Inc. v Ipex Inc.*, 2007 CanLII 11316 (ON SC).[35]

57. With respect, in the paragraphs quoted above, the Motions Judge conflated two different concepts and incorrectly relied on the absence of evidence where it was impermissible to do so. In so doing, the Motions Judge held the Appellants to too high a standard for a Rule 21 motion.

58. The *Rules* do not permit the admission of evidence at a motion brought under rule 21.01(1)(b). However, documents incorporated into the pleading by reference are not evidence and may form part of the record. In this case, West Face's motion record included correspondence between outside counsel that were incorporated by reference into the Claim and which, at a later stage of the proceeding, might be considered uncontradicted evidence of publication to third parties:

59. On January 6, 2015, West Face's outside counsel wrote:

> [...] we cannot respond directly to your vague allegations of "incorrect or misleading information regarding Callidus" without knowing what precisely you allege has been said, and why it is alleged to be incorrect or misleading. That said, speaking generally,

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[35] Reasons, ¶27-28; Appeal Book, Tab 3, p. 7 [underlining in original, **boldface** added].

> West Face is confident in the accuracy of its investment research. **It does not discuss companies with third parties without extensive research to support its analysis. Should Callidus commence defamation proceedings against West Face, West Face will vigourously defend itself in its Statement of Defence and demonstrate the truth of any statements that it has made about Callidus.**[36] [Emphasis added.]

60. It was premature for the Motions Judge to speculate that **no** evidence of publication was available in circumstances where, through its own counsel, West Face defended its conduct and essentially "dared" Callidus to bring a defamation claim.

61. In later correspondence, West Face's counsel muddied the waters by suggesting that he had not, in his previous letter, confirmed distribution of a research report to third parties. But the die had already been cast, at least to the point where it cannot be said at the pleadings stage that the Appellants' allegations of publication to unnamed third parties are a mere "fishing expedition". Indeed, West Face did publish to at least one known third party, Veritas.

62. The Motions Judge's conclusion that Catalyst would be unable to produce **any** uncontradicted evidence of publication to third parties is not borne out on the record before him, nor is it supported by a generous reading of the Claim as required at a Rule 21 motion. It was an error of law to strike paragraph 25 without leave to amend on this basis.

63. Finally, the reference to *Hyprescon* is misplaced. The Motions Judge appears to have confused the issue of grouping **defendants** (which is not at issue in this case) with the identification of **recipients** of defamatory statements. The Motions Judge's erroneous reliance on *Hyprescon* further supports the conclusion that he made a legal error when he struck paragraph 25 from the Claim without leave to amend.

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[36] Letter from M. Milne-Smith to D. Hausman dated January 6, 2015; Appeal Book, Tab 7.

F. The Motions Judge Erred by Refusing to Award Costs to the Appellants

64. A deferential standard of review applies to costs appeals; however, a costs order can be set aside if the Motions Judge erred in principle or was plainly wrong in exercising his discretion.[37]

65. Absent extraordinary circumstances, parties to litigation are entitled to make submissions as to costs at every stage of the proceedings. This standard rule was not followed in the motions below. Appellate courts have granted leave to appeal costs awards in similar circumstances to correct this obvious procedural unfairness.[38]

66. In this case, the Motions Judge's conclusion that success was divided on the motions below is not borne out by the actual result – Veritas was entirely unsuccessful in its motion, and the overwhelming majority of West Face's motion was dismissed. The suggestion that the motions involved "legitimate arguments" that "required resolution" does not justify an award of no costs.

67. Although this Court rarely interferes with the disposition of costs at first instance, it was an error in principle for the Motions Judge to deny the successful Appellants their costs, or at least the majority of the costs sought. Compounding this error is the fact that the decision not to award costs was made without first seeking submissions from the parties on this point.

68. This Court has previously held that it is a principle of long standing that a successful party is entitled to its costs. A motion judge may only depart from this principle if there has been

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[37] *McNaughton Automotive Limited v Co-operators General Insurance Company*, 2008 ONCA 597 at ¶26; ABOA, Tab 11.

[38] *Visic v. University of Windsor* (2006), 84 OR (3d) 56, 2006 CanLII 39575 at ¶19 (Div Ct); rev'd in part 2007 CanLII 21126 at ¶12 (Div Ct); ABOA, Tab 12. See also *Bulut v. Walker-Fairen*, 2010 ONSC 706 at ¶17 (Div Ct); ABOA, Tab 13.

misconduct of the parties, miscarriage of procedure, or oppressive and vexatious conduct of proceedings.[39]

69. None of these facts is present in this case. The Appellants were entirely successful as against Veritas and almost entirely successful as against West Face. The fact that unsuccessful arguments advanced by the Respondents were "legitimate" might be relevant to the scale of costs, but does not justify depriving the Appellants of their costs when they successfully fought off the Respondents' efforts to strike almost all of the Claim without leave to amend.

70. The Motions Judge exercised his discretion on a wrong principle and deprived the Appellants of their opportunity to make submissions on the point. This Court should grant the Appellants leave to appeal the costs order and to vary the order below by substituting an order that the Appellants are entitled to their costs of the motions.

PART V - ORDER REQUESTED

71. For the reasons stated above, the Motions Judge erred by striking paragraph 25 from the Claim and by declining to award costs to the plaintiffs.

72. The Appellants respectfully requests that this appeal be granted, the Motion Judge's order be overturned and that an order be made:

(a) restoring paragraph 25 to the Claim; and

(b) awarding costs to the Appellants for the motions below and the within appeal on a partial indemnity basis.

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[39] *1318706 Ontario Ltd. v. Niagara (Municipality)* (2005), 75 OR (3d) 405, 2005 CanLII 16071 at ¶50 (CA); ABOA, Tab 14.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of March 2016.

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Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and
CALLIDUS CAPITAL CORPORATION

Plaintiffs/
Appellants

and

VERITAS INVESTMENT RESEARCH CORPORATION and
WEST FACE CAPITAL INC.

Defendants/
Respondents

CERTIFICATE

I estimate that 1.5 hours will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 24th day of March, 2016.

Andrew Winton

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TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *1746357 Ontario Inc. v. Land Construction Co.*, 2010 ONSC 3224.

2. *Hunt v. Carey Canada Inc.*, [1990] 2 SCR 959.

3. *Odhavji Estate v. Woodhouse*, [2003] 3 SCR 263.

4. *1597203 Ontario Ltd. v. Ontario*, 2007 CarswellOnt 3782 (SCJ).

5. *Gutowski v. Clayton*, 2014 ONCA 921.

6. *Law Society of Upper Canada v. Ernst & Young*, 2003 CarswellOnt 2508 (CA).

7. *Giroux v. Conseil Scolaire Catholique de District Centre Sud*, 2010 ONCA 66.

8. *Paquette v. Cruji*, 1979 CarswellOnt 455 (SCJ).

9. *Lysko v. Braley*, 2006 CarswellOnt 1758 (CA).

10. *Rozen v. Jones*, 2009 CarswellOnt 3485 (SCJ).

11. *McNaughton Automotive Limited v Co-operators General Insurance Company*, 2008 ONCA 597.

12. *Visic v. University of Windsor* (2006), 84 OR (3d) 56, 2006 CanLII 39575 (Div Ct); rev'd in part 2007 CanLII 21126 (Div Ct).

13. *Bulut v. Walker-Fairen*, 2010 ONSC 706 (Div Ct).

14. *1318706 Ontario Ltd. v. Niagara (Municipality)* (2005), 75 OR (3d) 405, 2005 CanLII 16071 (CA).

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

21.01 (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly.

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

THE CATALYST CAPITAL GROUP INC. et al.
Plaintiffs/Appellants

-and-

VERITAS INVESTMENT RESEARCH CORPORATION et al.
Defendants/Respondents

Court File No. C61665

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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