Court of Appeal File No. C61665
Superior Court File No. CV-15-530726

COURT OF APPEAL FOR ONTARIO

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

FACTUM OF THE RESPONDENT, WEST FACE CAPITAL INC.

May 27, 2016

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PART I ~ OVERVIEW

1. On this appeal of West Face's partially successful motion to strike the Appellants' Statement of Claim, the Appellants seek to lower the bar for pleading defamation so low so as to provide no bar at all.

2. Unfortunately for the Appellants, in Canadian law there remain certain minimum requirements of pleadings, and claims are properly struck where those requirements are not met. This is particularly true of defamation pleadings, which this Court has emphasized are more important than pleadings in any other type of action.

3. On West Face's motion to strike, Justice Akhtar (the "**Motion Judge**") correctly struck out a critical paragraph of the Appellants' Claim that pleaded publication of the alleged libel with little or no particulars as to time, place, manner, or recipient. The Motion Judge held that the Appellants were able to meet the minimum requirements of pleading defamation with respect to a single, discrete allegation of publication of allegedly false and defamatory statements by West Face. However, they could not (in His Honour's words) "ride that horse" all the way to discovery of the Appellants' impossibly vague allegation that on some date or dates over a five-month span, West Face distributed an allegedly defamatory report by unknown means, on an unspecified number of occasions, to an unspecified number of unidentified third parties.

4. The Appellants now seek to undo the Motions Judge's decision. They say that because the Motion Judge allowed one limited aspect of their defamation claim to proceed, they should be allowed a free pass to pursue an unbounded fishing expedition against West Face. The law does not permit such "actions for discovery", and the

Motion Judge did not err in any way in striking out the offending portion of the Appellants' Claim.

PART II ~ THE FACTS

A. The Appellants' Claim

5. The Plaintiffs/Appellants are The Catalyst Capital Group Inc. ("**Catalyst**") and Callidus Capital Corporation ("**Callidus**"). Callidus is majority-owned by funds managed by Catalyst.[1]

6. The Defendants/Respondents are Veritas Investment Research Corporation ("**Veritas**") and West Face Capital Inc. ("**West Face**"). They are not related.

7. Catalyst has been engaged in litigation against West Face since 2014. The litigation concerns a former junior employee who resigned from Catalyst to work at West Face.[2] Catalyst only obtained West Face's allegedly defamatory research report about Callidus after alleging in that parallel litigation that West Face had prepared its internal report on Callidus using improperly obtained confidential information.

8. On June 18, 2015, the Appellants issued a Statement of Claim against Veritas and West Face, claiming $50 million in general damages for defamation, conspiracy, and intentional interference with economic relations. The Claim alleges that the Respondents conspired to publish false and defamatory statements about Callidus

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1 Claim, at para. 5, Appeal Book and Compendium, Tab 4, p. 28.

2 See, *e.g.*, *Catalyst Capital Group Inc. v. Moyse*, 2014 CarswellOnt 16182, West Face's Book of Authorities, Tab 3; *Catalyst Capital Group Inc. v. Moyse*, 2015 CarswellOnt 5319, West Face's Book of Authorities, Tab 4; *Catalyst Capital Group Inc. v. Moyse*, 2015 CarswellOnt 10413, West Face's Book of Authorities, Tab 5; *Catalyst Capital Group Inc. v. Moyse*, 2016 CarswellOnt 813 (Div. Ct.), West Face's Book of Authorities, Tab 6; and *Mid-Bowline Group Corp., Re*, 2016 CarswellOnt 1041, West Face's Book of Authorities, Tab 24.

so as to reduce Callidus's share price and enable West Face to profit from its short sales of Callidus's shares.

9. The Appellants' allegations of defamation by West Face were set out in paragraphs 21 to 25 of the Claim. Read generously, paragraphs 21 to 24 of the Claim plead a single, discrete instance of "publication" by West Face of allegedly false and defamatory statements about the Appellants. That pleading can be summarized through the following allegations:

(a) On or about December 17, 2014, three of West Face's four Partners – Greg Boland (West Face's CEO and co-Chief Investment Officer), Peter Fraser (West Face's other co-Chief Investment Officer) and Anthony Griffin – met with three representatives of Veritas – Anthony Scilipoti (Veritas's President and CEO), Dimitry Khmelnitsky, and Taso Georgopolous;

(b) At this meeting, Mr. Boland informed the Veritas representatives that West Face had produced a research report about Callidus, and that West Face had engaged in a short selling strategy with respect to Callidus; and

(c) At this meeting, Mr. Boland "arranged for West Face to share", and did in fact share, its allegedly libellous research report with Veritas.[3]

10. In short, paragraphs 21 to 24 collectively set out a specific alleged incidence of "publication" by West Face in naming the date, occasion, author, and recipient of the allegedly defamatory words.

11. Paragraph 25 of the Claim, however, provided none of these particulars. It was a bald, unparticularized pleading:

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[3] Claim, at para. 22, Appeal Book and Compendium, Tab 4, p. 31.

> 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**.[4]

12. Paragraph 25 of the Claim offered almost no particulars surrounding West Face's alleged publication of the supposedly defamatory words. On the contrary, the Appellants essentially conceded that they did not know any of the material facts necessary to plead the essential elements of defamation. Instead, they alleged that on some date or dates over a five-month span, West Face distributed its internal research about Callidus by unknown means, on an unspecified number of occasions, to an unspecified number of unidentified third parties.

B. West Face's Motion to Strike

13. West Face brought a motion for an Order pursuant to Rule 21.01(1)(b) striking out the Statement of Claim as against West Face, without leave to amend, on the basis that it disclosed no reasonable cause of action.[5]

14. West Face's motion to strike the defamation pleading focused on paragraph 25 of the Appellants' Claim, which was the only direct pleading that West Face actually published anything defamatory.[6] As set out in West Face's Notice of Motion, this pleading was woefully insufficient:

> Paragraph 25 of the Statement of Claim fails to plead the material facts necessary to constitute publication by West Face:

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4 Claim, at para. 25 (emphasis added), Appeal Book and Compendium, Tab 4, p. 32.

5 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 21.01(1)(b).

6 The Motion Judge ultimately concluded, as described above, that when read generously, paragraphs 21-24 of the Claim could be interpreted to plead that West Face had in fact published its Callidus research to Veritas. See Reasons, at para. 20, Appeal Book and Compendium, Tab 3, p. 16.

> (a) the Statement of Claim fails to plead when the alleged defamatory statements were made or published (the Plaintiffs plead only that a report critical of the Plaintiffs (the "**West Face Report**") was distributed an unspecified number of times over a five month span on "specific dates known only to West Face");
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> (b) the Statement of Claim fails to plead where or how the alleged defamatory statements were made or published (the Plaintiffs plead only that the West Face Report was "distributed", without pleading where or how the alleged distribution took place);
>
> (c) the Statement of Claim fails to plead to whom the alleged defamatory statements were made or published (the Plaintiffs plead only that the West Face Report was distributed to unspecified "third parties"); and
>
> (d) the Statement of Claim fails to plead a coherent body of fact…[7]

15. West Face's motion also sought to strike the Appellants' claims for intentional interference with economic relations and conspiracy, on the basis that these torts were entirely derivative or "dressed up" versions of the (defective) defamation claim.[8]

16. A key aspect of the relief sought by West Face was that the Appellants not be granted leave to amend.[9] The Appellants had argued that they had pleaded all particulars within their knowledge so there was no reason to grant leave to amend.

17. Veritas brought a concurrent motion to strike the Appellants' claims against it for intentional interference with economic relations and conspiracy. Veritas did not move to strike the defamation claim against it because Veritas had published a

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7 West Face's Notice of Motion, at para. 5, Appeal Book and Compendium, Tab 6, pp. 46-47.
8 West Face's Notice of Motion, at paras. 6-8, Appeal Book and Compendium, Tab 6, pp. 47-48.
9 West Face's Notice of Motion, at paras. 1 & 10-11, Appeal Book and Compendium, Tab 6, pp. 45-48.

research report about Callidus to its clients, and so the Appellants had been able to plead publication by Veritas with sufficient particularity.[10]

C. The Reasons of the Motion Judge

18. The Motion Judge heard West Face's and Veritas's concurrent motions to strike on November 9, 2015. He released his Reasons for Judgment on January 5, 2016.[11]

19. In considering the Appellants' pleadings of defamation, the Motion Judge properly applied the well-established criteria for pleading defamation as set out in Justice Lane's seminal decision of *Magnotta Winery Ltd. v. Ziraldo*[12] (these criteria are discussed more fully in the Law and Argument section, below). In doing so, His Honour distinguished between the particularized pleading of material facts in paragraphs 21-24, and the vague assertions in paragraph 25:

(a) First, the Motion Judge concluded that, when read together, paragraphs 21-24 of the Claim satisfied the *Magnotta Winery* criteria for detailing a "coherent body of fact" with respect to the Appellants' only specific allegation of defamation against West Face; namely, that on December 17, 2014, named members of West Face's management met with named members of Veritas and "arranged for West Face to share its report" with Veritas.[13] As noted by the Motion Judge, these paragraphs of the Claim "identifie[d] both the recipients and the publication of the alleged defamation".[14]

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10 Veritas's Notice of Motion, Appeal Book and Compendium, Tab 5.
11 Reasons, Appeal Book and Compendium, Tab 3.
12 *Magnotta Winery Ltd. v. Ziraldo*, 1995 CarswellOnt 1726 (Ct. J. (Gen. Div.)) [*Magnotta Winery*], West Face's Book of Authorities, Tab 22.
13 Reasons, at para. 20, Appeal Book and Compendium, Tab 3, p. 16.
14 Reasons, at para. 20, Appeal Book and Compendium, Tab 3, p. 16.

(b) Second, the Motion Judge concluded that paragraph 25 of the Claim "fail[ed] to satisfy the necessity of pleading a coherent body of fact" because the Appellants "[could not] provide the 'who, what and when' details of the alleged defamation".[15] In striking paragraph 25, the Motion Judge held that it is "impermissible for a plaintiff to use their pleadings to search for the source of their cause of action at the discovery stage",[16] and determined that the Appellants were "in that very position".[17]

20. Thus, contrary to the Appellants' suggestions, the Motion Judge did **not** hold that the entire Claim, including paragraph 25, had "satisfied the accepted criteria for pleading a claim for defamation"[18] or that the Appellants had made out a "*prima facie* cause of action against West Face".[19] Rather, the Motion Judge clearly divided his Reasons into two different analyses and reached two different conclusions, as set out above.

21. Importantly, the Motion Judge did **not** grant the Appellants leave to amend paragraph 25, because the Appellants had conceded "no knowledge of any further particulars that could be provided to form the foundation for a proper claim".[20]

22. Finally, the Motion Judge permitted the Appellants' claims for conspiracy and intentional interference with economic relations to proceed. In the result, while the majority of the Claim survived, West Face prevailed on the most important issue of striking paragraph 25. That victory transformed the case as against West Face from an

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15 Reasons, at para. 26, Appeal Book and Compendium, Tab 3, p. 18.
16 Reasons, at para. 25, Appeal Book and Compendium, Tab 3, p. 18.
17 Reasons, at para. 26, Appeal Book and Compendium, Tab 3, p. 18.
18 Appellants's Factum, at para. 33.
19 Appellants's Factum, at para. 47.
20 Reasons, at para. 29, Appeal Book and Compendium, Tab 3, p. 18.

"action for discovery" of almost unlimited scope, into a relatively narrow claim focussing on the December 17 meeting with Veritas.

23. Given the divided success, the Motion Judge exercised his broad discretion in respect of costs by not awarding costs in favour of or against any party. His Honour reasoned:

> 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.[21]

PART III ~ ISSUES

24. The two issues on this appeal are:

(a) whether the Motion Judge correctly applied the law in striking out paragraph 25 of the Statement of Claim; and

(b) whether the Motion Judge properly exercised his broad discretion regarding costs in deciding not to award costs to any party.

PART IV ~ THE LAW AND ARGUMENT

25. West Face respectfully submits that the Motion Judge correctly applied the law in striking out paragraph 25 of the Claim. He correctly applied Rule 21.01(1)(b) and the well-established jurisprudence applicable to defamation pleadings.

A. General Rules of Pleadings, and the Test on a Rule 21 Motion to Strike

26. Pleadings serve many purposes, including: (1) to clearly define the issues in the litigation; (2) to prevent surprise and give fair notice of the precise case which is

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[21] Reasons, at para. 48 (emphasis added), Appeal Book and Compendium, Tab 3, p. 23.

required to be met; (3) to enable the parties to prepare for trial; and (4) to facilitate the hearing and assist the Court in determining the truth of the allegations made.[22] The *Rules of Civil Procedure*, and in particular Rules 21 and 25.06,[23] implement these principles of pleadings.

27. As set out by Justice Cameron in the oft-cited decision of *Balanyk v. University of Toronto*:

> The plaintiff must plead all the material facts on which it relies and all of the facts which it must prove to establish a cause of action which is legally complete. If any fact material to the establishment of a cause of action is omitted, the statement of claim is bad and the remedy is a motion to strike the pleadings, not a motion for particulars.[24]

28. The test to be applied on a Rule 21 motion to strike a pleading is well settled: (i) it must be plain and obvious that the claim discloses no reasonable cause of action; (ii) the material facts pleaded are to be taken as true unless they are patently incapable of truth; (iii) neither the complexity of the issues, the novelty of the cause of action, nor the potential of a strong defence is to prevent a party from proceeding with its case; and (iv) a pleading should be read generously so as not to unfairly deprive a party of the benefit of the pleading.[25]

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[22] See, generally: *Metz v. Tremblay-Hall*, 2006 CarswellOnt 6333 at para. 5 (S.C.J.) [*Metz*], West Face's Book of Authorities, Tab 23; *MacRae v. Santa*, 2002 CarswellOnt 2529 at para. 8 (S.C.J.) [*MacRae*], West Face's Book of Authorities, Tab 21; *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 at para. 27 (S.C.J.) [*Balanyk*], West Face's Book of Authorities, Tab 1; and *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 at para. 9 (S.C.J.), West Face's Book of Authorities, Tab 25.

[23] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 21 and 25.06.

[24] *Balanyk* at para. 29, West Face's Book of Authorities, Tab 1. See also *Metz* at para. 9, West Face's Book of Authorities, Tab 23.

[25] See, for example, *Salewski v. Symons*, 2012 CarswellOnt 784 at para. 16 (S.C.J.) [*Salewski*], West Face's Book of Authorities, Tab 27; *Metz* at para. 8, West Face's Book of Authorities, Tab 23; and *Khan v. Canada (Attorney General)*, 2009 CarswellOnt 905 at para. 17 (S.C.J.) [*Khan*], West Face's Book of Authorities, Tab 17.

29. Under Rule 21.01(1)(b), a claim will be struck when either: (i) the pleaded facts do not give rise to a recognized cause of action; or (ii) the claim fails to plead the necessary legal elements of an otherwise recognized cause of action.[26]

B. Specific Requirements of Pleadings in Defamation Claims

30. This Court affirmed in *Lysko v. Braley* that pleadings in defamation cases are more important than in any other type of action.[27] This means that defamation pleadings are examined more carefully than other types of pleadings, and the Ontario courts are vigilant to protect against fishing expeditions.[28]

31. For a plaintiff in a defamation claim, the material facts necessary to make out a cause of action include the fact and manner of publication by the defendant; the words published; that they were published about the plaintiff; the facts relied on as causing the words to be understood as defamatory or as referring to the plaintiff; and knowledge of these facts by those to whom the words were published.[29] Put more

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[26] *Carbone v. DeGroote*, 2014 CarswellOnt 15028 at para. 40 (S.C.J.) [*Carbone*], West Face's Book of Authorities, Tab 2.

[27] *Lysko v. Braley*, 2006 CarswellOnt 1758 at para. 91 (C.A.), [*Lysko*], West Face's Book of Authorities, Tab 20. See also *De Haas v. Mooney*, 2003 CarswellOnt 565 at para. 6 (S.C.J.) [*De Haas*], West Face's Book of Authorities, Tab 7; and *Hyprescon Inc. v. IPEX Inc.*, 2007 CarswellOnt 2046 at para. 14 (S.C.J.) [*Hyprescon*], West Face's Book of Authorities, Tab 13.

[28] *Swan v. Craig*, [2000] O.J. No. 1377 at para. 11 (S.C.J.), West Face's Book of Authorities, Tab 28; quoted in *De Haas* at para. 6, West Face's Book of Authorities, Tab 7; see also *Lysko* at para. 101, West Face's Book of Authorities, Tab 20; *Hyprescon* at para. 19, West Face's Book of Authorities, Tab 13; and *Kalen v. Brantford (City)*, 2011 CarswellOnt 2036 at paras. 64-65 (S.C.J.) [*Kalen*], West Face's Book of Authorities, Tab 16.

[29] *MacRae* at para. 13, West Face's Book of Authorities, Tab 21. See also *Metz* at para 13, West Face's Book of Authorities, Tab 23; *Hyprescon* at para. 14, West Face's Book of Authorities, Tab 13; *Disruptive Strategies Inc. v. WorkOnce Wireless Corp.*, 2007 CarswellOnt 2474 at para. 11, West Face's Book of Authorities, Tab 9; *Leschyna v. CIBC World Markets Inc.*, [2005] O.J. No. 5678 at para. 20 (S.C.J.) varied [2006] O.J. No. 5857 (Div. Ct.) [*Leschyna*], West Face's Book of Authorities, Tab 19.

succinctly, a defamation claim must plead when, where, how, by whom, and to whom the alleged defamatory statements were made.[30]

32. As held by Justice Lane in the seminal *Magnotta Winery* decision, in order to be permitted to proceed with a defamation claim, the plaintiff must prove, among other things:

> that he is proceeding in good faith with a *prima facie* case and is not on a "fishing expedition"; **normally this will require at least the pleading of a coherent body of fact surrounding the incident such as time, place, speaker and audience**;[31]

33. This test is not a "free pass" for plaintiffs to make vague or unparticularized allegations of defamation. Deficient defamation pleadings are still routinely struck out by our Courts under this modern approach.

34. Ignorance of the material facts does not warrant a speculative action for discovery. The law recognizes that where a plaintiff fails to plead the requisite elements of defamation, it is entirely likely that no defamation has occurred. As stated by Justice Perell in *Dionisio v. El Popular*, if the plaintiff cannot plead the material elements of defamation, the case should not proceed:

> A plaintiff may not plead for the purpose of using the examinations for discovery for what is colloquially referred to as a "fishing expedition." **The plaintiff must plead material facts that lay the foundation for a cause of action before the examination for discovery** and not use his or her pleadings for the purpose of searching or probing for the foundation of a cause of action at the examinations for discovery.[32]

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30 See, generally, *William E. Robb Enterprises Inc. v. ATI Technologies Inc.*, 2006 CarswellOnt 7452 at para. 15 (S.C.J.) [*William E. Robb*], West Face's Book of Authorities, Tab 31; *De Haas* at para. 6, West Face's Book of Authorities, Tab 7; *Khan* at para. 29, West Face's Book of Authorities, Tab 17; and *Kalen*, at para. 68, West Face's Book of Authorities, Tab 16.

31 *Magnotta Winery*, at para. 14 (emphasis added), West Face's Book of Authorities, Tab 22.

32 *Dionisio v. El Popular*, 2007 CarswellOnt 7900 at para. 5 (S.C.J.) (emphasis added), West Face's Book of Authorities, Tab 8; citing *Lysko*, West Face's Book of Authorities, Tab 20.

35. Justice Shaw expressed a similar sentiment in *Metz v. Tremblay-Hall*:

> **If at the time of pleading, a party does not have knowledge of the facts that support a cause of action, then it is inappropriate to make those allegations.** It is not sufficient for a party to allege that the material facts are peculiarly within the knowledge of the opposing party or that it will determine facts as a result of examinations for discovery or in some other way that will support the allegations.[33]

36. Indeed, pleading that the necessary particulars of defamation are within the knowledge of the defendants has been memorably described as forcing the defendant to engage in "shadow boxing":

> [Pleading that particulars are known to the defendant] literally throws the requirement for particulars into the hands of the defendants. This is problematic in that the defendants would not know from this paragraph any of the details of the alleged defamation; namely, the actual words, the audience or the circumstances in which the defamation occurred. **This is akin to shadow boxing. The defendants are entitled to know what they are facing, and with sufficient particularity to plead any available defences.**[34]

37. Thus, while the Appellants argue that the "bar for striking pleadings is extremely high" and that "all but the most frivolous and unmeritorious claims" should be allowed to proceed,[35] the cases they cite do not involve defamation. Our courts have consistently struck out defamation pleadings that do not meet the requisite criteria.

38. For example, in *Magnotta Winery*, Justice Lane struck out the plaintiff's allegation that the defendant repeated a defamatory comment in a CBC radio broadcast "shortly after the publication" of a news article on July 2, 1993, because, among other reasons, "[t]here [was] no adequate reference to time".[36] Justice Lane held that the

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33 *Metz* at para. 10 (emphasis added), West Face's Book of Authorities, Tab 23.
34 *Leschyna* at para. 40 (emphasis added), West Face's Book of Authorities, Tab 19.
35 Appellants' Factum, at paras. 40-41.
36 *Magnotta Winery* at para. 17, West Face's Book of Authorities, Tab 22.

"material fact" of "when" the alleged defamation took place required a more specific allegation than "shortly after July 2, 1993".

39. Similarly, in *De Haas v. Mooney*, Justice Sachs struck out an allegation that "'on a date prior to August 12, 2000', the defendant 'advised a limousine driver by the name of Joseph' that the plaintiff was insane", on the basis that this allegation "[did] not sufficiently identify when and to whom the alleged words were spoken".[37] Again, it was not enough for the plaintiff to provide a general date range of "when" the defamation took place. Furthermore, pleading that the defamatory words were spoken to a "limousine driver by the name of Joseph" did not sufficiently particularize to whom the defamatory words were spoken.

40. In *Magnotta Winery* and *De Haas*, the plaintiff had failed to plead just one or two elements of defamation. In the case at bar, the Plaintiffs pleaded none of the requisite particulars of publication in paragraph 25.

41. A more closely analogous case, which demonstrates the inadequacy of alleging that defamatory statements were made over a months-long time period to unnamed third parties, is the 2006 case of *Metz v. Tremblay-Hall*. In that case, the plaintiff, Ms. Metz, was an Ontario lawyer of African-Canadian heritage who worked for the Children's Aid Society in Sault Ste. Marie. There were two groups of defendants: (1) Ms. Tremblay-Hall (another lawyer practising in Sault Ste. Marie) and her law firm McLeod, Baxter, Tremblay-Hall; and (2) Ms. Metz's employer the Children's Aid Society, and two of her colleagues there, Mr. Rossi and Mr. Squire.

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[37] *De Haas* at para. 11, West Face's Book of Authorities, Tab 7.

42. Ms. Metz alleged a number of causes of action against the various defendants, including defamation. Ms. Metz alleged that on March 15, 2004, while she was in the Barristers' Lounge of the Sault Ste. Marie courthouse, Ms. Tremblay-Hall uttered a vicious and racist slur at Ms. Metz in the presence of many other lawyers. This pleading survived.[38] However, Ms. Metz went on to allege that from March 15 to May 14, 2004, Ms. Tremblay-Hall and unnamed members of her law firm "repeatedly engaged in conduct, including but not limited to defamation of the Plaintiff's reputation in the legal community…". Ms. Metz also alleged that throughout March 15 to May 14, 2004, the Children's Aid Society, Mr. Rossi, Mr. Squire, and other unnamed "servants, agents, representatives, and/or employees of the Society … repeatedly engaged in conduct, including but not limited to defamation of the Plaintiff's reputation in the legal community…".[39]

43. Justice Shaw struck out these vague allegations from Ms. Metz's claim. The defamation allegations were not sufficiently clear to enable the defendants to plead a defence:

> It would not be possible for the Defendants, or any of them, to enter any defence to the allegations of defamation. They are unable to tell from the pleadings what are the alleged defamatory words, **where they were published, who published them, to whom they were published** and whether the words are defamatory of the Plaintiff.[40]

44. Finally, *William E. Robb Enterprises Inc. v. ATI Technologies Inc.* is a case with perhaps the most analogous facts to the case at bar. The plaintiffs alleged that the defendant, ATI, was vicariously liable for false and defamatory statements

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[38] As did paragraphs 21-24 of the Claim in this case.
[39] *Metz* at paras. 3.10, 3.11, 3.16 and 3.31, West Face's Book of Authorities, Tab 23.
[40] *Metz* at paras. 55-56 (emphasis added), West Face's Book of Authorities, Tab 23.

allegedly made by three of its former employees. The plaintiffs could not plead with precision when, nor to whom, the alleged defamatory statements were made, because their information about the alleged publication was limited to rumours they had heard from third parties. The plaintiffs in *William E. Robb* argued that "the dates and audience of the alleged defamatory statements will likely be obtained through the discovery process".[41]

45. Justice Wilton-Siegel held that the plaintiffs had not pleaded a coherent body of fact surrounding the incident. In particular, Justice Wilton-Siegel was critical of the pleading's failure to plead the audience to whom the alleged defamatory statements were made. In striking the allegations of defamation, His Honour held:

> It is necessary to identify the third parties and the other ATI representatives to whom it is alleged that the statements were made. In the absence of such pleadings, the respondents have failed to set out a pleading that addresses the **essential elements** of defamation and therefore have failed to set out a reasonable cause of action. **They have instead set out a pleading that will inevitably lead to a "fishing expedition" to determine if there is a valid claim that may be asserted**.[42]

C. The Motion Judge Correctly Applied the Law in Striking Out Paragraph 25 of the Statement of Claim

46. As the above cases amply demonstrate, the Motion Judge correctly applied the law in striking paragraph 25 of the Claim. Each of the Motion Judge's alleged errors is discussed in turn below.

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41 *William E. Robb* at para. 17, West Face's Book of Authorities, Tab 31.

42 *William E. Robb* at para. 18 (emphases added), West Face's Book of Authorities, Tab 31.

(i) The Motion Judge Did Consider West Face's Ability to Defend the Claim

47. The Appellants assert that the Motion Judge's first reversible legal error was in "failing to consider whether the pleading was sufficiently detailed for West Face to know the case to which it must respond".[43]

48. This argument is easily disposed of. First, contrary to the Appellants' assertion, the Motion Judge **did** consider whether paragraph 25 of the Claim was sufficiently detailed so as to allow West Face to know the case it would have had to meet. Indeed, the Motion Judge expressly dealt with this precise point in paragraph 24 of his Reasons, where he stated:

> **The concern arising out of the vagueness of the defamation pleadings in the case at bar is not simply that West Face does not know the case that it has to meet**. There is the additional potential that a procedural quagmire might follow at the discovery stage where the plaintiff will question witnesses on an unacceptably broad basis, riding on the horse that it requires information to support those vague pleadings.[44]

49. Second, the Appellants' argument is both: (a) based on a false premise; and (b) based on circular reasoning.

50. The false premise is that the Motion Judge held that the Appellants had made out a "*prima facie* cause of action against West Face".[45] This is not a fair reading of the Motion Judge's Reasons concerning paragraph 25 of the Claim. As explained above, the Motion Judge's Reasons very clearly separate the findings he made with respect to the defamation allegations contained in paragraphs 21 to 24 of the Claim (which he did not strike out), and the defamation allegation contained in paragraph 25

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[43] Appellants' Factum, at paras. 44(a), 45-50.
[44] Reasons, at para. 24 (emphasis added), Appeal Book and Compendium, Tab 3, p. 17.
[45] Appellants' Factum, at para. 47.

(which he did strike out and which the Appellants now seek to restore). The Motion Judge's conclusion that the Appellants had properly pled defamation was unquestionably restricted to the single, discrete instance of "publication" by West Face of the allegedly defamatory "West Face Report" to Veritas on or around December 17, 2014. The Motion Judge reached the opposite finding with respect to paragraph 25. He expressly held that paragraph 25 of the Claim "fail[ed] to satisfy the necessity of pleading a coherent body of fact".[46] This is analogous to Justice Shaw's decision in *Metz*.

51. The Appellants' circular reasoning is that paragraph 25 is not a fishing expedition because "publication to third parties … is an essential element of the allegation" and these "unnamed third parties … are readily known to West Face".[47] Unfortunately for the Appellants, the very definition of a fishing expedition is when the essential elements of the claim (the "fish") are unknown to the plaintiff and sought to be reeled in and dissected at discovery.

52. A Rule 21 motion gives a plaintiff many advantages. The facts pleaded are presumed true, and the defendant can neither deny them, nor lead contrary evidence. However, the law recognizes the unfairness of permitting a claim to proceed where the plaintiff cannot so much as state with minimal particularity what the defendant is accused of doing.

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[46] Reasons, at para. 26, Appeal Book and Compendium, Tab 3, p. 18.
[47] Appellants' Factum, at para. 49.

(ii) The Motion Judge Properly and Correctly Applied the Relevant Authorities

53. The Appellants contend that the Motion Judge's second reversible legal error was in failing to apply the result from the 1979 case of *Paquette v. Cruji*.[48] Unfortunately for the Appellants, *Paquette* does not assist the Appellants on its facts, which the Appellants skirt over in their Factum. The complete facts of *Paquette* are as follows.

54. The plaintiff was the former chief of police of Napanee. The defendant was his successor. The plaintiff alleged that the defendant made defamatory comments about the plaintiff to the plaintiff's potential subsequent employers, which harmed the plaintiff's employment prospects. The statement of claim set forth the substance of the defamatory words but did not provide the particulars concerning the time, place, or audience to whom the words were spoken (what today's courts refer to as the necessary "coherent body of fact" for pleading defamation).

55. The defendant made a demand for particulars, and the plaintiff's reply to that demand only confined the time period of the alleged defamatory statements to within a two year period, and confined the audience to two named individuals and an unidentified number of other, unnamed individuals. Specifically, the plaintiff's reply to the demand for particulars alleged that the defamatory statements were made to: "Thomas Prue, Theresa Houston, and others, the particulars of which others are not known to the plaintiff but known to the defendant".[49]

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[48] *Paquette v. Cruji*, 1979 CarswellOnt 455 (S.C.(H.Ct.J.)) [*Paquette*], West Face's Book of Authorities, Tab 26.
[49] *Paquette* at para. 3, West Face's Book of Authorities, Tab 26.

56. What the Appellants ignore in their misplaced reliance on *Paquette* is that the defendant in *Paquette* successfully moved before Justice Anderson to strike the words "…and others, the particulars of which others are not known to the plaintiff but known to the defendant".[50] In other words, the defendant **succeeded** in having the vague and overbroad portion of the plaintiff's pleading (*i.e.*, the portion analogous to paragraph 25 of the Appellants' Claim) struck. The Court of Appeal then **upheld** Justice Anderson's decision.[51]

57. The fundamental difference between *Paquette* and the Appellants' case is that in *Paquette*, the Court of Appeal allowed the plaintiff to amend his response to the demand for particulars because he advised that he was able to provide additional particulars which would enable the defendant to identify with precision the unnamed "other persons" to whom the alleged defamatory statements had been published. In this new amended reply, the plaintiff provided a considerable amount of additional detail concerning the dates, occasions, and audience to whom the alleged defamatory statements were made. As described by Justice Grange in paragraph 5 of *Paquette*:

> The Court [of Appeal] went on to dismiss the appeal but subject to the variation that the plaintiff was given leave to amend. The new reply to demand for particulars has now been delivered and is the subject of this motion [to strike]. The paragraph is amended to read as follows:
>
> > Thomas Prue, Theresa Houston, and others, the names of whom are not known to the Plaintiff, but known to the Defendant, but particulars of the identify of whom **are that they were an employee or agent of the following corporations or institutions from each of which the Plaintiff sought employment during the periods set out after each, and during said periods, each made an**

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50 *Paquette* at para. 5, West Face's Book of Authorities, Tab 26.
51 *Paquette* at para. 5, West Face's Book of Authorities, Tab 26.

> **inquiry of the Defendant concerning the Plaintiff's suitability for employment for the corporation or institution in question: …**
>
> **There then follows 16 paragraphs listing the various bodies and the appropriate dates**.[52]

58. It was the plaintiff's new reply to the defendant's demand for particulars that Justice Grange refused to strike out in *Paquette*. As noted by Justice Grange, the plaintiff's pleading was "buttressed … by the amended reply to the demand for particulars [which] is much more detailed **and contains particulars from which the defendant can readily surmise the occasion of the alleged slanders**".[53]

59. In the case at bar, the Appellants conceded in their motion materials and then re-confirmed to the Motion Judge that that they do **not** have any additional facts to plead. Therefore, unlike the plaintiff in *Paquette*, they have nothing to add to paragraph 25 and no way to "buttress" it with the additional facts necessary to meet the minimum requirements of pleadings. This Court should uphold the Motion Judge's decision to strike paragraph 25 of the Claim (just as the Court of Appeal upheld Justice Anderson's decision to strike the plaintiff's first reply to demand for particulars). However, unlike in *Paquette*, there is no basis for this Court to grant the Appellants leave to amend paragraph 25 of the Claim, because they have nothing further to add (and, as set out further below, the Appellants have put forward no basis for setting aside the Motion Judge's decision to not allow leave to amend).[54]

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52 *Paquette*, at para. 5 (emphasis added), West Face's Book of Authorities, Tab 26.

53 *Paquette*, at para. 11 (emphasis added), West Face's Book of Authorities, Tab 26.

54 West Face agrees with the Appellants that this aspect of *Paquette* has "stood the test of time" – in *Lysko*, this Court cited *Paquette* in upholding the motion judge's decision to strike out several paragraphs of a statement of claim because the plaintiff had failed to allege to whom the defamatory comments were made. See Appellants' Factum, at para. 54 and *Lysko*, at paras. 112-114, West Face's Book of Authorities, Tab 20.

60. Furthermore, the Motion Judge's choice not to specifically cite *Paquette* cannot somehow amount to a reversible error, given that he considered and applied the authoritative, relevant, modern body of jurisprudence to the facts of this case:

(a) The Motion Judge cited and relied on leading decisions of the Supreme Court of Canada with respect to the general test for striking out pleadings on a Rule 21 motion;[55]

(b) He applied the modern criteria for pleading defamation as set out by Justice Lane in the seminal 1995 decision of *Magnotta Winery*.[56] Notably, Justice Lane took *Paquette* and other earlier authorities into account in determining these criteria;

(c) He cited and relied on numerous other binding and/or persuasive authorities with respect to the requirements of defamation pleadings, including, among others, (i) this Court's decisions in *Lysko v. Braley*, *Gaur v. Data*, and *Guergis v. Novak*; and (ii) motions level decisions of Justice Shaw in *Metz v. Tremblay Hall*; Justice Patillo in *Disruptive Strategies Inc. v. WorkOnce Wireless Corp.*; Justice Perrell in *Dionisio v. El Popular*; Justice Wilton-Siegel in *William E. Robb Enterprises Inc. v. ATI Technologies Inc.*; and Justice Newbould in *Hyprescon Inc. v. IPEX Inc.*[57]

61. In summary, this was no reversible error. The Motion Judge's decision to strike paragraph 25 of the Appellants' Claim was entirely consistent with both *Paquette* **and** with our more modern jurisprudence regarding defamation pleadings. The analogous pleading in *Paquette* to paragraph 25 of the Appellants' Claim was struck for failing to disclose a reasonable cause of action. The Appellants' cursory description of the facts in *Paquette* glosses over the key distinguishing feature of that case – namely,

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55 Reasons, at paras. 11-13, Appeal Book and Compendium, Tab 3, p. 14.
56 Reasons, at para. 17, Appeal Book and Compendium, Tab 3, pp. 15-16.
57 Reasons, at paras 15-16, 18, 23-25, 27-28, Appeal Book and Compendium, Tab 3, p. 15-18.

that unlike the Appellants, the plaintiff was able to provide sixteen paragraphs of additional information describing the dates, occasions, and audience to whom the alleged defamatory statements were made. Unfortunately for the Appellants, and unlike in *Paquette*, the Appellants have conceded that they have no additional particulars within their knowledge.[58]

(iii) The Motion Judge Did Not Err by Referring to an Absence of Evidence

62. The Appellants' third and final ground of appeal is difficult to comprehend, but their argument appears to be that the Motion Judge erred by considering an argument that the Appellants themselves had put forward. At the same time, the Appellants appear to fault the Motion Judge for rejecting that very argument that they now say he should not even have considered.

(a) Background to the "*Gaskin* Exception"

63. By way of background, and as explained in the Motion Judge's Reasons, during the course of their oral submissions, the Appellants argued that paragraph 25 of the Claim should not be struck out based on the principle that "once the plaintiff ha[s] established a *prima facie* case against a named person, there [is] a right to plead defamation allegations against unnamed third persons".[59] The Appellants asserted that this principle was adopted by this Court in the 2013 decision of *Guergis v. Novak*.

64. In order to fully appreciate the Appellants' argument (and the Motion Judge's rejection of it), it is helpful to review the relevant passage from *Guergis*. Paragraph 52 of *Guergis* states:

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[58] Reasons, at para. 29, Appeal Book and Compendium, Tab 3, p. 18.
[59] Reasons, at para. 23, Appeal Book and Compendium, Tab 3, p. 17.

> Further, the appellant alleges in paragraph 98 of her statement of claim that Pellerin "spoke defamatory words about the Plaintiff" not only to Giorno but "and/or others". **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**: *Jaffe v. Americans for International Justice Foundation*, [1987] O.J. No. 2370 (Ont. Master), at para. 10. **These two requirements have not been met**. No *prima facie* case exists that the defamatory statements were made against named persons as that pleading has been struck. **Nor are the facts to support publication to other persons pleaded. All that remains is a bald allegation of publication to "others". Accordingly, the pleading against "others" is also properly struck**.[60]

65. The Court in *Guergis* appears to have accepted that there exists an **exception** to the general rule that a plaintiff must allege the identities of the third parties to whom the alleged defamatory statements were made in order to sustain the pleading. The Court of Appeal found this exception in Master Peppiatt's 1987 decision in *Jaffe v. Americans for International Justice Foundation*.[61] Master Peppiatt, in turn, appears to have adopted the principle from the 1961 case of *Gaskin v. Retail Credit Co*.[62] As set out in these cases, the exception only applied in circumstances where: (i) the plaintiff had made out a *prima facie* case that the defamatory statement was made to a named person; and (ii) the plaintiff had produced "uncontradicted evidence of publication" to additional persons that the plaintiff was not able to identify.

66. The Appellants sought to rely on the *Gaskin* exception because, of course, they could not provide the necessary details to sustain paragraph 25 under the modern *Magnotta Winery* criteria. The problem is that even following the *Gaskin* exception, the

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60 *Guergis v. Novak*, 2013 CarswellOnt 8858 at para. 52 (emphasis added), West Face's Book of Authorities, Tab 11.

61 *Jaffe v. Americans for International Justice Foundation*, 1987 CarswellOnt 514 (Ont. S.C.), West Face's Book of Authorities, Tab 14.

62 *Gaskin v. Retail Credit Co*., [1961] O.W.N. No. 171 (H. Ct.) [*Gaskin*], West Face's Book of Authorities, Tab 10.

Appellants cannot even plead, let alone produce, uncontradicted evidence of publication to additional, unidentified persons.

(b) The Motion Judge's Application of the *Gaskin* Exception

67. The Motion Judge concluded that the *Gaskin* exception did not assist the Appellants in sustaining paragraph 25 of the Claim because they are unaware of any details of publication to any of the unnamed third parties, and are unable to produce **any**, let alone uncontradicted, "evidence of publication", as required.[63]

68. The Appellants now assert that the Motion Judge erred by relying on an "absence of evidence where it was impermissible to do so".[64] They point out that evidence is inadmissible on a Rule 21 motion and that therefore the Motion Judge held them to "too high a standard".[65] As noted above, they fault the Motion Judge for considering and applying the very case they urged him to consider and apply.

69. There is no way that the Motion Judge's consideration of the *Gaskin* exception could justify an appeal of his decision, for a number of reasons.

70. **First**, there was no unfairness to the Appellants. While the *Gaskin* exception is, admittedly, incongruous with the idea of a modern Rule 21 motion (on which no evidence is admissible), it was the Appellants (and not West Face) who sought to rely on it. It would be a remarkable thing indeed if an appellant could justify an appeal on the basis that the judge erred in considering (and/or applying) a legal principle or argument that that very party had sought to rely on.

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63 Reasons, at para. 28, Appeal Book and Compendium, Tab 3, p. 18.
64 Appellants' Factum, at para. 57.
65 Appellants' Factum, at para. 57.

71. **Second**, the Motion Judge properly applied the *Gaskin* exception. He rightfully pointed out that the Appellants were unable to produce any evidence, let alone uncontradicted evidence, that West Face published its Callidus research to the phantom third parties referred to in paragraph 25. Contrary to the Appellants' arguments,[66] the pre-litigation correspondence between West Face and the Appellants' counsel – in which West Face's counsel denied that West Face had published anything false or defamatory about the Appellants – does not amount to "evidence", and certainly not "uncontradicted evidence", of publication by West Face to unknown third parties. Indeed, the quality of the "evidence" required to meet the *Gaskin* exception is undoubtedly much higher than lawyers' letters asserting and/or denying the allegations in question. In *Gaskin*, for example, the plaintiff's "evidence" came in the form of a solicitor's affidavit based on information and belief from the plaintiff. Yet even this was not "sufficient grounds for believing that publication to other persons actually occurred",[67] because all the affidavit did was simply repeat the plaintiff's suspicions. The Senior Master ruled that the solicitor's affidavit:

> …does not amount to evidence of publication of the slander to other persons and at most it is only suspicion on the part of the plaintiff. In view of the strong stand taken by the Courts against fishing interrogatories in defamation cases I feel bound to conclude that the test above has not been satisfied.[68]

72. **Third**, West Face did not rely on or require the *Gaskin* exception to succeed on its motion to strike paragraph 25. Thus, even if this Court were to rule that the *Gaskin* exception has become antiquated and should no longer exist (such that the

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66 Appellants' Factum, at paras. 56-63.
67 *Gaskin*, at p. 173, West Face's Book of Authorities, Tab.10.
68 *Gaskin*, at p. 174, West Face's Book of Authorities, Tab. 10.

Motion Judge should not have considered it), then paragraph 25 would still have been struck out, because the Appellants could not (and cannot) satisfy the modern *Magnotta Winery* criteria, and no exception would exist to allow them to attempt to circumvent this criteria.

(iv) Conclusion: The Motion Judge's Decision Should be Upheld

73. In conclusion, the Motion Judge correctly applied the law, and none of the Appellants' arguments are grounds for overturning his decision. Not only is the Motion Judge's decision demonstrably correct for the reasons set out above, its correctness is further bolstered by favourable treatment in the recent decision of Justice Diamond to strike portions of the plaintiffs' defamation pleadings in *The Usand Group v. Kempton*.[69] In that case, Diamond J. "echo[ed] the comments" made by the Motion Judge in respect of the Appellants' similarly vague defamation pleading in paragraph 25 and the attendant risk of a resulting fishing expedition.[70] He also adopted the Motion Judge's assertion that "when a plaintiff cannot provide the 'who, what and when' details of an alleged defamation, it cannot satisfy the necessity of pleading a coherent body of fact".[71]

D. The Motion Judge Did Not Err in Ordering No Costs

74. In addition to seeking to appeal the substantive outcome of the Motion Judge's decision, the Appellants also seek to appeal the Motion Judge's decision to not award costs to any party. There is unmistakeable irony in the fact that the only party appealing the Motion Judge's substantive decision is the same party arguing that it was

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69 *The Usand Group v. Kempton*, 2016 ONSC 3175 (CanLii) [*Usand*], West Face's Book of Authorities, Tab 29.
70 *Usand* at para. 23, West Face's Book of Authorities, Tab 29.
71 *Usand* at para. 24, West Face's Book of Authorities, Tab 29.

"overwhelmingly" successful on that motion and therefore entitled to costs. For the following reasons, there is no cause to interfere with the Motion Judge's costs decision.

75. **First**, it is trite law that section 131 of the *Courts of Justice Act* and Rule 57 of the *Rules of Civil Procedure* together provide a motion judge broad discretion with respect to costs,[72] and as noted by the Divisional Court in *Kwan v. 33 Charles Street East Inc.*, "declining to make an award for costs when success is divided is within the ambit of usual costs orders".[73]

76. **Second**, contrary to the Appellants' creative arguments, they were not successful vis-à-vis West Face. While West Face was not successful in striking the entire Claim, it succeeded in striking out paragraph 25 – by far the most significant and far-reaching paragraph of the Appellants' Claim, which would transform the action from one focussed narrowly on West Face's interaction with Veritas into an almost limitless Royal Commission of Inquiry into everything West Face has ever done, said or thought in respect of Callidus. As the Motion Judge noted, West Face held "particular ire" for paragraph 25 given its obvious deficiencies.[74] For this reason, West Face's Notice of Motion, the majority of West Face's written submissions, and virtually all of its oral submissions, were focussed on striking the brazen fishing expedition that was formerly paragraph 25. This was West Face's chief objective, and it succeeded.

77. **Third**, it was entirely reasonable and principled for the Motion Judge to not award costs to the Appellants (nor to the partially-successful West Face) given the

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[72] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57. See also *Kwan v. 33 Charles Street East Inc.*, 2008 CarswellOnt 5457 [*Kwan*], West Face's Book of Authorities, Tab 18.

[73] *Kwan* at para. 5, West Face's Book of Authorities, Tab 18.

[74] Reasons, at para. 19, Appeal Book and Compendium, Tab 3, p. 16.

aforementioned "division of success" and what the Motion Judge referred to as "several legitimate arguments that required resolution".[75] These legitimate arguments included, among others: (1) whether the Appellants had pled a "coherent body of fact" in paragraph 25[76] (which issue has been fully canvassed above); and (2) whether the Appellants' pleading of conspiracy should be struck out on the basis of the "merger doctrine".

78. The "merger doctrine" was a concept espoused by Lord Denning in the seminal 1954 decision of *Ward v. Lewis* – the idea being that where a tort has been committed by two or more persons, an allegation of a prior conspiracy to commit that same tort adds nothing to the claim, and may be struck at the pleadings stage.[77] As West Face argued before the Motion Judge, for over 60 years Canadian courts had repeatedly applied the merger doctrine to strike conspiracy claims at the pleadings stage despite other decisions to the contrary, such as the Supreme Court of Canada's decision in *Hunt v. T. & N plc*.[78] Pleadings of conspiracy to commit defamation were particularly susceptible to being struck out through application of the merger doctrine (see, for example, *Magnotta Winery*[79] and *Carbone v. DeGroote*[80]).

79. Within the last few years, however, Ontario Courts had begun to question the appropriateness of applying the merger doctrine at the pleadings stage (the argument being that merger issues should always be left to the trial judge). For example, in *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, Justice Perrell

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75 Reasons, at para. 48 (emphasis added), Appeal Book and Compendium, Tab 3, p. 23.
76 See Reasons, at paras. 19-20 and 21-29, Appeal Book and Compendium, Tab 3, pp. 16-18.
77 *Ward v. Lewis* (1954), [1955] All E.R. 55 at 56 (Eng. C.A.), West Face's Book of Authorities, Tab 30.
78 *Hunt v. T & N plc*, 1990 CarswellBC 216 (S.C.C.), West Face's Book of Authorities, Tab 12.
79 *Magnotta Winery* at paras. 18-20, West Face's Book of Authorities, Tab 22.
80 *Carbone* at paras. 81 & 85, West Face's Book of Authorities, Tab 2.

stated that, in his opinion, it was time to "eulogize the passing of the merger principle as a basis to challenge a pleading".[81] However, Justice Perrell explicitly recognized that this statement was made in *obiter* and that the "case law [was] divided and inconsistent" with respect to whether merger could apply at the pleadings stage.[82] Indeed, Justice Young granted the *Jevco* defendants' motion for leave to appeal Justice Perrell's refusal to apply the merger doctrine at the pleadings stage precisely because there were conflicting decisions.[83] The appeal decision in *Jevco* was still under reserve at the time the Motion Judge heard West Face's motion to strike – and so the applicability of the merger doctrine at the pleadings stage was still very much up in the air.

80. It was in this environment that the Motion Judge had to consider and render his decision regarding West Face's (and Veritas's) arguments that the merger doctrine should apply in this case. While the Motion Judge ultimately agreed with Justice Perrell, he made explicit reference to the fact that at the time he first released his Reasons (on January 5, 2016), he had been unaware of the fact that Justice Perrell's decision in *Jevco* had been upheld by the Divisional Court (on December 23, 2015).[84]

81. In summary, West Face respects the Motion Judge's decision to not award costs to any party given the divided outcome of the motion and the previously unsettled area of the law surrounding the merger doctrine (which only applied to West Face's

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81 *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, 2014 CarswellOnt 4660 at para. 80 (S.C.J.) [*Jevco*], leave to appeal granted 2015 CarswellOnt 847 (Div. Ct.) [*Jevco Leave to Appeal*]; appeal dismissed 2015 CarswellOnt 19618 (Div. Ct.) [*Jevco Appeal*], West Face's Book of Authorities, Tab 15.

82 *Jevco* at para. 79, West Face's Book of Authorities, Tab 15.

83 *Jevco Leave to Appeal* at paras. 3, 19-20, West Face's Book of Authorities, Tab 15.

84 See Reasons, at para. 46, footnote 1, Appeal Book and Compendium, Tab 3, p.23, citing *Jevco Appeal*, West Face's Book of Authorities, Tab 15.

motion to strike the conspiracy claim, which is not under appeal). The Motion Judge's decision to not award costs was well within his broad discretion, and should not be interfered with. As touched on above, the truth of who won their day in Court is perhaps best evidenced by how the parties reacted to the outcome: the Appellants appealed; West Face did not.

E. The Appellants Should Not Be Granted Leave to Amend the Claim

82. It is unclear from the Appellants' Factum as to whether they take the position that, even if the Motion Judge was correct in striking paragraph 25, he was incorrect in refusing to grant the Appellants leave to amend. If this is the Appellants' position, they have not set out any identifiable legal error, nor could they. The Motion Judge's decision to not grant leave to amend was based on the Appellants' own admissions that they have no further particulars that would enable them to improve the pleading. Leave to amend would simply have resulted in another deficient pleading.[85]

PART V ~ ORDER REQUESTED

83. For the reasons set out above, West Face respectfully requests that this Appeal be dismissed, with costs of the appeal in favour of West Face on a partial indemnity scale.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 27th day of April, 2016.

DAVIES WARD PHILLIPS & VINEBERG LLP
Lawyer for the Defendant/Respondent
West Face Capital Inc.

[85] Justice Diamond adopted the same approach in *Usand* at para 27, West Face's Book of Authorities, Tab 29.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Balanyk v. University of Toronto*, [1999] O.J. No. 2162 (S.C.J.)

2. *Carbone v. DeGroote*, 2014 CarswellOnt 15028 (S.C.J.)

3. *Catalyst Capital Group Inc. v. Moyse,* 2014 CarswellOnt 16182 (S.C.J.)

4. *Catalyst Capital Group Inc. v. Moyse,* 2015 CarswellOnt 5319 (Div. Ct.)

5. *Catalyst Capital Group Inc. v. Moyse,* 2015 CarswellOnt 10413 (S.C.J.)

6. *Catalyst Capital Group Inc. v. Moyse,* 2016 CarswellOnt 813 (Div. Ct.)

7. *De Haas v. Mooney*, 2003 CarswellOnt 565 (S.C.J.)

8. *Dionisio v. E. Popular*, 2007 CarswellOnt 7900 (S.C.J.)

9. *Disruptive Strategies Inc. v. WorkOnce Wireless Corp.*, 2007 CarswellOnt 2474 (S.C.J)

10. *Gaskin v. Retail Credit Co*., [1961] O.W.N. No. 171 (H. Ct.)

11. *Guergis v. Novak*, 2013 CarswellOnt 8858 (C.A.)

12. *Hunt v. T & N plc,* 1990 CarswellBC 216 (S.C.C.)

13. *Hyprescon Inc. v. IPEX Inc.*, 2007 CarswellOnt 2046 (S.C.J.)

14. *Jaffe v. Americans for International Justice Foundation*, 1987 CarswellOnt 514 (Ont. S.C.)

15. *Jevco Insurance Co. v. Pacific Assessment Centre Inc.*, 2014 CarswellOnt 4660 (S.C.J.); leave to appeal granted 2015 CarswellOnt 847 (Div. Ct.); appeal dismissed 2015 CarswellOnt 19618 (Div. Ct.)

16. *Kalen v. Brantford (City)*, 2011 CarswellOnt 2036 (S.C.J.)

17. *Khan v. Canada (Attorney General)*, 2009 CarswellOnt 905 (S.C.J.)

18. *Kwan v. 33 Charles Street East Inc.,* 2008 CarswellOnt 5457 (Div. Ct.)

19. *Leschyna v. CIBC World Markets Inc.*, [2005] O.J. No. 5678 (S.C.J.); varied [2006] O.J. No. 5857(Div. Ct.)

20. *Lysko v. Braley*, 2006 CarswellOnt 1758 (C.A.)

21. *MacRae v. Santa*, 2002 CarswellOnt 2529 (S.C.J.)

22. *Magnotta Winery Ltd. v. Ziraldo*, 1995 CarswellOnt 1726 (Ct. J. (Gen. Div.))

23. *Metz v. Tremblay-Hall*, 2006 CarswellOnt 6333 (S.C.J.)

24. *Mid-Bowline Group Corp., Re,* 2016 CarswellOnt 1041 (S.C.J. Commercial List)

25. *National Trust Co. v. Furbacher*, [1994] O.J. No. 2385 (S.C.J.*)*

26. *Paquette v. Cruji,* 1979 CarswellOnt 455 (S.C. (H. Ct. J.))

27. *Salewski v. Symons*, 2012 CarswellOnt 784 (S.C.J.)

28. *Swan v. Craig*, [2000] O.J. No. 1377 (S.C.J.)

29. *The Usand Group v. Kempton,* 2016 ONSC 3175 (CanLii)

30. *Ward v. Lewis* (1954), [1955] All E.R. 55 at 56 (Eng. C.A.)

31. *William E. Robb Enterprises Inc. v. ATI Technologies Inc.*, 2006 CarswellOnt 7452 (S.C.J.)

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, c. C.43, s. 131

S.131 CURRENCY

131(1)Costs

Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid.

131(2)Crown Costs

In a proceeding to which Her Majesty is a party, costs awarded to Her Majesty shall not be disallowed or reduced on assessment merely because they relate to a lawyer who is a salaried officer of the Crown, and costs recovered on behalf of Her Majesty shall be paid into the Consolidated Revenue Fund.

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, R. 21, 25.06 and 57

RULE 21 DETERMINATION OF AN ISSUE BEFORE TRIAL

WHERE AVAILABLE

To Any Party on a Question of Law

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. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(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). R.R.O. 1990, Reg. 194, r. 21.01 (2).

To Defendant

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

Jurisdiction

(a) the court has no jurisdiction over the subject matter of the action;

Capacity

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

Another Proceeding Pending

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

MOTION TO BE MADE PROMPTLY

21.02 A motion under rule 21.01 shall be made promptly and a failure to do so may be taken into account by the court in awarding costs. R.R.O. 1990, Reg. 194, r. 21.02.

FACTUMS REQUIRED

21.03 (1) On a motion under rule 21.01, each party shall serve on every other party to the motion a factum consisting of a concise argument stating the facts and law relied on by the party. O. Reg. 14/04, s. 15.

(2) The moving party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least seven days before the hearing. O. Reg. 394/09, s. 5.

(3) The responding party's factum shall be served and filed with proof of service in the court office where the motion is to be heard at least four days before the hearing. O. Reg. 394/09, s. 5.

(4) REVOKED: O. Reg. 394/09, s. 5.

RULE 25 PLEADINGS IN AN ACTION

RULES OF PLEADING — APPLICABLE TO ALL PLEADINGS

Material Facts

25.06 (1) Every pleading shall contain a concise statement of the material facts on which the party relies for the claim or defence, but not the evidence by which those facts are to be proved. R.R.O. 1990, Reg. 194, r. 25.06 (1).

Pleading Law

(2) A party may raise any point of law in a pleading, but conclusions of law may be pleaded only if the material facts supporting them are pleaded. R.R.O. 1990, Reg. 194, r. 25.06 (2).

Condition Precedent

(3) Allegations of the performance or occurrence of all conditions precedent to the assertion of a claim or defence of a party are implied in the party's pleading and need not be set out, and an opposite party who intends to contest the performance or occurrence of a condition precedent shall specify in the opposite party's pleading the condition and its non-performance or non-occurrence. R.R.O. 1990, Reg. 194, r. 25.06 (3).

Inconsistent Pleading

(4) A party may make inconsistent allegations in a pleading where the pleading makes it clear that they are being pleaded in the alternative. R.R.O. 1990, Reg. 194, r. 25.06 (4).

(5) An allegation that is inconsistent with an allegation made in a party's previous pleading or that raises a new ground of claim shall not be made in a subsequent pleading but by way of amendment to the previous pleading. R.R.O. 1990, Reg. 194, r. 25.06 (5).

Notice

(6) Where notice to a person is alleged, it is sufficient to allege notice as a fact unless the form or a precise term of the notice is material. R.R.O. 1990, Reg. 194, r. 25.06 (6).

Documents or Conversations

(7) The effect of a document or the purport of a conversation, if material, shall be pleaded as briefly as possible, but the precise words of the document or conversation need not be pleaded unless those words are themselves material. R.R.O. 1990, Reg. 194, r. 25.06 (7).

Nature of Act or Condition of Mind

(8) Where fraud, misrepresentation, breach of trust, malice or intent is alleged, the pleading shall contain full particulars, but knowledge may be alleged as a fact without pleading the circumstances from which it is to be inferred. O. Reg. 61/96, s. 1.

Claim for Relief

(9) Where a pleading contains a claim for relief, the nature of the relief claimed shall be specified and, where damages are claimed,

(a) the amount claimed for each claimant in respect of each claim shall be stated; and

(b) the amounts and particulars of special damages need only be pleaded to the extent that they are known at the date of the pleading, but notice of any further amounts and particulars shall be delivered forthwith after they become known and, in any event, not less than ten days before trial. R.R.O. 1990, Reg. 194, r. 25.06 (9).

RULE 57 COSTS OF PROCEEDINGS

GENERAL PRINCIPLES

Factors in Discretion

57.01 (1) In exercising its discretion under section 131 of the *Courts of Justice Act* to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the *Courts of Justice Act*,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

DIRECTIONS TO ASSESSMENT OFFICER

57.02 (1) Where costs are to be assessed, the court may give directions to the assessment officer in respect of any matter referred to in rule 57.01. R.R.O. 1990, Reg. 194, r. 57.02 (1).

(2) The court shall record,

(a) any direction to the assessment officer;

(b) any direction that is requested by a party and refused; and

(c) any direction that is requested by a party and that the court declines to make but leaves to the discretion of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.02 (2).

COSTS OF A MOTION

Contested Motion

57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

(a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment. O. Reg. 284/01, s. 16.

(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just. R.R.O. 1990, Reg. 194, r. 57.03 (2).

Motion Without Notice

(3) On a motion made without notice, there shall be no costs to any party, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.03 (3).

COSTS ON SETTLEMENT

57.04 Where a proceeding is settled on the basis that a party shall pay or recover costs and the amount of costs is not included in or determined by the settlement, the

costs may be assessed under Rule 58 on the filing of a copy of the minutes of settlement in the office of the assessment officer. R.R.O. 1990, Reg. 194, r. 57.04.

COSTS WHERE ACTION BROUGHT IN WRONG COURT

Recovery within Monetary Jurisdiction of Small Claims Court

57.05 (1) If a plaintiff recovers an amount within the monetary jurisdiction of the Small Claims Court, the court may order that the plaintiff shall not recover any costs. O. Reg. 377/95, s. 4.

(2) Subrule (1) does not apply to an action transferred to the Superior Court of Justice under section 107 of the *Courts of Justice Act*. R.R.O. 1990, Reg. 194, r. 57.05 (2); O. Reg. 292/99, s. 2 (2).

Default Judgment within Monetary Jurisdiction of Small Claims Court

(3) If the plaintiff obtains a default judgment that is within the monetary jurisdiction of the Small Claims Court, costs shall be assessed in accordance with that court's tariff. O. Reg. 377/95, s. 4.

Proceeding Dismissed for Want of Jurisdiction

(4) Where a proceeding is dismissed for want of jurisdiction, the court may make an order for the costs of the proceeding. R.R.O. 1990, Reg. 194, r. 57.05 (4).

COSTS OF LITIGATION GUARDIAN

57.06 (1) The court may order a successful party to pay the costs of the litigation guardian of a party under disability who is a defendant or respondent, but may further order that the successful party pay those costs only to the extent that the successful party is able to recover them from the party liable for the successful party's costs. R.R.O. 1990, Reg. 194, r. 57.06 (1).

(2) A litigation guardian who has been ordered to pay costs is entitled to recover them from the person under disability for whom he or she has acted, unless the court orders otherwise. R.R.O. 1990, Reg. 194, r. 57.06 (2).

LIABILITY OF LAWYER FOR COSTS

57.07 (1) Where a lawyer for a party has caused costs to be incurred without reasonable cause or to be wasted by undue delay, negligence or other default, the court may make an order,

(a) disallowing costs between the lawyer and client or directing the lawyer to repay to the client money paid on account of costs;

(b) directing the lawyer to reimburse the client for any costs that the client has been ordered to pay to any other party; and

(c) requiring the lawyer personally to pay the costs of any party. O. Reg. 575/07, s. 26.

(2) An order under subrule (1) may be made by the court on its own initiative or on the motion of any party to the proceeding, but no such order shall be made unless the lawyer is given a reasonable opportunity to make representations to the court. R.R.O. 1990, Reg. 194, r. 57.07 (2); O. Reg. 575/07, s. 1.

(3) The court may direct that notice of an order against a lawyer under subrule (1) be given to the client in the manner specified in the order. R.R.O. 1990, Reg. 194, r. 57.07 (3); O. Reg. 575/07, s. 1.

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION Plaintiffs/Appellants	and	VERITAS INVESTMENT RESEARCH CORPORATION and WEST FACE CAPITAL INC. Defendants/Respondents	Court of Appeal File No. C61665 Superior Court File No. CV-15-530726

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COURT OF APPEAL

Proceeding commenced at Toronto

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