CITATION: The Catalyst Capital Group Inc. v. West Face Capital Inc., 2021 ONSC 125
COURT FILE NO.: CV-17-587463-00CL
DATE: 20210111

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION Plaintiffs **– and –** WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10 Defendants **– and –** CANACCORD GENUITY CORP. Third Party	*David C. Moore, Kenneth G. Jones, John E. Callaghan, Benjamin Na* and *Matthew Karabus* for the Plaintiffs and for Newton Glassman, James Riley and Gabriel De Alba, Defendants by Counterclaim *Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson* and *Maura O'Sullivan* for West Face Capital Inc. and Gregory Boland *Linda M. Plumpton, Andrew Bernstein* and *Leora Jackson* for M5V Advisors c.o.b. Anson Group Canada, Admiralty Advisors LLC, Frigate Ventures LP, Anson Investments LP, Anson Capital LP, Anson Investments Master Fund LP, AIMF GP, Anson Catalyst Master Fund LP, ACF GP, Moez Kassam, Adam Spears and Sunny Puri (collectively, the "Anson Defendants") *Devin Jarcaig* for Bruce Langstaff *Phil Tunley, Jennifer Saville, Alexi Wood* and *Lillian Cadieux-Shaw* for Rob Copeland *Kevin Baumann* in person

AND BETWEEN:	
WEST FACE CAPITAL INC. and GREGORY BOLAND Plaintiffs by Counterclaim	
– and –	
THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSEN, B.C. STRATEGY LTD. D/B/A BLACK CUBE, B.C. STRATEGY UK LTD. D/B/A BLACK CUBE and INVOP LTD. D/B/A PSY GROUP Defendants to the Counterclaim	*John Adair* and *Michael Darcy* for B.C. Strategy Ltd. d/b/a Black Cube and B.C. Strategy U.K. Ltd. d/b/a Black Cube
AND BETWEEN:	
BRUCE LANGSTAFF Plaintiff by Counterclaim	
– and –	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION Defendants to the Counterclaim	
	HEARD BY ZOOM CONFERENCE: December 2, 3 and 4, 2020

RULING ON PRIVILEGE MOTIONS

C. BOSWELL J.

> For millions of years, mankind lived just like the animals. Then something happened which unleashed the power of our imagination. We learned to talk and we learned to listen. Speech has allowed the communication of ideas, enabling human beings to work together to build the impossible. Mankind's greatest achievements have come about by talking, and its greatest failures by not talking. It doesn't have to be like this. Our greatest hopes could become reality in the future. With the technology at our disposal, the possibilities are unbounded. All we need to do is make sure we keep talking.
>
> *Stephen Hawking*

[1] Sometimes people talk *too* much. Sometimes they get themselves into trouble doing so. Sometimes they hurt other people by what they say. And sometimes they do so intentionally.

[2] Dr. Hawking was right, of course. It's impossible to overstate the important place that communication has had in much of human achievement. But language can also be used to demean and demoralize, provoke and offend. It can be used to shape public perception and behavior. It can be used to discredit known facts or promote false narratives. It can be weaponized.

[3] This multi-tentacled lawsuit is all about the trouble that talking – both the written and spoken word – can create. At the core of the lawsuit are two very wealthy and powerful men; competitors of one another in the private equity investment business. Each accuses the other of weaponizing language against him and his business. Each seeks hundreds of millions of dollars from the other as damages for defamation.

[4] This ruling will not offer any conclusions about whether either man's allegations are well-founded. This is, in effect, a disclosure motion – just one small battle in a larger war.

[5] One of the protagonists (Mr. Boland) says the other (Mr. Glassman) directed agents to conduct a smear campaign against him and his business. He alleges that the agents engaged in some unethical behavior, including (1) conducting pretext interviews of his employees in an attempt to elicit confidential information from them; and (2) publishing, or attempting to publish, false and defamatory statements about him and his business in social and mainstream media outlets. He seeks production of any documents relating to the activities of those agents.

[6] The documents have not been produced, not because they are not relevant to the live issues between the parties, but because the plaintiff, Catalyst, alleges that they are subject to either solicitor-client privilege or litigation privilege.

[7] West Face, the Anson Defendants and Mr. Baumann, supported by Mr. Copeland and Mr. Langstaff, ask, on motion, that the court declare Catalyst's privilege claims to be unsustainable and that the court order production of the documents in issue.

[8] This ruling is unavoidably lengthy and somewhat dense, so a roadmap may be helpful. I intend to proceed as follows.

[9] First, I will provide an overview of the context in which the motions are situated. Because of the detail required, I will break the overview down into six parts:

(a) An introduction of the parties involved in the motions;

(b) A description of the sale of WIND Mobile, which was a triggering event to a series of lawsuits between the principal parties;

(c) A review of the "Moyse" action, which was the first lawsuit between the parties subsequent to the WIND Mobile transaction;

(d) An overview of "Project Maple Tree" which was a code-named operation involving a host of projects undertaken by agents of Catalyst. One of the goals of the operation was to undermine the integrity of the trial judgment in the Moyse action. The documents generated in the course of the planning and implementation of Project Maple Tree are the subject matter of these motions;

(e) A general description of the core aspects of this lawsuit, known by the parties as the "Wolfpack" action; and,

(f) A brief history of the privilege motions now before the court. They were initiated over two years ago but never heard. They were revived as an interlocutory step to a number of pending anti-SLAPP motions, which is significant for reasons I will outline.

[10] With the contextual overview in place, I will expand on the live issues and the parties' positions with respect to them.

[11] Finally, at the discussion stage of these reasons, I will analyze a jurisdictional issue raised by Black Cube as well as Catalyst's assertions of solicitor-client and litigation privilege.

I. OVERVIEW

[12] The Catalyst Capital Group Inc. and West Face Capital Inc. are both significant players in the Canadian private equity market. Both were suitors of WIND Mobile when it was put up for sale in 2014. West Face prevailed. Catalyst cried foul and sued. West Face prevailed again. Catalyst appealed. While the appeal was pending, agents of Catalyst engaged in a systematic effort to unearth fresh evidence that might undermine the integrity of the judgment in favour of West Face, to diminish the public reputation of West Face and to promote the public image of Catalyst. Some of their tactics were ethically dubious.

[13] This lawsuit is the fourth in a string of actions involving Catalyst and West Face. Each accuses the other of manipulating public discourse to unfairly influence the private equity market.

[14] Catalyst claims that West Face and others conspired to harm it and a related company – Callidus Capital Corporation – through false, negative publicity and a targeted short-selling of the publicly-traded shares of Callidus. West Face countersues, claiming that Catalyst engaged in a course of conduct designed to defame West Face and its principals and to unfairly harm its position in the market.

[15] The underlying action is complex to say the least. The stakes are a half a billion dollars. There are multiple parties and layers of claims, counterclaims and claims over. The pleadings are voluminous. The materials filed on this motion are similarly voluminous and run to the many thousands of pages.

[16] Understanding the privilege issues engaged by this motion requires at least some appreciation of the broader issues in the action. That said, it would be easy to get lost in the labyrinthine factual context in which these motions are situated. Any attempt to summarize all of it is a fool's errand. While a somewhat detailed overview is necessary, I will do my best to keep it manageable by focusing on only what is relevant and material to this particular battle. I begin with a brief introduction of the central parties.

1. THE PRINCIPAL PARTIES

[17] There are close to forty parties involved in this lawsuit in one capacity or another. Most of them are not directly engaged in this particular skirmish. I will identify only those who played an active role in the motions.

[18] Catalyst, as I alluded to, is a private equity investment firm based out of Toronto.

[19] Callidus is a private lender specializing in loans to financially distressed borrowers. Catalyst and Callidus are related companies. Specifically, a number of Catalyst funds hold, in the aggregate, the majority of the shares of Callidus.

[20] Newton Glassman is a founding partner of Catalyst, the chief executive officer of Callidus and one of the two principal protagonists I referred to above.

[21] James Riley and Gabriel De Alba were also executives at Catalyst at all material times.

[22] Like Catalyst, West Face is a private equity investment firm based out of Toronto. West Face and Catalyst are competitors.

[23] Gregory Boland is the chief executive officer of West Face. He is the other principal protagonist I referred to above.

[24] The Anson Defendants are a related group of hedge funds and some of their principals. They are alleged to have participated in a defamation campaign against Catalyst and Callidus as

part of a "Wolfpack" of conspirators whose aim was to drive down the price of Callidus shares, whilst short-selling them.

[25] Bruce Langstaff is a former employee of Canaccord Genuity Corp. Canaccord is an independent investment dealer. Mr. Langstaff was its managing director of Canadian equity sales. He is alleged to have facilitated short-selling trades by Wolfpack members in Callidus shares.

[26] Rob Copeland is a reporter for the Wall Street Journal (the "WSJ"). He is alleged to have penned a defamatory article, published in August 2017, that had the effect of driving down the Callidus share price.

[27] Kevin Baumann is the former president of Alken Basin Drilling Inc., a borrower of Callidus. He is alleged to have made, in a conspiracy with West Face and others, defamatory statements against Catalyst and Callidus including false "whistleblower" complaints to the Ontario Securities Commission.

[28] Black Cube is a private investigation firm based in Israel and comprised of former members of the Israeli Defence Force and the Mossad, Israel's national intelligence agency. They ostensibly provided "litigation support" services to Catalyst. They are a central party to these motions and I will explore their role in these proceedings in some detail as these reasons unfold.

[29] Other companies and individuals, while not active participants in the motions, do assume prominent roles and are worth a mention. They include:

(a) Brian Greenspan is a prominent Toronto criminal lawyer and has acted as counsel to Catalyst from time to time;

(b) Tamara Global Holdings Ltd. is an Israeli security and litigation support firm, whose principal is Yossi Tanuri. Tamara was retained by Catalyst in the summer of 2017 to provide litigation support services as the date scheduled for the hearing of Catalyst's appeal of the judgment in the Moyse action approached;

(c) Invop Ltd. is a now-insolvent Israeli public relations firm that carried on business as "Psy Group". They specialized in influencing public opinion through the dissemination of information in mainstream and social media platforms. Royi Burstein was the CEO of Psy Group. Emmanuel Rosen was employed with Psy Group as a public relations specialist. Psy Group and Black Cube were subcontractors of Tamara;

(d) Phillip Elwood is a Washington, D.C.-based independent public relations consultant. He was retained by Psy Group to assist them in their role as a subcontractor to Tamara;

(e) Virginia Jamieson is a New York City-based public relations consultant. She was also retained by Psy Group for reasons similar to Mr. Elwood;

(f) Christie Blatchford was a well-known writer for the National Post. She authored an article in late November 2017 titled, "*The Judge, The Sting, Black Cube and Me*"; and,

(g) Frank Newbould is a former justice of this court. He presided at the trial of the Moyse action and rendered a judgment that Catalyst found to be entirely unsatisfactory.

[30] The roles each of the parties played in the complex history to this proceeding will become clearer as this ruling unfolds. For our purposes, the story begins in 2014 with the sale of WIND Mobile.

2. THE WIND MOBILE DEAL

[31] WIND Mobile was a wireless telecommunications provider founded in 2008. It was substantially funded through foreign parties. The Canadian government restricts foreign ownership of telecommunications companies operating in Canada. To comply with Canadian regulations, WIND Mobile's ownership structure was as follows: Globalive Communications Corporation, a Canadian company, held two-thirds of the voting shares in WIND Mobile, but one-third of the equity. VimpelCom Inc., a Russian company, held the other two-thirds of the equity and one-third of the voting shares.

[32] In 2014, VimpelCom made it known that it was going to sell its ownership stake in WIND Mobile at a fixed price of $300 million.

[33] Catalyst soon found itself in the catbird seat, having secured exclusive negotiating rights with VimpelCom beginning in the third week of July 2014. Catalyst was not able, however, to reach an agreement with VimpelCom and their period of exclusivity expired in mid-August, 2014. It proved to be a missed opportunity of epic proportions.

[34] A month after Catalyst's exclusive negotiating window closed, VimpelCom sold its interest in WIND Mobile to a consortium of investors that included West Face. About a year and a half later, that consortium sold WIND Mobile to Shaw Communications Inc. for $1.6 billion.

3. THE MOYSE ACTION

[35] Catalyst and West Face have been litigating hard against one another since June 2014. The commencement of legal friction between them corresponds with the sale of WIND Mobile from VimpelCom to the West Face consortium.

[36] In 2014 Brandon Moyse was a young financial analyst. He had been working for Catalyst in that capacity for about two years. For reasons best known to him, he left that employment in May 2014. He joined West Face a month later, notwithstanding that he had a six month non-competition clause in his contract of employment with Catalyst.

[37] Mr. Moyse had been part of Catalyst's "core telecommunications team". He was aware that Catalyst was interested in acquiring WIND and he had done some work on that project.

Catalyst was concerned that he would share confidential information with their competitor, West Face. They sued West Face and Mr. Moyse to enforce the provisions of the non-competition clause, alleging that Mr. Moyse may have imparted unspecified confidential information to West Face. Shortly after the lawsuit commenced, the parties consented to an order that Mr. Moyse would be placed on leave. As it happens, he never returned to work at West Face and his total tenure there was less than a month.

[38] When Catalyst subsequently learned of the acquisition of WIND Mobile by West Face and others in September 2014, they amended their claim. They alleged that in acquiring WIND, West Face had improperly used confidential information about Catalyst's negotiations with WIND, given to them by Mr. Moyse. Catalyst sought a constructive trust interest in West Face's interest in WIND and an accounting of any profits earned by West Face as a result of its acquisition of WIND.

[39] The Moyse action came on for trial in early June 2016 and was heard over six days before Justice Frank Newbould, at the time the lead judge of the Commercial Court in Toronto. Catalyst's case was constructed on a body of circumstantial evidence from which it asked Justice Newbould to infer that West Face and Mr. Moyse had improperly made use of Catalyst's confidential information.

[40] On August 18, 2016 Justice Newbould released a 49 page decision. He did not draw the inferences urged upon him by Catalyst. Instead, he dismissed the claim in its entirety.

[41] Compounding the loss were two aspects of Justice Newbould's ruling that appear, in my view, to have stuck in Catalyst's craw.

[42] First, the less than favourable observations he made about the evidence of Mr. Glassman and Mr. De Alba.

[43] Second, the rejection by the trial judge of Catalyst's claims of spoliation in relation to digital evidence deleted by Mr. Moyse.

[44] Mr. Moyse admitted that he transferred confidential Catalyst information to West Face during his interview process. He then covered his tracks by deleting evidence of that communication. His testimony was to the effect that the transfer was inadvertent and that the information in issue had nothing to do with WIND.

[45] Of arguably greater concern was the deletion by Mr. Moyse of the browsing history on his personal computer immediately prior to a scheduled forensic imaging of the computer's hard drive.

[46] On July 16, 2014 West Face and Mr. Moyse consented to an order that Mr. Moyse would preserve his records relevant to his activities from and after March 27, 2014. Mr. Moyse further agreed to have his personal electronic devices, including his computer, forensically imaged. Subsequently, the court authorized an independent supervising solicitor to review the forensic images.

[47] The report of the independent supervising solicitor included a finding that, on the morning of July 16, 2014, Mr. Moyse downloaded deletion software to his personal computer. He used that software to delete his internet browsing history before his computer was forensically imaged.

[48] Counsel to Catalyst urged Justice Newbould to reject Mr. Moyse's evidence and to infer that he likely destroyed relevant evidence supportive of the plaintiffs' claim.

[49] Justice Newbould again rejected the inferences urged upon him by counsel to Catalyst. Instead he accepted Mr. Moyse's explanation that he deleted his browser history because he was concerned that it would show he had visited adult entertainment websites. Newbould J. found that Catalyst had failed to establish that Mr. Moyse deleted any documents relevant to the WIND transaction and that Mr. Moyse never communicated to anyone at West Face anything about Catalyst's dealings with WIND Mobile or about their strategy to acquire WIND. He found that even if Mr. Moyse *had* breached his duty of confidentiality, Catalyst had failed to establish that it suffered any resulting detriment or damage. He concluded that Catalyst failed to acquire WIND because of the positions it took in the negotiations with VimpelCom and not because of any misuse of confidential information by West Face or anyone else. In short, Catalyst was the author of its own misfortune.

[50] The day after Justice Newbould's ruling was released, an article about the trial appeared in the Financial Post. It quoted a spokesperson from Catalyst as saying:

> We are deeply disappointed by the decision and the severe indications of possible bias displayed by Judge Newbould. We believe that he did not give fair consideration to all of the evidence presented, ignored contradictory statements made by the defendants that are part of the court record and delivered a judgement containing clear misstatements of fact.

[51] The principals of Catalyst were clearly unhappy with Justice Newbould's decision.

[52] Catalyst appealed the judgment. The appeal was scheduled to be heard September 26, 2017.[1] What happened in the weeks leading up to the scheduled appeal date is at the heart of these motions.

4. PROJECT MAPLE TREE

[53] Project Maple Tree is the name given to a multi-pronged, joint operation undertaken by foreign agents hired by Catalyst to provide what they describe as "litigation support". The agents involved were engaged by Tamara Global, which had been retained by Catalyst in late August 2017. The documents over which privilege is asserted by Catalyst and challenged by the moving parties relate to the creation and implementation of Project Maple Tree, so I will describe it in some detail.

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[1] Catalyst's appeal in the Moyse action was adjourned to February 2018 and dismissed at that time. A motion for leave to appeal to the Supreme Court of Canada was dismissed on March 28, 2019.

4.1 The Retainer of Tamara Global

[54] Mr. Glassman executed an affidavit in response to these motions on November 24, 2020. He described in it a number of growing concerns that were troubling him in the summer of 2017. He was concerned, he said, that he and his family, his business partners and their families and Catalyst and Callidus were under attack by persons who, because of a strongly held animus, were intent on destroying his business interests.

[55] His concerns were based on factors which included:

(a) A sophisticated cyber attack on Callidus' computer system on July 22, 2017;

(b) The appearance of factually false communications about Catalyst and Callidus on Twitter and other social media platforms;

(c) Being advised by reporters at Thomson Reuters that they were going to publish a story that Catalyst and Callidus were the subject of an active police investigation (which was false);

(d) The publication of an article in the WSJ on August 9, 2017 which suggested that the Security Exchange Commission and the Toronto Police Service were each investigating Catalyst for fraud. Mr. Glassman refers to this article as the "False Fraud Article" because its contents were untrue – there were no fraud investigations. Publication of the article caused a dramatic drop in the price of Callidus shares;

(e) The receipt, on August 11, 2017, of an email from someone named Vincent Hanna, who advised Mr. Glassman that a "cabal of conspirators" caused the publication of the WSJ article. Mr. Hanna advised him that a group of funds were targeting Callidus and Mr. Glassman personally. They were spreading false rumours through the market and acting in concert to short Callidus stock. The cabal purportedly included Mr. Boland of West Face, some of the Anson Defendants and others;

(f) The discovery by maintenance staff of a person rummaging through the garbage containers at Mr. Glassman's Muskoka cottage;

(g) The discovery in early September 2017 that the backup generator at Mr. Glassman's Toronto home had been compromised, which he believes was an attempt to compromise his home security system; and,

(h) Two "brush pass" verbal threats on the sidewalk in Toronto's financial district, during which a man threatened that Mr. Glassman and his young son would be "gotten to" shortly.

[56] Mr. Glassman deposed that he considered it essential to obtain and understand the best possible information about what was transpiring so that a fully informed legal strategy could be formulated. He thought he knew the ideal person to help.

[57] Yossi Tanuri is Mr. Glassman's friend. They have participated together in numerous philanthropic activities. Mr. Glassman knew Mr. Tanuri to have been a member of an elite commando unit in the Israeli Defence Forces known as "Matkal". He now operates Tamara Global – an investigation and security company. Mr. Glassman determined that Mr. Tanuri's firm was ideally suited to help him get the information he thought was essential to address the issues that were troubling him in the summer of 2017.

[58] The Tamara retainer was handled by one of Catalyst's lawyers, Brian Greenspan.

[59] Mr. Greenspan executed an affidavit on November 10, 2018 in relation to a prior iteration of these privilege motions. It was refiled as part of Catalyst's response to the current motions. Mr. Greenspan deposed that, on instructions from Catalyst, he retained Tamara on August 31, 2017 to conduct a "qualitative property, personnel and equipment assessment of the current needs and future requirements of the Catalyst Defendants".[2] It is unclear to me how a retainer of that description matches up with the concerns identified as troubling Mr. Glassman.

[60] At any rate, Mr. Greenspan noted that Tamara's retainer included the authorization to retain subcontractors or consultants. He went on to say,

> Consequently, Tamara Global retained [Black Cube] as a subcontractor to conduct investigations relating to ongoing and potential litigation of the Catalyst Defendants, including litigation between the Catalyst Defendants and West Face. Pursuant to the resulting retainer arrangement between Tamara Global and [Black Cube], [Black Cube] was to undertake any such investigative work in accordance with its best professional judgment and in compliance with all local laws.
>
> The purpose of the retainer arrangements and the work undertaken by [Black Cube] on behalf of the Catalyst Defendants were (*sic*) in support of litigation…and/or were used by the Catalyst Defendants to obtain legal advice.

[61] As Mr. Glassman recounts, Mr. Tanuri flew to Toronto to meet with him on an urgent basis in late August 2017. He was accompanied by a man named Gadi Ben Efraim who was apparently, at that time, still an active agent in one of the Israeli intelligence services. Mr. Glassman wouldn't say what was discussed at this urgent meeting; he asserts privilege over the communications he had with Messrs. Tanuri and Ben Efraim. But he *was* willing to say that as a result of the discussion, he decided that the inclusion of media advice and assistance was "a part of any litigation plan and legal advice going forward". He reached that conclusion because of his perception that weaponized language was being used against him and his business interests through a variety of media sources.

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[2] By the "Catalyst Defendants" he meant Catalyst, Callidus, Mr. Glassman, Mr Riley and Mr. De Alba, each of whom is a named defendant to the counterclaim of West Face.

[62] More particularly, Mr. Glassman concluded that "any litigation plan had to include and be coordinated with a positive media strategy to counteract and mitigate" the effects of false social media attacks and the WSJ False Fraud article. He thought it was necessary to "set the record straight".

[63] While Mr. Glassman did not elaborate on the instructions he gave to Mr. Tanuri, I think it can be readily inferred that they included the need to create a counter-strike media strategy.

4.2 The September 6, 2017 Meeting in London

[64] September 6, 2017 was a pivotal date in the course of the battle between Catalyst and West Face. On that date, Mr. Glassman flew to London, England for a meeting with Mr. Tanuri and Mr. Ben Ephraim. He had been invited there by Mr. Tanuri to meet, he said, with a group of investigators that Mr. Tanuri had hired to provide litigation support. Those investigators were, for the most part, Black Cube employees.

4.3 The September 13, 2017 Email

[65] Tamara retained not only Black Cube agents, but agents of Psy Group as well. It appears that at least one representative from Psy Group attended the meeting in London on September 6, 2017.

[66] A week after that meeting, the CEO of Psy Group, Royi Burstein, sent an email to a number of Psy Group employees, including, but not limited to, Emmanuel Rosen, Avi Eliyahou, Ori Amir and someone named Yossef. The subject-line of the email was, "Project Maple Tree".

[67] According to the content of the email, Project Maple Tree had four missions. Those missions were loosely organized around (1) Justice Newbould; (2) the Wolfpack conspirators; (3) West Face and Mr. Boland; and (4) Catalyst and Callidus. A fifth mission, described as "HUMINT Mission 1" was also discussed.

[68] The email contains information provided by "the client", presumably Mr. Glassman, in respect of each mission. It does not, however, go into any detail about what each mission will entail.

[69] The discussions surrounding Mission 1 and HUMINT Mission 1 provide at least some clues about the type of activities Black Cube and Psy Group were retained to conduct.

[70] Mission 1 had a target – Justice Newbould – and a target audience – the Court of Appeal. It had a six-week timeframe. Its goal was to promote the message that Justice Newbould was racist, anti-Semitic and biased. Further, that he disregarded evidence in the Moyse trial and approved of the destruction of evidence by Mr. Moyse.

[71] HUMINT Mission 1 also had a target – Bei Heung – a controller at West Face. She purportedly advised a close friend of Mr. Glassman that West Face was "imploding" and that the partners were fighting. The mission was to approach her, determine her motives and obtain information about the real situation at West Face.

4.4 The September 14, 2017 Meeting in New York

[72] Philip Elwood, as I noted earlier, is a public relations consultant based in Washington, D.C. He swore an affidavit dated May 12, 2020 which was filed by West Face in support of this motion.

[73] Mr. Elwood deposed that he was retained by Psy Group in September 2017 to work on a matter for Catalyst and Mr. Glassman. He described Psy Group's business as "collecting business intelligence and then deploying that intelligence for the benefit of its clients." He said Psy Group's operatives were former members of the Mossad or the intelligence branch of the Israeli Defence Force. Psy Group and Black Cube were in competition with one another.

[74] Collecting business intelligence, he said, could take a number of forms. It could include online research. It could also involve covert operations including physical surveillance or contacting targets under false pretenses, as well as the making of surreptitious audio and video recordings of targets discussing sensitive topics.

[75] Though not entirely clear from his affidavit, it appears that Mr. Elwood's role was not in the collection of intelligence, but in its deployment. That deployment, he said, could involve working with legitimate journalists, creating websites, manipulating Google search results or publishing messages favourable to the client on social media platforms.

[76] Mr. Elwood deposed that he was contacted by Royi Burstein in late August or early September 2017 about meeting with a new client (Mr. Glassman) in New York City. Mr. Elwood was not clear on the date of the meeting, but Mr. Glassman's daytimer provides clear evidence that the meeting occurred on the morning of September 14, 2017.

[77] Mr. Elwood said that in addition to him and Mr. Glassman, there were a number of representatives from Psy Group in attendance at the meeting including Royi Burstein, Emmanuel Rosen, Ori Amir, Abraham Ronan, Avi Eliyahou and someone named Yossef.

[78] The meeting, according to Mr. Elwood, lasted all day. The first half was taken up by Mr. Glassman explaining his concerns about a "Wolfpack" of hedge funds conspiring against him; trying to harm him in litigation and in the financial markets. His focus appeared to be on West Face and Mr. Boland.

[79] The second half of the meeting involved Mr. Burstein describing a two-pronged operation known as Project Maple Tree. There was to be a "white prong" and a "black prong". The white prong involved utilizing mainstream media sources to generate positive publicity for Catalyst and Mr. Glassman. The black prong involved generating stories about the Wolfpack conspiracy; publishing any kind of negative information possible about West Face and Mr. Boland; and portraying Justice Newbould as corrupt and anti-Semitic.

4.5 The September 16, 2017 Emails

[80] Royi Burstein sent out two emails to Psy Group agents on September 16, 2017 that elaborate on the contours of Project Maple Tree.

[81] The first was sent at 7:15 p.m. to a group that included Emmanuel Rosen, Phil Elwood, Abraham Ronen, Avi Eliyahou and Yossef. Mr. Burstein stressed the importance of the upcoming week and he provided more details on 3 projects:

(i) The negative campaign. He identified the most urgent mission as follows:

> [To] hear/see 'chatter" on social media etc of rumors of an alleged Wolfpack, rumors of west face/anson partners involvement therein, rumors of 8 or more victims, rumors of boland being looked at (not yet criminal investigation) for criminality etc.

He also instructed "Emmanuel" and "Phil" to move forward with organizing the materials for the journalists they wanted to contact.

(ii) The Humint campaign. Mr. Burstein stressed the urgency of moving on this aspect of the project as quickly as possible. He said he expected to "have targets by Monday latest". He alluded to Black Cube's involvement in the project as well, saying,

> As you all know, here we are under competition with the Cubes. According to client they have already made headway with one of the targets and intend to meet him this week. We need to MOVE FAST.

(iii) The positive campaign. This was also stressed as urgent and Mr. Burstein instructed that they should be already "working on the obvious components, such as posting positive articles.

[82] Mr. Burstein sent a second email to a similar group of individuals at 10:24 p.m. that same day. The subject of the email was "notes from second meeting with client – Sep 15".

[83] In this email, Mr. Burstein identified the "mission priorities" as:

1. Discredit Westface

2. (indirectly) discredit newbould

4.6 The Implementation of Project Maple Tree

[84] Given the state of disclosure at this point, the details of how Project Maple Tree was implemented are somewhat sketchy. Certain elements of it have come to light and they are the driving factors behind this motion.

[85] Philip Panet is the chief operating officer and general counsel of West Face. He swore a lengthy affidavit which was filed by West Face in support of these motions. He deposed that within several days of Mr. Burstein's September 13, 2017 email, a "wave of false and

defamatory statements concerning West Face (and other members of the purported 'Wolfpack') began to appear on the internet."

[86] He mentioned two examples. The first was a silent video posted on YouTube on September 19, 2017 by a person using the pseudonym, "Wolf Pack". Titled, "Judicial and Economical Corruption in Canada", it said that West Face, Anson Funds and others had formed a "Wolf pack" designed to target companies and bring them down.

[87] The second was an internet posting that appeared on a number of websites on September 19, 2017 which suggested that West Face, Anson Funds and others were co-operating to "bring down stock and purchase floundering companies at rock bottom prices."

4.7 The Sting on Justice Newbould

[88] Justice Newbould retired from the Superior Court of Justice in June 2017. He joined an arbitration practice following his retirement.

[89] A Black Cube operative approached him on September 13, 2017 posing as a potential arbitration client. They met at his office on September 18, 2017 and arranged to have dinner together later that evening. Justice Newbould was unaware, of course that the entire engagement was a pretext. During both meetings he was baited by the operative in an effort to elicit anti-Jewish sentiments. Both meetings were secretly recorded.

[90] Mr. Glassman deposed that he was contacted by Mr. Tanuri on September 18, 2017 and told that he needed to travel to London the next day for an important briefing. He said he was not aware, before this meeting, of any plan to conduct a pretext investigation on Justice Newbould. He did not authorize such an operation and his counsel have made it clear that their camp does not approve of it having been done. Indeed, Mr. Greenspan's firm made it clear to Black Cube that they were to immediately desist in any further such investigations because that is not how things are done in Canada.

[91] Nevertheless, Mr. Glassman was, as he said, "troubled" by what he heard in the taped conversations and, later, by what he read in the transcripts of the recordings. He formed the view that it may be pertinent "fresh evidence" to be adduced on Catalyst's appeal of the Moyse trial decision.

[92] At the same time, the sting on Justice Newbould and some of the content of the recorded discussions created difficulties between Catalyst and its then counsel, Lax, O'Sullivan, which resulted in a break in that relationship. Catalyst was required to retain new counsel on the eve of the hearing of the Moyse appeal.

[93] The appeal was adjourned from September 2017 to February 2018 to permit new counsel to be retained and for counsel to consider whether there was merit to a fresh evidence application. It was ultimately determined that the transcripts of the sting on Justice Newbould would not be submitted to the Court of Appeal as fresh evidence.

4.8 The Approach to Christie Blatchford

[94] A different decision appears to have been made about submitting the transcripts to the press.

[95] On September 15, 2017, Virginia Jamieson, an independent public relations consultant in New York City, initiated contact with several journalists, including Christie Blatchford, then a reporter with the National Post. This was a cold call. Ms. Jamieson said only that she understood Ms. Blatchford had covered "Judge Neubolt" and that she had a source who wanted to talk to Ms. Blatchford about how "Judge Neubolt" had allowed the destruction of evidence in the Catalyst/West Face action.

[96] The evidentiary record is unclear as to exactly how Ms. Jamieson came to be retained, but it is apparent from other email communications that she was receiving instructions from Emmanuel Rosen of Psy Group. Mr. Rosen, for instance, sent an email to Ms. Jamieson on September 17, 2020 under the subject line, "The Story". It attached an article (or proposed article) titled, "Judge Frank Newbould's record might unravel September 20th." The article is critical of Justice Newbould's decision in the Moyse trial, suggesting that he ignored a "cascade of confidential documents having been passed by Moyse" to West Face. It suggests that Justice Newbould was biased. The author of the article is unknown to me.

[97] Ms. Jamieson sent a copy of the same article to Ms. Blatchford later that same day.

[98] Ms. Blatchford passed away in February 2020, but she swore an affidavit on May 21, 2019 outlining her involvement with Ms. Jamieson and attempts made by a number of the defendants to the counterclaim of West Face to induce her to write an article about Justice Newbould and a "Wolfpack" of companies seeking to profit by disseminating false information about public companies. Counsel to West Face filed a copy of that affidavit in support of its motion.

[99] I need only hit the highlights of Ms. Blatchford's affidavit. It outlines the initial contact made by Ms. Jamieson and proceeds chronologically to cover the increasing pressure directed at her to publish a story damaging to Justice Newbould and to the "Wolfpack" members.

[100] On September 19, 2017, Ms. Jamieson emailed a document to Ms. Blatchford which contained edited extracts from the trial ruling of Justice Newbould. Later that day, she offered to arrange a meeting between Ms. Blatchford and one of the principals of Catalyst. The suggested meeting never occurred.

[101] On September 21, 2017, Ms. Jamieson met with Ms. Blatchford at a café in Toronto. There, Ms. Blatchford was provided with a USB flash drive which contained edited portions of the surreptitiously recorded conversations between a Black Cube operative and Justice Newbould. I am satisfied that the USB drive was provided to Ms. Jamieson by James Riley.

[102] On October 12, 2017, Ms. Blatchford met with Psy Group's Emmanuel Rosen in Toronto. They discussed the contents of the USB key. She deposed that Mr. Rosen encouraged her to publish an article portraying Justice Newbould as corrupt. She said she became suspicious

about Mr. Rosen's motives, given that she did not believe the contents of the USB key supported his position. Moreover, Mr. Rosen advanced the implausible suggestion that an Aboriginal group was responsible for the sting on Justice Newbould.

[103] Ms. Blatchford came to believe that she was being duped into writing an article to advance someone's individual agenda. She began to press Ms. Jamieson for answers about who was giving her instructions. She pursued information from Mr. Greenspan, who was authorized to speak on Catalyst's behalf. Mr. Greenspan made it clear, she said, that the principals of Catalyst did not approve or even know of, the sting on Justice Newbould before it happened.

[104] Ms. Blatchford eventually did write an article, but not the one Ms. Jamieson's principals had hoped for. Her article was published in the online version of the National Post on November 24, 2017 and it was entitled *The Judge, The Sting, Black Cube and Me.* The article highlighted Catalyst's unhappiness with the Moyse ruling, it's hiring of Black Cube for security reasons and the sting perpetrated on Justice Newbould by Black Cube agents. The overall tone of the article was singularly unflattering to Catalyst.

4.9 Additional Stings

[105] Justice Newbould wasn't the only one subjected to a pretext operation. A number of West Face's current and former employees were as well, including Brandon Moyse, Alexander Singh, Bei Huang and Yujia Zhu.

[106] Mr. Singh was pursued in an a particularly aggressive manner. Black Cube agents posed as recruiters for a European private equity firm interested in hiring him. He had been general counsel to West Face at the time of the WIND deal. Black Cube agents met with him in Toronto and subsequently flew him to London, England to meet with him again. They questioned him extensively about the hiring of Brandon Moyse and the Moyse litigation in an apparent effort to obtain evidence that would support Catalyst's assertion that Mr. Moyse provided West Face with confidential information about Catalyst's WIND strategy.

5. THE WOLFPACK ACTION

[107] On November 7, 2017, Catalyst and Callidus commenced this action. The parties refer to it as the "Wolfpack" action.

[108] Two other actions were commenced by Catalyst against West Face and others between the Moyse action and the Wolfpack action. They warrant brief mention.

[109] On June 18, 2015 Catalyst issued a claim against West Face and a company named Veritas Investment Research Corporation. Veritas is an independent equity research firm.

[110] In the Veritas action, Catalyst and Callidus allege that West Face and Veritas published defamatory statements about Callidus with the intention of driving down the share value of Callidus and profiting on that decline by short-selling Callidus stock. Mr. Glassman describes their strategy as a "short and distort" campaign.

[111] Catalyst's assertion is that when it amended its claim in the Moyse action to assert a constructive trust interest in West Face's stake in WIND Mobile, West Face conspired with Veritas to interfere with the financial interests of Callidus by publishing false and defamatory statements about Callidus. The alleged goal was to induce a sell-off of Callidus stock, which would drive down its market price. Concurrently West Face and Veritas short-sold Callidus stock and thereby profited from the decline in share price.

[112] The Veritas action has not proceeded past the exchange of affidavits of documents.

[113] On May 31, 2016, just days before the trial of the Moyse action began, Catalyst initiated a claim against VimpelCom, Globalive, West Face and others. Catalyst alleged that West Face had participated in a conspiracy to induce VimpelCom to breach its exclusivity arrangement with Catalyst. More broadly, Catalyst alleged that a number of the defendants to the action committed the torts of inducing breach of contract, conspiracy and breach of confidence which had the effect of preventing Catalyst from acquiring WIND Mobile.

[114] The VimpelCom action had no legs. West Face moved in August 2017 to dismiss it on the basis of the equitable doctrines of issue estoppel, cause of action estoppel and abuse of process. The motion came before Hainey J. in August 2017 and proceeded over two days in August and a further day in April 2018.

[115] Justice Hainey released an endorsement on the motion on April 18, 2018. He concluded that the VimpelCom action was barred by each of the three equitable doctrines relied upon by the defendants. He dismissed the action.

[116] Catalyst appealed the decision of Justice Hainey. Their appeal was dismissed on May 2, 2019. A motion for leave to appeal to the Supreme Court of Canada was dismissed on November 14, 2019.

[117] The Wolfpack action appears to me to be a significantly expanded version of the Veritas action. It includes similar allegations of a conspiracy to harm the financial interests of Catalyst and Callidus through a strategy of using defamatory statements and misinformation to drive down the market value of Callidus' shares and targeted short-selling[3] to profit from the falling stock price.

[118] More particularly, the plaintiffs allege in the Wolfpack action that a group of investors – the "Wolfpack" – conspired to manipulate the market price of Callidus shares through the

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[3] The basics of short-selling are straightforward enough. "Going short" is the opposite of a buy and hold strategy or playing the long game – buying a stock and holding it with the hope that it will increase in value over time. Short-selling is based on the expectation that a stock price is going to drop. A short-seller will often borrow stock from a broker and sell it. Eventually the borrowed stock has to be returned to the broker and when that time arrives, the borrower must go into the market and purchase the shares to be returned. Provided the market price has dropped between the sale of the borrowed shares and the purchase of the replacement shares, the short-seller will make a profit.

publication of false and defamatory statements about Catalyst and Callidus. They intended to, and did, drive the share price down, at a time when they were shorting Callidus stock.

[119] The defamation campaign alleged by the plaintiffs reflects the weaponization of language through the following means:

(a) Utilizing the Bay Street "rumour mill" to circulate negative information about Catalyst and Callidus;

(b) The generation of negative stories about Callidus in the press;

(c) Making "whistleblower" complaints about Catalyst and Callidus with the Ontario Securities Commission and the U.S. Securities and Exchange Commission, consistent with the negative stories circulated through the press; and,

(d) The publication of the WSJ False Fraud Article on August 9, 2017.

[120] The alleged Wolfpack conspirators include West Face, its principal, Mr. Boland, numerous other investors (largely the Anson Defendants), certain guarantors of Callidus loans, Mr. Langstaff (who purportedly facilitated the short-sell trades) and members of the media.

[121] West Face and Mr. Boland filed a defence and counterclaim to the Wolfpack action on December 29, 2017. Their counterclaim, seeking $450 million in damages for defamation, names Catalyst, Callidus, Messrs. Glassman, De Alba and Riley, Virginia Jamieson, Emmanuel Rosen, Black Cube and Psy Group as defendants.

[122] West Face and Mr. Boland allege that Mr. Glassman has directed a campaign of defamation against them, carried out by the defendants to the counterclaim. That campaign – essentially Project Maple Treet – has included:

(a) Retaining Black Cube to conduct a number of pretext operations including:

(i) stings against current and former employees of West Face, with the goal of obtaining confidential information of West Face; and,

(ii) a sting against former Justice Newbould in an effort to embarrass and humiliate him, to undermine the integrity of his judgment in the Moyse action and to shroud West Face in controversy; and,

(b) Retaining Psy Group to publish false and defamatory statements about them, primarily on websites, blogs and social media sites.

[123] The theory of West Face is that Mr. Glassman orchestrated the campaign of defamation against them as retaliation for their successes, both in the acquisition of WIND Mobile and in the litigation that has followed. The ultimate goal, they suggest, is to damage the reputations of West Face and Mr. Boland and to discourage market participants from doing business with them.

[124] I want to again be clear, this ruling has nothing to do with the merits of the claim or counterclaim. This ruling is only about whether documents generated during the planning and implementation of Project Maple Tree must be disclosed.

6. THE PRIVILEGE MOTIONS

[125] The moving parties want access to all communications and documents associated with Project Maple Tree. Catalyst resists. It maintains that Tamara Global was retained to provide litigation support with respect to ongoing and contemplated litigation. Their position is that any communications between Catalyst's counsel and Tamara or any of Tamara's subcontractors are privileged, as are any documents generated by Tamara and its subcontractors during the course of carrying out the litigation support roles they were retained to engage in.

[126] West Face does not accept the validity of Catalyst's assertions of privilege. They first moved for production of all Black Cube documents in September 2018. The motion was scheduled to be heard on November 27, 2018. The hearing was postponed, however, as a result of an agreement between the parties that they would engage in mediation with Justice Hainey in an attempt to resolve some or all of Catalyst's privilege claims. The mediation commenced in October 2018 and continued for several months.

[127] The mediation ultimately failed. I am unclear about why the privilege motion was not rescheduled. I suspect because it was overtaken by a series of anti-SLAPP motions initiated in the latter half of 2019.

[128] Litigating in court is very expensive; everyone knows that. Some parties are better able to afford it than others. Sometimes parties are able to use the cost of litigation to their advantage. As an example, some parties have historically been able to use the cost and aggravation of defamation litigation to suppress free speech. Lawsuits of that nature are often referred to as "gag" proceedings because they have the effect of stifling free expression. For those who prefer more cumbersome language, they are known as "strategic lawsuits against public participation" ("SLAPP").

[129] The Supreme Court recently referred to SLAPPs as "façades" for plaintiffs who are "manipulating the judicial system in order to limit the effectiveness of the opposing party's speech and deter that party, or other potential interested parties, from participating in public affairs." See *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 at para. 2 ("*Pointes Protection*").

[130] To combat the menace posed by SLAPPs to Ontarians' freedom of expression, the provincial government introduced the *Protection of Public Participation Act*, S.O., 2015, c. 23. That Act brought into force anti-SLAPP provisions by way of amendments to the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*"), specifically by adding sections 137.1-137.5.

[131] The purposes of the Ontario anti-SLAPP provisions are identified in s. 137.1(1) of the *CJA*, and broadly include promoting open discourse on matters of public interest and discouraging the use of litigation as a means of limiting such public discourse.

[132] Justices of this court have been granted the discretion to dismiss a proceeding against any person who satisfies the justice that the proceeding arises from an expression made by a person that relates to a matter of public interest. See *CJA* s. 137.1(3).

[133] In November 2019, a number of parties to these proceedings initiated anti-SLAPP motions seeking to have claims or counterclaims dismissed as against them. Those motions are being case-managed by Justice McEwen and are scheduled to be heard by him in early March 2021.

[134] In the course of the anti-SLAPP motions, West Face filed the affidavit of Philip Elwood sworn May 12, 2020. Attached to his affidavit were a number of emails that referenced Project Maple Tree, including some of the emails I referred to earlier as being sent by Mr. Burstein to Psy Group agents on September 13 and 16, 2017. I will refer to these documents, as the parties have, as the "Elwood Documents".[4]

[135] Mr. Elwood had disclosed the Elwood Documents to West Face in September 2019 and they appeared in the affidavit of documents of West Face circulated amongst the parties in December 2019.

[136] Whether and how Catalyst first asserted privilege over the Elwood Documents is a matter of debate. Catalyst certainly claimed privilege over them when Mr. Elwood's affidavit was circulated in relation to the anti-SLAPP motions. Their assertion of privilege triggered the motions now before the court.

[137] West Face moves for an order declaring that Catalyst has no sustainable claim of privilege over the Elwood Documents or Mr. Elwood's affidavit more generally, as well as any documents relating to the planning and implementation of Project Maple Tree. They are already in possession of the Elwood Documents and they seek production orders in relation to the balance of Project Maple Tree documents.

[138] The Defendants, Bruce Langstaff and Rob Copeland, each filed factums joining in the relief requested by West Face.

[139] The Anson Defendants and Kevin Baumann each filed their own notices of motion seeking an order declaring that Catalyst has no sustainable claim to privilege over the Elwood Documents.

[140] The fact that the privilege motions are interlocutory to the anti-SLAPP motions may be of some consequence, given the operation of s. 137.1(5) of the *CJA* which provides:

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[4] There were, in fact, 16 documents produced to West Face by Mr. Elwood in September 2019. Fifteen were identified in Schedule "A" to the affidavit of documents of West Face and 1 was identified in Schedule "C" . Only 12 of them were attached as exhibits to Mr. Elwood's affidavit. Any reference I make to the "Elwood Documents" includes all 16 documents disclosed by Mr. Elwood to West Face.

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

[141] The parties are not agreed on the impact of s. 137.1(5), or about a number of other issues. I will turn now to a summary of the issues in dispute and the parties' positions with respect to them.

II. THE LIVE ISSUES AND THE PARTIES' POSITIONS

[142] The motions were argued over three very full days. The parties' oral arguments were supplemented by 167 pages of facta. What follows are merely the highlights of the parties' positions on the live issues.

1. THE JURISDICTIONAL ISSUE

[143] The wording of s. 137.1(5) of the *CJA* is clear. Once an anti-SLAPP motion is initiated, no further steps may be taken in the proceeding until the anti-SLAPP motion has been fully adjudicated.

[144] Black Cube's counsel took the initiative on the jurisdictional issue. It had not otherwise been raised by any other party.

[145] Black Cube submits that s. 137.1(5) unequivocally stays any further steps in a proceeding until the conclusion of the anti-SLAPP motion.

[146] Black Cube recognizes that there may be interlocutory steps that must be taken within the context of an anti-SLAPP motion. Motions may be necessary, for instance, to compel answers to undertakings given or questions refused during cross-examinations. But Black Cube's counsel argues that stringent limitations must be applied to the conduct of anti-SLAPP motions, lest they become unwieldy or prolonged. Absent such controls, an anti-SLAPP motion could ironically become a proxy for the very mischief it is aimed at curtailing – gag litigation.

[147] In Black Cube's submission, interlocutory proceedings are permitted within an anti-SLAPP motion provided they truly arise within that process, are a necessary part of its proper adjudication and will not frustrate the goal of efficiency inherent in the statutory process.

[148] In this instance, Black Cube says, only the issue of privilege with respect to the Elwood Documents truly arises within the anti-SLAPP motions. Those documents were, for the most part, attached as exhibits to an affidavit filed in connection with those motions. The Black Cube and Psy Group documents are not in issue in the anti-SLAPP motions, according to Black Cube's counsel, and it cannot therefore be said that any dispute about privilege over those documents arises within the anti-SLAPP motions.

[149] In Black Cube's view, the fact that the Black Cube and Psy Group documents may be relevant in the broader context of the litigation as a whole does not assist. Anti-SLAPP motions are *not* the equivalent of summary judgment motions. The court is not to take a "deep dive" into

the merits of the proceeding. The Black Cube and Psy Group documents are not necessary for the proper adjudication of the anti-SLAPP motions and therefore proceedings regarding their disclosure are stayed by s. 137.1(5) of the *CJA*.

[150] Catalyst did not independently assert any jurisdictional impediment to the hearing of the motions, but their counsel tended to agree with Black Cube's submission that production of the documents in issue is not necessary for the proper adjudication of the anti-SLAPP motions.

[151] West Face contends that interlocutory proceedings are permitted within anti-SLAPP motions; on this point the parties appear to be in agreement.

[152] The privilege motions, it says, have been identified by the parties and the court as warranted and they have been case-managed. The documents in issue are, West Face suggests, unquestionably relevant to the anti-SLAPP motions.

[153] West Face does not appear to me to disagree with the general need for motions within anti-SLAPP proceedings to be proportionate and not inconsistent with the relevant statutory goals. But West Face argues that the motion is not disproportionate by any measure, in light of the overall litigation and the resources of the parties.

[154] West Face is dismissive of Black Cube's contention that the privilege motion with respect to Black Cube and Psy Group documents does not truly arise within the anti-SLAPP motions and is not necessary for its proper adjudication. The anti-SLAPP motions have been case managed. Within that managed context, the parties have agreed that these motions are appropriate and should be heard and determined.

[155] Finally, in any event, West Face argues that the motion was initiated well before the anti-SLAPP motions were served and recent appellate jurisprudence suggests that fact alone is sufficient to ground jurisdiction.

[156] The other moving parties adopt the position of West Face.

2. THE ASSERTION OF SOLICITOR CLIENT PRIVILEGE

[157] In Ontario, privilege may be established over documents and communications on a class basis or on a case-specific basis. There are no assertions of case-specific privilege here, so I will forego any discussion about the requirements to establish case-specific privilege over a communication.

[158] On the other hand, Catalyst and Callidus advance two assertions of class privilege.

[159] Class privileges presumptively arise when membership in the class is established. Two are in play here: solicitor-client privilege and litigation privilege.

[160] The main thrust of Catalyst's position is that the documents in issue are subject to solicitor-client privilege. Litigation privilege is asserted in the alternative.

[161] In Catalyst's submission, West Face has over-complicated the motion and has waded into issues well beyond the discrete matter of privilege; issues which go more to the merits of the litigation and the anti-SLAPP motions. Provided the court focuses on the discrete privilege arguments, it argues, a conclusion that all of the documents in issue are subject to privilege is inevitable.

[162] By way of context, the principal protagonists, Catalyst and West Face, were involved in a number of ongoing and pending lawsuits in the summer of 2017. Mr. Glassman found himself subjected to a number of attacks on a personal, professional and commercial level. He took the necessary steps to investigate and respond to these attacks including, through counsel, the retention of an investigative firm, Tamara Global.

[163] Catalyst's intention was that Tamara, and any agents retained by it, would be part of an integrated team, which included the principals of Catalyst and its counsel. This integration is crucial to Catalyst's assertions of privilege. In particular, Catalyst contends that the operations undertaken by Tamara, Black Cube and Psy Group were all intended to be used to obtain legal advice and to develop and implement a litigation strategy. There was, at all times, an expectation on the part of Catalyst, that all communications and documents generated within the investigative team would remain confidential.

[164] Catalyst submits that there are no circumstances set out in the record here that would abrogate Catalyst's claim to privilege, such as waiver or criminality.

[165] Black Cube supports Catalyst's position.

[166] West Face gave short shrift to Catalyst's assertion of solicitor-client privilege. Counsel to West Face asserts that solicitor-client privilege arguably attaches to only one document. Specifically, several pages of notes written by a lawyer in Mr. Greenspan's office in relation to a witness interview that came to be in the possession of Mr. Elwood. They were passed on to West Face and were identified at Schedule "C" to its affidavit of documents.

[167] In the submissions of West Face, solicitor-client privilege simply cannot attach to any of the Project Maple Tree documents – not Black Cube documents, Psy Group documents or the Elwood Documents. Solicitor-client privilege is confined to communications between a solicitor and his or her client.

[168] The balance of the moving parties adopt the position of West Face.

3. THE ASSERTION OF LITIGATION PRIVILEGE

[169] Catalyst also advances a claim to litigation privilege over a significant portion of the documents in issue. It again relies on the integration of its investigative team and its undiminished expectation of confidentiality. It submits that each of the documents in issue was created for the dominant purpose of obtaining legal advice and formulating a litigation strategy with respect to ongoing or contemplated litigation.

[170] The bulk of West Face's submissions focus on Catalyst's assertion of litigation privilege. Their counsel advances a four-pronged argument as to why that assertion is not sustainable:

(i) Catalyst has failed to tender sufficiently cogent evidence to establish that litigation privilege attaches to any of the documents in issue;

(ii) Any privilege that may have attached to the documents expired when the Moyse action and the VimpelCom action were disposed of on a final basis;

(iii) The misconduct of Catalyst, or of its principals, servants or agents vitiates any privilege that may have attached; and,

(iv) Any privilege that may have attached to the documents has been waived.

[171] In the submission of counsel to West Face, each prong of its argument is, on its own, sufficient to undermine Catalyst's assertion of litigation privilege. West Face, they say, need only prevail on any one of its arguments to succeed on this motion.

[172] The other moving parties join in the position of West Face, though each of the other moving parties is concerned only with the privilege claims being asserted over the Elwood Documents.

[173] The Anson Defendants emphasize the point that the Elwood Documents are not related to litigation but reflect a public relations strategy. They also emphasize the issue of waiver. They say they have received the Elwood Documents three times. First, they were produced by West Face in its Affidavit of Documents in December 2019. Second, they were included in West Face's motion record served in May 2020. Third, in August 2020, they got the motion record of Rob Copeland, which also included the Elwood Documents.

[174] While Catalyst has been aware of the production and circulation of the Elwood Documents on each occasion, they have not, at any time, contacted the Anson Defendants to assert privilege. It was not until they received Mr. Glassman's affidavit, affirmed November 24, 2020, that they first observed Catalyst claiming privilege.

[175] Catalyst's singular delay in asserting privilege is, in the view of the Anson Defendants, fatal to that privilege.

[176] Catalyst denies that privilege has been waived or vitiated in any way. It asserts that this Wolfpack litigation is closely related to all other litigation between the parties and therefore that the doctrine of expiration does not apply. It agrees that some of the conduct of Black Cube was regrettable. It submits, however, that it did not instruct Black Cube to undertake pretext investigations. Moreover, when those investigations came to light, it instructed Black Cube to desist in the further use of any such techniques. In the circumstances, Catalyst says it ought not to be painted with the brush of impropriety. At any rate, Catalyst's counsel points out that there is nothing inherently improper or illegal about the employment of pretext investigations, or about the use of the fruits of any such investigations.

[177] Black Cube weighed in on the allegations of impropriety. They submit that the evidentiary record is insufficient and lacking in detail and does not support a conclusion that privilege has been abrogated on the basis of malfeasance. Black Cube accuses West Face of making impassioned and sweeping allegations of misconduct and failing to tie any specific misconduct to any particular documents. Each document has to be considered separately and each party, counsel says, is entitled to careful consideration of his, her or its conduct and the consequences that might flow from it.

4. BLACK CUBE'S PUBLICATION BAN REQUEST

[178] As I noted, Black Cube's principal position is that the court does not have the jurisdiction to hear these motions. Should that position not prevail, however, they are concerned that any disclosure of Black Cube documents risks publicly identifying Black Cube agents. The ability of those agents to conduct covert investigations depends on their continued anonymity. Their counsel asks that the court permit the redaction of identifying information from any Black Cube documents that may be ordered produced.

[179] West Face opposes any such limitation on production. They urge the court to refuse to provide such discretionary relief because the foreign agents of Black Cube have conducted themselves in a manner abusive of the court and its processes.

5. THE FILING OF MOTION MATERIALS

[180] Following a case conference with counsel conducted prior to the argument of the motions, it was agreed that they would deliver their motion materials directly to me. The motion materials contain sensitive elements, some of which I have mentioned already. Directions must be given with respect to the filing of materials with the court office. Counsel have left those directions to the discretion of the court.

III. DISCUSSION

[181] Before delving into the issues raised by the parties, I want to briefly address the evidentiary record as it relates to the documents in issue.

[182] I have identified the documents in issue as being communications and documents generated by the planning and implementation of Project Maple Tree. These documents appear to fall into four broad categories: the Elwood Documents; the Tamara Global documents; the Black Cube documents; and the Psy Group documents.

[183] I have already particularized the Elwood Documents to some extent. They are more easily managed than the balance of the documents in issue for two principal reasons. First, there aren't very many of them; just 16 in total. Second, they have already been widely circulated amongst the parties. The upshot is that I have been able to review their contents. That ability certainly aids in the assessment of the privilege claims asserted over them.

[184] By contrast, I have very few of the other documents in issue. A modest selection of them was provided to me by Catalyst's counsel. My decisions about the privilege claims asserted over these documents must, for the most part, be made without access to their contents.

[185] Only a handful of the Tamara and Black Cube documents have been produced for my inspection, by way of a two-volume confidential Privileged Documents Brief. I intend to consider the assertions of privilege over these documents, one-by-one. These documents must otherwise serve as a proxy for the balance of any Tamara and Black Cube documents not produced for inspection.

[186] Said another way, I am proceeding from the premise that the onus is on Catalyst to provide a sufficient evidentiary record to establish the privilege claimed with respect to each document in issue. Catalyst has provided me with a select group of Tamara and Black Cube documents for consideration. I am proceeding on the basis that the documents provided to me are representative of the character of the Tamara and Black Cube documents in issue on the whole.

[187] Psy Group is an Isreali-based company. It is insolvent. It has not actively participated in this litigation. West Face has obtained a number of orders here in Ontario requesting the assistance of the Israeli courts in ordering the preservation and production of Psy Group documents. To date there has been no success in obtaining Psy Group's documents.

[188] I pause to comment on a submission by Catalyst's counsel. The orders made by the Commercial Court in Toronto seeking the assistance of the Israeli courts in West Face's pursuit of Psy Group documents, include a mechanism for determining any claims of privilege over any such documents. Catalyst's counsel suggested that the parties ought to be following the process established by those orders, rather than engaging in this free-standing privilege motion.

[189] I have three observations to make. First, in my view, if a mechanism was created for Psy Group to advance privilege claims over any of its documents whose disclosure was otherwise compelled by the assistance orders, that mechanism does not handcuff me in any way.

[190] Second, the appropriate time to raise arguments of this nature would have been when these motions were scheduled by the case management judge.

[191] Third, though Catalyst did not frame its argument this way, one might argue that it is not possible to assess any claim to privilege over documents that have not been identified and which Catalyst does not, apparently, have in its possession or control. It might be suggested that the mechanism contained in the assistance orders offers the best or fairest process to determine any privilege issues with respect to Psy Group documents.

[192] While I certainly see some attractiveness to such an argument, I reject it. I have sufficient evidence of Psy Group's role in Project Maple Tree and sufficient particulars of how and why any Psy Group documents may have been created, to render an informed decision about whether any may be protected by solicitor-client or litigation privilege.

[193] I will move on to an analysis of the live issues.

1. THE JURISDICTIONAL ISSUE

1.1 The Governing Principles

[194] For ease of reference, I will repeat the content of s. 137.1(5) of the *CJA*:

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

[195] The anti-SLAPP provisions are relatively new to Ontario and there is limited caselaw addressing the implications of the stay provision.

[196] Despite the paucity of caselaw interpreting s. 137.1(5), I think its purpose is clear. The prohibition on any further steps in a proceeding once an anti-SLAPP motion has been served prevents parties from engaging in extraneous litigation that may undermine the efficiency of the process established by s. 137.1 or otherwise compound the mischief the anti-SLAPP provisions are designed to prevent. See *United Soils Management Ltd. v. Mohammed*, 2017 ONSC 904, para. 16.

[197] The plain wording of the stay provision makes it apparent that it is non-discretionary. It permits no exceptions. *United Soils*, paras. 1 and 16. That said, it may be possible to draw a distinction between taking steps in the proceeding and taking steps in the motion. *United Soils*, para. 20. The parties appear to agree on this distinction and I take no issue with it. The jurisprudence has, however, yet to offer any guidance on what steps within the motion may be permissible.

[198] In assessing whether and to what extent interlocutory steps may be permitted within an anti-SLAPP motion, I believe consideration must be given to the design of the process established by s. 137.1. It is intended to be an efficient and economical means of identifying and stopping SLAPP proceedings in their tracks.

[199] The intention of anti-SLAPP legislation is to prevent deep-pocketed parties from misusing the court's processes to grind down litigants of lesser means, effectively preventing them from meaningfully participating in public discourse. The process established to identify and weed out SLAPPs has been designed in harmony with the legislative intention. For instance, anti-SLAPP motions require an evidentiary record, but one that is, by design, limited. The record is meant to reflect the nature of the process and the stage of the proceedings at which it occurs. As Coté J. observed in *1704604 Ontario Ltd. V. Pointes Protection Association*, 2020 SCC 22 at para. 52, a motion judge hearing an anti-SLAPP motion "is to engage in only a limited weighing of the evidence" and avoid a "deep dive" into the evidentiary record. The goal is to dispose of the motion as efficiently and economically as possible.

[200] It seems to me that any discretion to permit interlocutory motions within an anti-SLAPP motion must be exercised having regard to the aspirations of the legislation in terms of efficiency and economy. A multiplicity of interlocutory steps, or steps that fail to pass muster on a costs/benefits assessment ought to be avoided.

[201] The concept of proportionality is another means of expressing the essence of the costs/benefits analysis. It has taken on increasing prominence in the interpretation of the *Rules of Civil Procedure* over the past decade. It is a concept that, in my view, is of vital concern to the management of anti-SLAPP motions. Interlocutory steps that are disproportionate to the requirements of the anti-SLAPP motion(s) and the circumstances of the parties should be discouraged.

[202] To summarize, I accept Justice Penny's distinction, in *United Soils*, between steps in the proceeding and steps within the anti-SLAPP motion itself. The former are stayed. The latter are permissible, in the court's discretion. That discretion must be exercised having regard to the purposes and goals of the anti-SLAPP statutory regime – principally efficiency and economy. Accordingly, any proposed interlocutory steps must be subject to a costs/benefits analysis. Those steps found to be disproportionate to the needs of the anti-SLAPP motion or the circumstances of the parties should not be permitted.

[203] One further issue that arose during the course of argument was whether s. 137.1(5) has the effect of staying interlocutory proceedings already in process prior to the service of an anti-SLAPP motion. This issue arose largely as a result of the release by the Court of Appeal, on December 3, 2020, of its ruling in *Zoutman v. Graham*, 2020 ONCA 767.

[204] *Zoutman* was a defamation action commenced by a doctor against an individual who had made derogatory comments about him on a website known as RateMDs.com. The plaintiff moved for summary judgment once pleadings had closed. Two months after the summary judgment motion was served – and a month before it was scheduled to be heard – the defendant moved to strike the claim under s. 137.1 of the *CJA*. The two motions were ordered heard together. The judge hearing the motions dismissed the defendant's anti-SLAPP motion and granted the motion for summary judgment, awarding $50,000 in damages. The defendant appealed.

[205] One of the arguments raised on appeal was that the summary judgment motion ought not to have been heard until the anti-SLAPP motion was disposed of, in light of s. 137.1(5). The Court of Appeal rejected that argument, saying, at para. 17:

> …[T]he respondent brought and scheduled his summary judgment motion well before the appellant brought his motion under s. 137.1. Furthermore, the two motions were ordered to be heard at the same time, and the appellant did not seek to appeal that decision. In this context, the appellant did not take any further step within the meaning of s. 137.1(5).

[206] Counsel to West Face submit that the upshot of *Zoutman* is that any motion initiated prior to the service of an anti-SLAPP motion may continue, notwithstanding the operation of s. 137.1(5) of the *CJA*. They remind the court that their privilege motion was first launched in the fall of 2018.

[207] With respect to counsel, I do not read *Zoutman* as supportive of such a broad proposition. An interlocutory order had been made in *Zoutman* that provided for the combined hearing of the

defendant's anti-SLAPP motion and the plaintiff's summary judgment motion. That order was not appealed from. Moreover, it does not appear that any further steps were taken with respect to the summary judgment motion between the time that the anti-SLAPP motion was served and when the combined motions were argued. There was, in the result, arguably no breach of s. 137.1(5). Finally, on the facts of *Zoutman*, it would appear that combining the two outstanding motions did not run afoul of the legislative goals of efficiency and economy.

1.2 Analysis

[208] I am satisfied that the court has the jurisdiction to hear and determine the motions regarding Catalyst's assertions of privilege. There are a number of reasons supporting this conclusion.

[209] First, I am satisfied that these motions are not further steps in the proceeding at large, but are legitimate interlocutory steps within the anti-SLAPP motions.

[210] Second, the anti-SLAPP motions are being closely case managed by a judge of the Commercial List. These motions – and their parameters – have been case conferenced at length. Significant efforts, including the engagement of the Chief Justice's office, were taken to schedule the motions before an out-of-jurisdiction judge. At no time during that entire process did any party assert that the court lacked the jurisdiction to hear the motions as a result of the impact of s. 137.1(5) of the *CJA*, or otherwise. That argument was only raised during the hearing of the motions by Black Cube, a non-party to the anti-SLAPP motions.

[211] Third, while arguments were advanced before me to the effect that the documents in issue are not relevant or necessary to the determination of the anti-SLAPP motions, those assertions lacked conviction. I am satisfied that the parties actually engaged in the anti-SLAPP motions have always proceeded on the basis that the documents in issue are relevant to the determination of those motions. How significant they may be I am unable to say, but again, I defer to the fact that it was determined, through a case management process, that the motions should proceed.

[212] Fourth, I agree with Black Cube's submission that the court must manage interlocutory proceedings within an anti-SLAPP motion with regard to the goals of the legislated process in mind. Interlocutory steps within an anti-SLAPP motion may be permitted, but they must be proportionate and not undermine the goals of efficiency and economy.

[213] On this last point, I note that this is a $450 million lawsuit. This is not a David and Goliath battle. This is Goliath v. Goliath. The anti-SLAPP motions were initiated in November 2019. They will not be argued until at least early March 2021 – some 16 months in the making. There have been substantial materials filed in connection with the motions. There have been, or will be, cross-examinations on those materials. In terms of the privilege motions, I have received well in excess of 4,000 pages of materials. No party has shied away from supplementing the record.

[214] Proportionality takes on a different hue in a case like this. The main protagonists here have been litigating hard against each other for almost five years now. In the scheduling of these motions, no one appears to have raised any alarms about their cost, the time they would

take, or the resources they would consume. Again, only Black Cube, a non-party to the anti-SLAPP motions, suggests that perhaps the costs associated with these privilege motions outweigh any benefits they might bring to the process. The parties actually litigating the anti-SLAPP motions do not appear to agree.

[215] In the circumstances, I conclude that:

(a) These privilege motions do not run afoul of the prohibition on further steps set out in s. 137.1(5) of the *CJA* because they are permissible steps within the anti-SLAPP motions; and,

(b) I am not satisfied, in the unique circumstances of this litigation, that the privilege motions undermine the goals of the anti-SLAPP process to such a degree that they should be prohibited. They are not disproportionate within the context of this litigation.

[216] In the result, I am satisfied that I have the jurisdiction to hear the motions and I will proceed to a consideration of the substantive issues.

2. THE ASSERTION OF SOLICITOR-CLIENT PRIVILEGE

2.1 The Governing Principles

The Basics

[217] Solicitor-client privilege is a class privilege. It protects the confidential relationship between a solicitor and his or her client. It has a constitutional dimension. Beginning as a rule of evidence, it has evolved into a principle of fundamental justice and a civil right of fundamental importance in Canadian law. See *Solosky v. The Queen*, [1980] 1 S.C.R. 821; *Geffen v. Goodman Estate*, [1991] 2 S.C.R. 353; *Smith v. Jones*, [1999] 1 S.C.R. 455, and *R. v. Fink*, 2002 SCC 61.

[218] The basic rationale for solicitor-client privilege is well known and easily understood. Comprehensive and meaningful legal advice is realistically only possible where the client can be confident that what is said between her and her solicitor will not be disclosed. This rationale was explained as more than simply "utilitarian" by Justice Doherty, dissenting, but not on this point, in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, [1999] O.J. No. 3291 (C.A.) at para. 92. He described the privilege as "an expression of our commitment to both personal autonomy and access to justice."

[219] The onus is on the party asserting privilege to establish an evidentiary basis for it. See *Chrusz* at para. 95.

[220] The conditions necessary to establish the privilege are grounded in its rationale. They were identified in the seminal case of *Solosky v. The Queen*, as above. There are three. The communication over which privilege is asserted must:

(a) be a communication between lawyer and client;

(b) which entails the seeking or giving of legal advice; and,

(c) which is intended to be confidential by the parties.

See also *Pritchard v. Ontario (Human Rights Commission)*, [2004] 1 S.C.R. 809 at para. 15.

[221] The privilege is assiduously protected, but it is not entirely impenetrable nor without exceptions. Its scope does not extend to communications where legal advice is not sought or offered or where the communications are not intended to be confidential. It is also not engaged where the communications themselves are criminal or where the client's purpose in obtaining legal advice is to facilitate the commission of a crime: see *Solosky*, as above, as well as *Descoteaux v. Mierzwinski,* [1982] 1 S.C.R. 860 and *Pritchard,* as above, at para. 16.

[222] The criminal purpose exception has arguably been extended to communications made with the intent of committing tortious conduct, or abuses of the court's processes. See *McDermott v. McDermott*, 2013 BCSC 534.

The Limited Extension to Communications with Third Parties

[223] Of particular interest to this case is the question of whether solicitor-client privilege can extend to communications between a solicitor and a third-party, notwithstanding the apparently clear pre-conditions described in *Solosky*. The short answer is yes it can, but only in limited circumstances.

[224] Prior to the Court of Appeal decision in *Chrusz,* as above, the jurisprudence appears to have recognized solicitor-client privilege over communications between a solicitor and a third party only in the following, very limited, circumstances:

> …where the third party serves as a channel of communication between the client and solicitor, communications to or from the third party by the client or solicitor will be protected by the privilege as long as those communications meet the criteria for the existence of the privilege.
>
> See *Chrusz*, as above, at para. 106.

[225] In *Chrusz*, Doherty J.A. expanded somewhat the protection of solicitor-client privilege over communications between a solicitor and a third party. Communications between a solicitor and a third party will continue to be recognized as subject to solicitor-client privilege where the third party acts as an agent or channel of communication between the client and the solicitor. They will also attract solicitor-client privilege where the third party's retainer "extends to a function which is essential to the existence or operation of the client-solicitor relationship". (*Chruz*, para. 120).

[226] An example of this latter situation is provided by the English case of *Susan Hosiery Ltd. v. M.N.R.*, [1969] 2 Ex. C.R. 27. In that case, the client's financial advisors met with the solicitor to convey information about its business affairs. They acted essentially as translators and as a "conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer". (*Chrusz*, para. 111).

[227] Justice Doherty summarized the extension of solicitor-client privilege to communications between the solicitor and third parties as follows:

> Client-solicitor privilege is designed to facilitate the seeking and giving of legal advice. If a client authorizes a third party to direct a solicitor to act on behalf of the client, or if the client authorizes the third party to seek legal advice from the solicitor on behalf of the client, the third party is performing a function which is central to the client-solicitor relationship. In such circumstances, the third party should be seen as standing in the shoes of the client for the purpose of communications referable to those parts of the third party's retainer.
>
> If the third party is authorized only to gather information from outside sources and pass it on to the solicitor so that the solicitor might advise the client, or if the third party is retained to act on legal instructions from the solicitor (presumably given after the client has instructed the solicitor), the third party's function is not essential to the maintenance or operation of the client-solicitor relationship and should not be protected. (*Chrusz*, paras. 121-122).

[228] Generally, a third party investigator who gathers information to be used by counsel for the purpose of preparing for litigation or providing legal advice will not be considered essential to the maintenance or operation of the solicitor-client relationship. See *Ontario (Liquor Control Board v. Lifford Wine Agencies Ltd*., [2005] O. J. No. 3042 (C.A.).

Waiver

[229] Solicitor-client privilege belongs to the client and can only be waived by the client or through his or her informed consent: *R. v. Fink*, as above, at para. 39 and *R. v. McClure*, 2001 SCC 14.

[230] Waiver may be express or, where fairness requires it, implied. The Court of Appeal explained the distinction in *R. v. Youvarajah*, 2011 ONCA 654 at paras. 146-147:

> An express waiver of privilege will occur where the holder of the privilege (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive it: S & K Processors Ltd. v. Campbell Ave. Herring Producers Ltd., [1983] B.C.J. No. 1499, [1983] 4 W.W.R. 762 (S.C.), per McLachlin J.

> Despite these requirements, an implied waiver of solicitor-client privilege may occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it…

[231] Implied waiver arises, in other words, where the holder of the privilege takes some action or position inconsistent with the maintenance of the privilege. See *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795 at para. 92. One example of implied waiver, offered by the Court of Appeal in *Youvarajah*, is where a client alleges a breach of duty by his or her counsel. Another, offered by McLachlin J., as she then was, in *S & K Processors*, as above, is where a party relies on legal advice to justify or explain its conduct. Moreover, disclosure of a portion of an otherwise privileged communication may sometimes, as a matter of fairness, require that the whole of the communication be disclosed. See for instance, *Howard v. London (City)*, 2015 ONSC 3698.

[232] The "shield and sword" analogy is sometimes invoked to explain the circumstances in which implied waiver will arise. A privilege holder may not at once attempt to use privileged documents to her benefit and at the same time shelter behind the privilege to prevent an opposing party from testing the evidence. See *Huang*, as above, at para. 143.

2.2 Analysis

2.2.1 The Elwood Documents

[233] The first prerequisite to a finding that solicitor-client privilege attaches to a communication is that the communication be between a solicitor and his or her client.

[234] For the purposes of the motions now before the court, I am interpreting the "client" as broadly including Catalyst and Callidus as well as their principals, Mr. Glassman, Mr. Riley and Mr. De Alba. Their solicitors have included, at varying times, the Greenspan firm, the Lax O'Sullivan firm, Moore Barristers and Gowling WLF (Canada) LLP.

[235] None of the Elwood Documents is a communication between a solicitor and client. They consist of email communications amongst Psy Group employees; email communications between Psy Group employees and Mr. Elwood; and emails between Virginia Jamieson and various parties. Privilege is also asserted over the contents of Mr. Elwood's affidavit, none of which has anything to do with communications between solicitor and client, save perhaps for the "Schedule 'C' Document" which I will come to in a moment.

[236] None of the Elwood Documents could even be said to be communications between a solicitor and a third party acting as a conduit for the client. Again, save for the Schedule "C" Document, none of the communications forming the Elwood Documents even involves a solicitor.

The Schedule "C" Document

[237] The only one of the Elwood Documents that involves a solicitor are the notes of Naomi Lutes, which were listed at Schedule "C" to West Face's Affidavit of Documents.

[238] Ms. Lutes is a lawyer at Greenspan Humphrey Weinstein. The notes in question were provided to me by counsel to Catalyst. None of the moving parties has seen the contents of the notes. Though a copy of them was provided to West Face's lawyers by Mr. Elwood, West Face's lawyers did not read them, out of respect for their apparent confidential nature.

[239] The notes reflect the content of a meeting on September 12, 2017 between Ms. Lutes, Mr. Riley, John Philips and Derrick Snowdy. I do not know who John Philips is. Mr. Snowdy is a private investigator and appears to have been providing evidence of the "short and distort" actions of what is referred to in the notes as a "cabal". I believe the so-called cabal is more or less the same group referred to throughout this litigation as the "Wolfpack".

[240] Ms. Lutes took handwritten notes of the meeting and then subsequently created a typed version of them. The typed version is in the form of a Memorandum from Ms. Lutes to Jim Riley. It is marked "Solicitor-Client Privileged".

[241] Ms. Lutes sent the notes by email to Yossi Tanuri of Tamara Global on September 14, 2017. They were subsequently shared with Royi Burstein at Psy Group, who emailed them to Emmanuel Rosen, Phil Elwood, Avi Eliyahou, Abraham Ronen and others on September 16, 2017.

[242] In my view, there can be no sustainable claim to solicitor-client privilege over Ms. Lutes' notes for at least three reasons:

(a) The handwritten notes are not a communication between solicitor and client. They are a record of discussions between the solicitor and a potential witness. The fact that Mr. Riley was present during the meeting with the witness does not alter the nature of the communication. The communicating was between Mr. Snowdy (a witness) and others, including Ms. Lutes;

(b) Typing up a copy of the handwritten notes does not alter their character, even when the reference to "Solicitor-Client Privileged" is added. One cannot make a non-privileged document privileged just by writing "Privileged" on it. Having said that, the typed version of the notes contains a number of bracketed comments by Ms. Lutes, which I may have considered privileged, were it not for my next point;

(c) Whatever privilege may have attached to the notes was waived when the memorandum was delivered by Ms. Lutes to Yossi Tanuri and subsequently passed on to Psy Group and others, including Mr. Elwood.

[243] It is important to recall that privilege belongs to the client and it is the client's to waive. In this instance, the memorandum was sent to Mr. Tanuri with an email from Ms. Lutes that said, "Hi Yossi: Jim asked me to email you my notes of today's meeting. Please see attached."

[244] I understand "Jim" to be a reference to Jim Riley. I find that the memorandum of Ms. Lutes' notes was deliberately sent to Mr. Tanuri by counsel, on express instructions from the client. In the circumstances, if solicitor-client privilege at any time applied to the notes, it has been unequivocally waived.

[245] To close off this section, I will briefly address the possibility that solicitor-client privilege extended to communications between counsel (Ms. Lutes) and Tamara. In my view, it did not. Tamara did not act as a conduit between the client and counsel. Moreover, the communication of the memorandum to Tamara could not be described as essential to the maintenance or operation of the solicitor-client relationship.

[246] Tamara was hired as a security/investigations firm. They were to gather information and report it back to the client or counsel and they were to act on instructions from the client or counsel. They were not essential to the privileged relationship between counsel and client.

[247] In the result, I find that none of the Elwood Documents, including the Schedule "C" Document, is protected by solicitor-client privilege.

2.2.2 Communications Between Counsel and Tamara Global

[248] Recall that Tamara was retained by Catalyst, through Mr. Greenspan, on August 31, 2017. Tamara had the authority to retain third parties as subcontractors or consultants. Relying on that authority they retained Black Cube and Psy Group.

[249] Mr. Greenspan's letter engaging Tamara included the following paragraph**:**

> During the course of your retainer, we will provide you with information, data, and access to both principals and employees of the client/clients. The information provided to you or to consultants retained by you as subcontractors is to remain confidential and subject to solicitor-client privilege. Any results of your assessment and reports provided to us as counsel for the client/clients are to remain confidential and subject to solicitor-client privilege.

[250] With the greatest of respect to Mr. Greenspan, it simply cannot be that communications between counsel and Tamara are protected by solicitor-client privilege. At a very basic level they are simply not communications between a solicitor and client. And as I have found, Tamara is not the sort of third party to whom solicitor-client privilege might be extended. They were not essential to the solicitor-client relationship between Catalyst and any of its counsel.

2.2.3 The Black Cube and Psy Group Documents

[251] I reach the same conclusion with respect to any Black Cube and Psy Group documents. The assertion that they are protected by solicitor-client privilege is even less compelling than the assertion that communications between counsel and Tamara are protected by solicitor-client privilege.

[252] Black Cube and Psy Group are both independent contractors hired by Tamara to assist Tamara in carrying out its retainer with Catalyst. They were the subcontractors or consultants of Tamara. They are clearly not the "client" claiming privilege. They are third parties to the relationship between counsel and Catalyst, Callidus and their principals.

[253] As third parties there is only a narrow path to the protection of solicitor-client privilege over their communications and documents. And that narrow path is not present here. They did not act as a communications conduit between counsel and Catalyst. Nor did either play any role that one could characterize as essential to the solicitor-client relationship. Indeed, each of them appears to have had few, if any, direct communications with either the client or the solicitors.

[254] In my view, none of the documents of Tamara, Black Cube and Psy Group are subject to solicitor-client privilege. My conclusion includes any communications between Tamara, Black Cube or Psy Group whether internal, with counsel, with each other, or with third parties.

2.2.4 Other Documents

[255] Included in the 30-document brief of ostensibly privileged documents submitted by Catalyst's counsel were a number of communications clearly subject to solicitor-client privilege. They include:

(a) An email dated September 7, 2017 from Rocco DiPucchio – then counsel at Lax O'Sullivan – to Mr. Glassman regarding the prosecution of various actions on behalf of Catalyst;

(b) Two emails dated September 21, 2017 from David Moore to Brian Greenspan regarding the Moyse appeal and the possible use of fresh evidence; and,

(c) An email dated September 27, 2017 from David Moore to Brian Greenspan regarding a potential motion to adduce fresh evidence.

[256] None of the foregoing communications is subject to disclosure. As I understand the positions of the moving parties, none is seeking to get access to communications of this nature.

[257] I will turn now to a consideration of the assertion of litigation privilege.

3. THE ASSERTION OF LITIGATION PRIVILEGE

3.1 The Governing Principles

[258] Litigation privilege is another class privilege. Unlike solicitor-client privilege, it does not protect a relationship. Instead, it protects an area – a "zone of privacy" – necessary to foster the needs of our adversarial model of adjudication. See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at para. 34. It protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. See *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52 at para. 1.

[259] The purpose of the privilege, says the Supreme Court,

> …is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure. (*Blank*, para. 27).

[260] The parameters of litigation privilege strike a balance between the need for a protected area of privacy in which preparation for adversarial litigation takes place and the need for full disclosure to ensure trial fairness. As Carthy J.A. observed in *Chrusz*, "the modern trend is in the direction of complete discovery…[L]itigation privilege is the area of privacy left to a solicitor after the current demands of discovery have been met." (Para. 25).

[261] The Supreme Court described the ambit of litigation privilege succinctly in *Lizotte*, as above, at para. 19:

> Litigation privilege gives rise to an immunity from disclosure for documents and communications whose dominant purpose is preparation for litigation. The classic examples of items to which this privilege applies are the lawyer's file and oral or written communications between a lawyer and third parties, such as witnesses or experts.

[262] The privilege applies only to communications made at a time when litigation was commenced or contemplated and where the dominant purpose of the communication (and not just a substantial purpose) was for use in, or advice concerning that litigation. See *Blank*, as above, at para. 60 and *LCBO v. Lifford Wine Agencies*, as above, at para. 74.

[263] Again, the onus is on the party asserting the privilege to establish, with respect to each document in issue, that the dominant purpose for its creation was existing or contemplated litigation. See *Bartucci v. Lindsay*, 2010 ONSC 3942, at para. 11.

[264] The time at which the dominant purpose for a document's creation is to be assessed is the time when it was created. See *Nova Chemicals (Canada) Ltd. v. Ceda-Reactor Ltd*., 2014 ONSC 3995 at para. 35.

Expiration

[265] Litigation privilege, unlike solicitor-client privilege, is of temporary duration. Its purpose is to foster the litigation process and it makes sense, therefore, that it expires when the litigation it relates to comes to an end. *Blank*, para. 9. One must be cautious, however, in the determination of when litigation has come to an end. Sometimes parties remain engaged, over a number of legal proceedings, in what is fairly understood to be the same battle. Provided the ongoing proceedings are "closely related" to the litigation in which the privilege first arose, it will continue.

[266] "Closely related" litigation is that which involves the same or related parties and arises from the same or a related cause of action. *Blank*, para. 39.

Abrogation

[267] Over two paragraphs in *Blank*, the Supreme Court established an exception to the application of litigation privilege where disclosure would afford evidence of the misconduct or abuse of process of the party claiming privilege. Fish J. described the exception, at para. 45, as follows:

> Even where the materials sought would otherwise be subject to litigation privilege, the party seeking their disclosure may be granted access to them upon a *prima facie* showing of actionable misconduct by the other party in relation to the proceedings with respect to which litigation privilege is claimed. Whether privilege is claimed in the originating or in related litigation, the court may review the materials to determine whether their disclosure should be ordered on this ground.

[268] The "*Blank* exception" appears to have application beyond instances of strictly *actionable* misconduct. As Sharpe J.A. described the exception in *Moore v. Getahun*, 2015 ONCA 55, at para. 77, "the ends of justice do not permit litigation privilege to be used to shield *improper* conduct." (Emphasis mine).

[269] The issue in *Moore* was the propriety of communications between counsel and a medical expert hired by counsel to provide an opinion on standard of care and causation in a medical malpractice action. The Court of Appeal held that there is nothing inherently improper about counsel communicating with the expert during the preparation of a report. But those communications become improper if counsel communicates with the expert "in a manner likely to interfere with the expert witness's duties of independence and objectivity." The court concluded that where the opposing party can show reasonable grounds to suspect such improper communications have taken place, disclosure of those communications may be compelled, under the *Blank* exception.

[270] *Moore* is, in my view, significant for three reasons. First, it extends the *Blank* exception to improper conduct beyond that which is actionable. Second, it makes it evident that the misconduct in issue is not limited to the conduct of the client. Third, it permits compelled production where an opposing party establishes "reasonable grounds to suspect" improper conduct, which is arguably a lower threshold than a "*prima facie* showing".

Waiver

[271] Litigation privilege may be waived in the same manner as solicitor-client privilege, either expressly or implicitly.

3.2 Analysis

[272] Catalyst's claims to litigation privilege are significantly more difficult to assess than its claims to solicitor-client privilege. The difficulty can largely be explained by the fact that there are multiple lawsuits between Catalyst and West Face. Some of those lawsuits are now at an end, including the Moyse and VimpelCom actions. Others remain extant, including this Wolfpack action and the Veritas action.

[273] The first prerequisite to a valid claim of litigation privilege is that the communications in issue were made at a time when litigation was commenced or contemplated. The second prerequisite is that the dominant purpose of the communication was for use in, or advice concerning, that litigation.

[274] The Moyse and VimpelCom actions are both clearly at an end. They have each been finally disposed of at the trial court level, been unsuccessfully appealed to the Court of Appeal and denied a substantive hearing by the Supreme Court. Communications or documents that might otherwise have been clothed with litigation privilege in relation to the Moyse or VimpelCom actions will no longer be subject to that privilege, unless I conclude that this action is closely related to them.

[275] In my view, while this Wolfpack action shares some DNA with the earlier proceedings, they are not closely related.

[276] The Moyse and VimpelCom actions directly related to whether there was some impropriety with the way the WIND Mobile deal transpired. The Moyse action was about whether Mr. Moyse had given West Face confidential information belonging to Catalyst that somehow aided West Face in its pursuit of WIND. The VimpelCom action was about whether an exclusive negotiating agreement between VimpelCom and Catalyst had been breached and whether West Face had somehow induced that breach. The damages sought in each case were directly related to the profit West Face made on the WIND deal.

[277] The Wolfpack action has nothing to do with the WIND deal – at least not on paper. It may be born of the hard-feelings generated by the prior litigation, but as a matter of law, the issues here are totally different than those engaged by the earlier proceedings. At the core of the Wolfpack action are allegations and counter-allegations of defamation and market manipulation.

[278] What all of this means is that communications made, and documents created, for use in or advice concerning the Moyse or VimpelCom actions are no longer protected by litigation privilege. Any such privilege, if it existed, has expired.

[279] In some instances, there isn't a bright line between communications/documents in relation to the prior litigation and those related to the current litigation. At the time Tamara, Black Cube and Psy Group were active, the Moyse and VimpelCom actions were ongoing and the Wolfpack claim was at least contemplated, if not ongoing.

[280] I will again, consider each broad group of documents in turn. In the last section, I began my analysis with the Elwood Documents, then moved on to the communications and documents

of Tamara, Black Cube and Psy Group. In this section, I am going to begin with Tamara Global, simply for reasons of efficiency.

3.2.1 Communications with Tamara Global

[281] I have little to go on in terms of the communications Tamara has had with Catalyst or with its counsel, over which litigation privilege may be asserted. As I noted, I have been provided with specific documents to review by way of a Privileged Documents Brief submitted by Catalyst's counsel, but it contains relatively few documents.

[282] I am not privy to the rationale used to select the particular documents disclosed to me for review. I see no other reasonable way to approach these documents than to go through them individually, then to extend the reasoning I employ to the wider group of documents not otherwise produced for my review.

[283] The Privileged Documents Brief was filed in two volumes. The second volume, consisting of 8 tabs, reflects Black Cube documents. I will address these in a later section dedicated to Black Cube.

[284] The first volume contains a variety of documents, 22 in total, some of which involve communications between counsel and Tamara. My conclusions about these documents are as follows:

Tab 1:

[285] Tab 1 is copy of the Tamara Global retainer letter dated August 31, 2017. The retainer is expressly for the following reasons:

> The scope of the assignment authorized pursuant to this Retainer Agreement relates to a qualitative property, personnel and equipment assessment of the current needs and future requirements of our client/clients in order to more effectively and lawfully carry on their business objectives. The assignment may be expanded or modified by written or verbal instructions from authorized representatives of our office.

[286] What is immediately apparent from the language of the retainer agreement is that its dominant purpose – indeed any purpose – is not related to pending or contemplated litigation. It is not subject to litigation privilege.

Tabs 2 - 4

[287] Tabs 2 – 4 consist of three emails from Mr. Greenspan to Mr. Tanuri on September 1, 2017.

[288] The first email has a number of attachments including Veritas research alerts on a number of companies and a document/memo entitled, "Evidence that Veritas Investment Research has a

long history of conspiring with short sellers". Most of the documents attached are public documents and as such are disclosable, assuming they're relevant. They do not attract privilege simply because they came to be filed in the solicitor's brief. The one-page memo on Veritas' history of conspiracy is puzzling. I have no idea who created it or for what purpose. In the absence of evidence to that effect, I am not prepared to make a finding that it was prepared for the dominant purpose of the Veritas lawsuit or other, ongoing or pending litigation.

[289] The second email encloses a string of other, rather cryptic, emails about a number of subjects. Again, I am not prepared to speculate about how litigation privilege may attach to these documents or communications.

[290] The third email attaches some handwritten charts of parties and how they may be connected. I am satisfied that this document was created for the dominant purpose of the Wolfpack litigation and is subject to litigation privilege.

Tab 5

[291] Tab 5 is an email between Mr. DiPucchio and Mr. Glassman dated September 7, 2017. I have addressed it above. It is subject to solicitor-client privilege.

Tabs 6 - 7

[292] Tabs 6 and 7 include a copy of the retainer agreement between Black Cube and Tamara for what they refer to as "Project Camouflage", as well as some email communications dated September 7-9, 2017 between Mr. Tanuri and Mr. Greenspan regarding the content of the retainer. Arguably Tamara may have a viable assertion of solicitor-client privilege over the email communications, but no such claim has been asserted by them in this litigation.

[293] I will elaborate on this point a little later, but I am of the view that Black Cube's activities, ostensibly provided as "litigation support" are not properly characterized as having legitimate litigation as their dominant purpose. In my view, attempting to humiliate and denigrate a judge whose ruling one disapproves of, and lying and cheating one's way to extracting another party's private and confidential information, are not proper components of legitimate litigation. Moreover, I consider that a *prima facie* case of impropriety has easily been made out in relation to the conduct of Black Cube, such that any claim to litigation privilege over any of its relevant communications and documents has been vitiated.

Tabs 8 - 9

[294] Tabs 8 and 9 are copies of Ms. Lutes' handwritten and typed notes of the meeting with a witness on September 12, 2017. I will consider the claim to litigation privilege over these notes as part of my analysis of the Elwood Documents.

Tab 10

[295] Tab 10 is an email communication between Ms. Lutes and Mr. Tanuri dated September 14, 2017 which includes transcripts of "guarantors" requested by Mr. Tanuri. These appear to

relate to an OSC investigation. The transcripts are not subject to litigation privilege in this action, but I am satisfied that the dominant purpose of Ms. Lutes' email was this litigation and that the email itself is subject to litigation privilege.

Tab 11

[296] Tab 11 consists of a series of emails between counsel and Mr. Tanuri. They clearly have to do with the Moyse litigation and are no longer subject to litigation privilege.

Tabs 12 and 13

[297] These tabs are transcripts of meetings between a Black Cube agent and Justice Newbould on September 18, 2017 as part of Project Camouflage. The sting on Justice Newbould related solely to the Moyse action. If these transcripts were ever subject to litigation privilege, that privilege has expired as a result of the termination of Moyse litigation. I also consider the entire sting on Justice Newbould to be an abuse of the court's processes and, pursuant to the *Blank* exception, I would not uphold litigation privilege over these transcripts even if it had not otherwise expired.

Tabs 14 and 15

[298] These documents are emails between Mr. Moore and Mr. Greenspan which I referred to earlier. They are clearly subject to solicitor-client privilege.

Tab 16

[299] Tab 16 consists of notes Ms. Lutes took of a meeting on September 25, 2017 with Black Cube agents. They reflect discussions about sting operations which I find to have been wholly related to the Moyse action. As such any litigation privilege that may have applied to them has expired. And again, in view of my finding that the stings conducted by Black Cube on Justice Newbould and others were improper, I would not otherwise have upheld any assertion of litigation privilege in any event.

Tab 17

[300] Tab 17 is another email from Mr. Moore to Mr. Greenspan which, as I have found, is subject to solicitor-client privilege.

Tab 18

[301] This document is a memo prepared by a junior counsel in Mr. Greenspan's firm regarding a potential fresh evidence application in the Moyse appeal. It undoubtedly was covered by litigation privilege at one point, but that privilege has expired.

Tabs 19 - 21

[302] Tabs 19-21 consist of communications between Mr. Greenspan and Mr. Tanuri and between Mr. Tanuri and Mr. Glassman. The emails concern the pretext investigations (stings) conducted by Black Cube and concerns about keeping a lid on the transcripts of those operations. These documents related only to the Moyse litigation in my view and any litigation privilege that may once have applied has expired. Again, I am also of the view that any such privilege has been abrogated by Black Cube's improper conduct.

Tab 22

[303] Tab 22 consists of a package of documents purportedly provided to former Justice Stephen Goudge, together with an opinion he rendered to West Face's counsel about whether solicitor-client privilege attaches to the notes of Ms. Lutes attached as Schedule "C" to the West Face Affidavit of Documents.

[304] None of the documents provided to Mr. Goudge are subject to privilege. I have by and large already dealt with each of them. His opinion may have been subject to a claim of litigation privilege by West Face, but they have released the opinion as an exhibit to Mr. Panet's affidavit. It is certainly not subject to privilege in the hands of Catalyst or any other party.

Conclusions

[305] Of the documents I have just reviewed, I have found that just two are covered by sustainable litigation privilege. They are both communications between counsel and Tamara regarding, and limited to, the Wolfpack litigation.

[306] I said earlier that I am treating the documents produced to me as a proxy for the thousands of documents that have not been produced. I accept that one might argue that Catalyst's failure to produce a document and prove that it is covered by privilege is a failure of Catalyst to meet its onus.

[307] Realistically, however, the court is not able, as a practical matter, to review thousands of individual documents and render one-off rulings with respect to each one. There was always going to have to be some means of dealing with documents as a group or groups. I do not fault the approach taken by Catalyst's counsel to deal with the documents in a practical way.

[308] I would hold, in the result, and using the documents produced as a proxy for the larger group of documents in issue, that any communications between counsel and Tamara dealing solely with the Wolfpack or Veritas litigation are subject to litigation privilege. If there are questions about any particular documents and whether they fall into this category, I may be spoken to. The balance of any Tamara Global documents related to the planning and implementation of Project Maple Tree are not privileged and must be disclosed.

[309] I will proceed to consider the Elwood Documents.

3.2.2 The Elwood Documents

[310] The Elwood Documents are not, in my view, subject to litigation privilege, save for the Schedule "C" Document. There are a number of factors that support this conclusion.

[311] Save for the Schedule "C" Document, none of them are the types of documents that one would classically associate as being subject to litigation privilege. None form part of the solicitor's brief and none are communications between counsel and a third party, such as a witness or expert.

[312] Having said, that, a document need not be one of the "classically" recognized types I have just described in order to attract litigation privilege. But it must be a document created at a time when litigation was pending and it must have been created for the dominant purpose of that litigation.

[313] I do not intend to go through the Elwood Documents individually. I do not believe it necessary to do so. I am not satisfied that any of them – save the Schedule "C" Document – were created for the dominant purpose of litigation.

[314] The Elwood Documents all relate, in one way or another, to Project Maple Tree and its implementation.

[315] Mr. Elwood described Project Maple Tree as having two prongs, white and black. The white prong involved a media campaign to, as Mr. Elwood deposed, "generate positive publicity in the mainstream media for Catalyst and Glassman, such as touting their business successes and charitable donations." The black prong also included an element of public relations. Specifically, generating negative media attention to West Face and Mr. Boland.

[316] In my view, the "black and white" public relations elements of Project Maple Tree (for instance, any communications involving Ms. Jamieson and her attempts, on behalf of Psy Group, to persuade Ms. Blatchford and others to publish articles about West Face, the Wolfpack conspirators, or Justice Newbould) had nothing to do with litigation.

[317] Even if I were to accept that the media aspects of Project Maple Tree were somehow part of an overall litigation strategy, I am *not* satisfied that documents or communications relating to public relations were created for the *dominant* purpose of litigation. Their dominant purpose was clearly related to the management of the public images of West Face and Catalyst.

[318] The black prong of Project Maple Tree also had some more nefarious elements, as I have set out above, including pretext stings on Justice Newbould as well as current and former employees of West Face. These elements had to do with undermining the integrity of the trial decision in the Moyse action. That action is over and any litigation privilege that applied to any such documents or communications has now expired.

[319] Determining the dominant purpose of some of the communications contained in the Elwood Documents is made more difficult by the fact that some of them refer to multiple topics. Mr. Burstein's emails of September 13 and 16, 2017 are good examples. They reference Project Maple Tree and its various aspirations. They include references to investigations surrounding the alleged Wolfpack conspirators.

[320] If reference to the Wolfpack was *all* these emails talked about, I would not hesitate to conclude that they are subject to litigation privilege. But none of them could be described that way. Each includes a variety of topics – some Wolfpack; some public relations; and some related to the improper planned activities of Black Cube agents.

[321] In the result, at best, I would say that the investigation into the Wolfpack conspirators was a *substantial* element of some of the communications. But a substantial element is not sufficient to attract litigation privilege.

The Schedule "C" Document

[322] The Schedule "C" Document is, again, distinguishable from the balance of the Elwood Documents. It reflects Ms. Lutes' notes of a meeting between counsel and a potential witness in the Wolpack action. The memorandum she prepared would most certainly be considered part of the solicitor's brief. Moreover, it directly relates to contemplated litigation which remains extant.

[323] The central question for determination, however, is whether Catalyst can sustain a claim to privilege over the document in Mr. Elwood's possession. I find that they cannot.

[324] The evidentiary record reflects the chain by which the document came into Mr. Elwood's possession. It was sent by Ms. Lutes to Mr Tanuri, on Mr. Riley's instructions. This was enough to waive any claim to solicitor-client privilege in the document, but I would not conclude that it was enough, on its own, to amount to a waiver of litigation privilege. To paraphrase Justice Carthy's reasoning in *Chrusz*, there is nothing inconsistent in giving a copy of the notes to Catalyst's investigator and maintaining privilege against its adversary. (*Chrusz*, para. 58).

[325] But Catalyst, and in turn their counsel, knew that Tamara had been retained to do more than just investigate the alleged Wolfpack conspirators. The aspirations of Project Maple Tree were well-known to Catalyst. Those aspirations included positive and negative media relations campaigns.

[326] There is no evidence in the record that would support a finding that the further distribution of Ms. Lutes' notes within the investigative group was inadvertent. I would, in fact, infer that Catalyst and its counsel would have been alive to the fact that Mr. Tanuri was likely to share the notes with other investigators.

[327] The notes came to be delivered to Mr. Elwood. Again, there is no evidence to suggest that the disclosure was inadvertent. Indeed, it appears entirely intentional. Mr. Elwood's role in Project Maple Tree had nothing to do with preparation for litigation. He was not engaged to investigate the allegations of a Wolfpack conspiring to harm the financial interests of Catalyst or Callidus. He was hired to find a way to get stories to print in the mainstream media.

[328] I conclude that Ms. Lutes' notes were provided to Mr. Elwood for the purpose of shoring up the credibility of the stories he was to promote to media outlets. There is no evidence I have seen that suggests Mr. Elwood's use of those notes was restricted in any way or that he was instructed to keep them confidential.

[329] In my view, the wide dissemination of the notes to various parties for various purposes is antithetical to a sustainable claim to privilege of any sort over them.

[330] In the result, I find that Catalyst has no sustainable claim to litigation privilege in the Elwood Documents, including the Schedule "C" Document.

3.2.3 The Black Cube Documents

[331] The Black Cube Documents are extensive. Only a small number have been produced to me for inspection. In my view, none of them are subject to sustainable claims of litigation privilege.

[332] As I noted, volume two of Catalyst's Privileged Documents Brief includes 8 tabs, all related to Black Cube. I will review them in turn.

Tab 1

[333] The document at Tab 1 is interesting because it is a signed copy of the Black Cube retainer agreement. It is dated September 11, 2017 and is significantly longer than the September 7, 2017 copy found at Tab 6 of volume one of the Brief of Privileged Documents. While the main body of the agreement remains vague as to the subject-matter of the engagement, there is a schedule attached to it that sets out a bonus payment structure. That schedule gives a much clearer idea of the contours of Black Cube's engagement.

[334] West Face took the position on these motions that there is no evidence that Black Cube was involved in any investigations having to do with any litigation other than the Moyse action. It follows, in their submission, that any claim to litigation privilege over Black Cube documents has expired.

[335] Their counsel has not been privy to the document at Tab 1. It clearly demonstrates that part of Black Cube's retainer was the investigation into an alleged Wolfpack and its members.

[336] Again, if all Black Cube was doing was investigating the existence of a Wolfpack and its membership, I would be inclined to agree with Catalyst's position regarding the privileged nature of its communications and documents. But that is not the case.

[337] To be sure, one purpose of the Black Cube retainer, perhaps even a substantial purpose, was to conduct investigations relating to membership in the alleged Wolfpack. I accept that such an investigation was legitimate and appropriate. But an equally or more substantial purpose was the investigation of Justice Newbould, along with other targets, with the goal of undermining the integrity of the trial court ruling in the Moyse action.

[338] To suggest that conducting sting operations such as the ones carried out in this instance is properly construed as a legitimate "litigation purpose" is misguided in my view. I find that the Black Cube retainer agreement, with attachments, found at Tab 1 has a mix of purposes – some related to litigation, others related to more mischievous pursuits. I am not satisfied, in the circumstances, that the *dominant* purpose of the document is litigation.

[339] The trend in civil litigation is towards full disclosure, as a function of trial fairness and in service of the truth-seeking goal of the adjudicative process. The goal of litigation privilege is to promote the efficacy of the adversary process: *Blank*, para. 27. These goals tend to bump up against one another. Striking a balance between them can be difficult. I have to say, however, that activities that tend to undermine the integrity of the litigation process ought not to be recognized by the court as worthy of the court's protection. In my view the balance points clearly towards disclosure.

[340] In a moment I will address more generally the application of the *Blank* exception to the assertion of litigation privilege over Black Cube documents. At this stage, I am making the point that the September 11, 2017 retainer agreement was not created for the dominant purpose of litigation. It was created in part for a legitimate purpose of litigation support and at least equally for the purpose of engaging in mischief with the goal of undermining the integrity of the court's processes. On the "dominant purpose" test, the claim for litigation privilege fails.

Tabs 2 and 3

[341] Tabs 2 and 3 are spreadsheets that identify targets to be investigated by Black Cube. I reject the claim to litigation privilege for the exact same reason I rejected it in relation to the document at Tab 1. It fails to meet the dominant purpose test.

Tab 4

[342] The document at Tab 4 is an exchange of emails between a Black Cube agent and a Psy Group agent. Its contents unequivocally belie Dr. Yanus' evidence that "Black Cube did not co-ordinate its efforts with those of Psy Group." The contents of this email exchange relate to the sting on former Justice Newbould. That sting cannot, in my view, fairly be described as serving a proper litigation purpose. Accordingly, I again find that this document fails to meet the prerequisite of being prepared for the dominant purpose of litigation.

[343] It also fails because it solely relates to the Moyse litigation, which is now complete. If litigation privilege applied at one time, it has expired.

Tab 5

[344] Tab 5 is a letter dated September 21, 2017 on the letterhead of K. Wruck & Associates, a licensed Ontario private investigation firm. They were apparently retained by Black Cube in an effort to comply with the provisions of the *Private Security and Investigative Services Act, 2005,* S.O. 2005, chapter 34.

[345] At any rate, the content of the letter relates to the sting on Justice Newbould. I would not clothe this document with litigation privilege for the same reasons as I expressed in relation to the documents at Tab 4.

Tab 6

[346] Tab 6 is an encrypted chat exchange between a Black Cube agent and a Psy Group agent. The email reveals a plan to exchange lists of objects between themselves. I have no other evidence about this document and will not speculate about its specific purpose. Catalyst has failed to establish why litigation privilege applies to it.

Tab 7

[347] Tab 7 is an email exchange between the same agents referenced in the document at Tab 6. The agents are divvying up targets. Some have to do with West Face and others with suspected Wolfpack members. I am not satisfied that litigation privilege should apply to these emails for the same reason I am not satisfied that it should apply to the document at Tab 1. Specifically, some of the investigations being undertaken may well have had a legitimate litigation purpose to them. Others, as I have found, did not. And for that reason, I am unable to say that the legitimate litigation purpose was anything more than a substantial reason for the document's creation.

Tab 8

[348] The document at Tab 8 consists of 200 plus pages of transcribed conversations in an encrypted chat room called "Hummus Abu-Gosh". The conversations appear to be amongst Black Cube members. I have no evidence about (1) who created the chat group; (2) why it was created; or (3) what all of the topics discussed mean.

[349] It is self-evident that it was intended to be a secure means by which agents of Black Cube could communicate with one another. It is not the case, however, that its content was restricted to one or another particular topic. I do not consider it my function to review over 200 pages of text messages to try to figure out, on my own, what was being discussed and how it might relate to a legitimate litigation purpose. Catalyst has failed, in other words, to satisfy me that this document was created for the dominant purpose of (legitimate) litigation, and for that matter, litigation that remains extant. For that reason alone any claim to litigation privilege over it is rejected.

The *Blank* Exception

[350] I have a broader basis, however, to reject any claim to litigation privilege over Black Cube documents. Specifically, the *Blank* exception.

[351] I repeat a line from *Moore*, as above, at para. 77: "The ends of justice do not permit litigation privilege to be used to shield improper conduct".

[352] Conducting a pretext investigation on a former justice of this court may not be illegal or even actionable. Conducting pretext investigations on current or former employees of a business competitor may also not be illegal or an actionable wrong.

[353] But in my view luring a judge into a conversation based on a false pretext and attempting to bait him into making anti-Semitic remarks is remarkably improper. On September 18, 2017 "Arik" from Psy Group emailed "Guy" from Black Cube and made the goal of the operation clear: "Basically we're trying to prove that he's a racist, a depraved anti-Semite, and trying to find information that could paint him in as negative a light as possible."

[354] There was nothing in the judgment of Justice Newbould that would suggest he was biased, a racist or a depraved anti-Semite. The sting perpetrated on him was unvarnished random virtue testing or worse.

[355] Equally problematic were the stings on West Face employees. They too were lured in by lies. Efforts, sometimes quite significant, almost always adhering to the adage, *in vino veritas,* were made to persuade them to divulge West Face's confidential information.

[356] One of the factors that enabled Black Cube was the fact that the common law in Ontario lacks a robust framework for assessing the admissibility, in civil actions, of illegally, surreptitiously or otherwise improperly obtained evidence. A rule presumptively excluding from civil trials, evidence obtained by improper means would serve as a strong disincentive for parties to engage in the type of conduct Black Cube agents engaged in here. To date, no such rule exists in the civil context.

[357] By contrast, in the criminal law context there is a well-developed body of jurisprudence under s. 24(2) of the *Charter of Rights and Freedoms* which addresses the exclusion of evidence obtained in a manner infringing any of the *Charter's* provisions. There is also a growing body of law in the family law context which requires, as a condition of admissibility, a showing that the probative value of surreptitiously-obtained evidence exceeds any systemic or case-specific prejudice that may arise if the evidence is admitted. See *Sordi v. Sordi*, 2011 ONCA 665.

[358] Counsel to Catalyst and Black Cube submit that there is nothing inherently improper about pretext investigations. On some level, I agree with that. As an example, imagine a district manager of a chain of retail clothing stores who occasionally and randomly drops into one or another of the stores under her management, posing as a shopper, just to see if the sales staff are adhering to company policies regarding customer service. This classic "undercover boss" scenario does not strike me as inherently improper, though it clearly has a pretext element to it.

[359] The undercover boss scenario is, by and large, harmless. It doesn't depend on active deceit and doesn't compromise the autonomy and privacy rights of employees. Countenancing it would not likely have any negative impact on the reputation of the administration of justice in the eyes of reasonably informed and objective members of the community.

[360] Perhaps a closer analogy to the pretext investigations conducted by Black Cube in this case are Mr. Big investigations conducted from time to time by Canadian law enforcement agencies.

[361] An invention of Canadian law enforcement, the Mr. Big technique is the ultimate pretext investigation. In short, it typically involves undercover police agents, posing as members of a criminal organization, luring a target into joining their organization on the promise of friendship

and easy money. The goal is to have the target confess, to the head of the fictitious criminal organization, his involvement in a serious criminal offence. The confession is induced through lies and deception. Classically, the target is told that the organization is aware of his involvement in an offence (usually a homicide) and has a means of eliminating the risk of prosecution, provided they are made aware of all of the details. The target, wanting to remain a part of the organization and wanting to avoid prosecution, confesses to the boss (Mr. Big). See, for instance, *R. v. Hart*, 2014 SCC 52.

[362] It may be tempting to conclude that if Canadian courts are prepared to accept the validity of pretext investigations in the Mr. Big context, they should certainly be prepared to accept the validity of the pretext investigations conducted by Black Cube agents. But that would be an unsafe conclusion.

[363] First of all, Mr. Big operations are never about disclosure. They are about admissibility. The issue before the court in the case at bar is not about admissibility; it is about whether the details of the pretext investigations, otherwise relevant to a material issue in the litigation, ought to be disclosed. The legal principles engaged in disclosure (or privilege) issues are different than those engaged in admissibility issues.

[364] Second, it must be recognized that confessions generated through Mr. Big investigations are presumptively inadmissible. Though the Mr. Big technique is not illegal in Canada (as it is in many other jurisdictions including the United States) its use makes courts very uneasy. Confessions that arise in the context of lies, deception and inducements have to be looked at very carefully in terms of their reliability. Moreover, every Mr. Big investigation is subjected to close scrutiny for abusive conduct by state actors.

[365] In the context of Black Cube's pretext investigations, I would suggest that they too warrant close scrutiny, not because of concerns about the reliability or admissibility of any evidence they may have generated, but because of concerns about abusive conduct and their intrusion on the privacy and dignity interests of the targets. The court must be wary of protecting abusive conduct, even when not the actions of state agents, lest the administration of justice be brought into disrepute.

[366] Improper, even illegal, conduct may very well result in the creation of documents whose dominant purpose is litigation. But the court cannot sanction the suppression of such evidence because to do so would effectively make the court an accessory to the improper or illegal conduct. The court must distance itself from such conduct in order to maintain its integrity and repute. That is what the *Blank* exception is all about.

[367] Black Cube agents lied to former Justice Newbould. They took him to dinner, bought him drinks, pretended like they wanted to retain him as an arbitrator and then did their best to dupe him into making utterances that might embarrass him. They did so not because there was any credible evidence that he was biased against Jews or Catalyst or anyone else. They did so because they were being paid a very large amount of money to do so by someone who was very unhappy with a decision that he had rendered in his capacity as a Superior Court Justice.

[368] Black Cube agents also deceived a number of employees of West Face, both active and former. They pretended to offer lucrative and interesting employment opportunities. They acted like they thought the targets were unique, accomplished and special. At times they went to significant lengths. With Mr. Singh, for instance, they took him out for dinner and drinks and did their best to induce him to implicate Mr. Moyse in a breach of confidence. When their first effort failed, they flew him to London, England, took him out for dinner and more drinks and took another run at him.

[369] Black Cube's efforts were designed to, by hook or by crook, obtain confidential information about West Face. They were, in my view, corporate espionage.

[370] The conduct of Black Cube agents was an affront to justice. It is the type of conduct that the court must distance itself from.

[371] Again, this is not an admissibility ruling. I do not have to decide whether any evidence generated through the stings conducted by Black Cube might be admissible despite the manner in which it was obtained. This is a disclosure ruling. The sole question for determination is whether the court should recognize a claim to privilege over communications and documents generated by and in furtherance to a course of conduct deemed by the court to be improper.

[372] In view of the decisions in *Blank* and *Moore*, I think the answer is clearly no.

[373] The means by which the court distances itself from Black Cube's conduct is to refuse to shield evidence of their activities from the disinfecting light of day.

[374] I would add the following observation: the purpose underlying litigation privilege is the need to foster the needs of our adversarial model of litigation. Offering safe harbor to Black Cube's odious methods would not foster those needs. It would only serve to encourage the use of these types of investigative techniques; to dilute personal privacy and dignity; and to bring the administration of justice into disrepute.

[375] I am proceeding on the basis that Black Cube's documents are relevant to live issues in the anti-SLAPP motions and the litigation in general. Ordering production of those documents serves the truth-finding function of the adjudicate process. At the same time, in the circumstances of this case, ordering production does not, in my view, impair the efficacy of the adversary process. The documents in issue overwhelmingly have to do with the Moyse litigation and Catalyst's unhappiness with the result. They have little, if anything, to do with the ability of counsel to properly prepare for the extant litigation – this Wolfpack action or the Veritas action, if it is seriously being pursued.

[376] I understand Catalyst's argument that the privilege in issue is theirs and not Black Cube's. Further that the principals of Catalyst did not know about the specific investigations Black Cube was planning to conduct and certainly did not approve of them.

[377] But as I observed earlier, misconduct that meets the *Blank* exception test need not be that of the party asserting privilege. In *Moore*, as above, it was the conduct of the party's solicitor that was in issue. Here it is the conduct of the party's agent.

[378] The purpose of the *Blank* exception is to avoid litigation privilege being used to shield improper conduct. That purpose would not be well-served if a party could simply disavow responsibility for the misconduct of its retained agent.

[379] I am also somewhat concerned about what inferences the specifics of Black Cube's retainer give rise to. Their base fee was $1.5 million U.S. A bonus structure – the particulars of which I will not elaborate on – provided for maximum fees up to $11 million U.S. Catalyst was the party ultimately paying Black Cube's fees. Even for Catalyst, $11 million is a big number. A natural inference is that the payor of such a significant sum will want to know what it is they are paying for. How else will they know if the fees are reasonable? The alternative is that they do not want to know. Actual knowledge and willful blindness are close cousins.

[380] As I said earlier, I am proceeding on the basis that the Black Cube documents provided to me are representative of the whole of the Black Cube documents over which privilege is asserted. In other words, the sample is a proxy for the whole. Unlike the case with respect to the Tamara documents, none of the Black Cube documents presented to me meets the criteria for a finding of litigation privilege. In the result, and by extension, I conclude that none of Black Cube's purportedly privileged communications and documents are protected by litigation privilege.

[381] At this point, I would move on to a consideration of the Psy Group documents. Almost none of those documents have been produced to me for inspection, save for those that are reflected in the Elwood Documents.

[382] I have rejected the claims to solicitor-client privilege and litigation privilege with respect to the Elwood Documents on the whole. I have no reason to believe that any of the Psy Group documents relating to Project Maple Tree is subject to solicitor-client privilege or litigation privilege based on the reasoning I applied to the balance of the Elwood Documents.

4. BLACK CUBE'S PUBLICATION BAN CLAIM

[383] Black Cube urges the court to permit them to redact any reference in any document that may tend to identify any of their agents. They depend on undercover, "pretext", investigations as a significant part of their business model.

[384] Black Cube has not, however, established the court's jurisdiction to permit such redactions. Assuming, for the sake of argument, that I have a discretion to permit the redaction of documents otherwise subject to disclosure, ought I to exercise that discretion in favour of Black Cube in the circumstances of this case? In my view, no.

[385] Presumably any discretion to permit redactions must be exercised in the interests of justice. I have no evidence that would establish why the interests of justice require the redactions sought. Nothing in Dr. Yanus' affidavit suggests, for instance, that the safety of Black Cube agents would be endangered if their identities were revealed. At best, it appears that Black Cube's business model might be impacted. This is the same business model that gave rise to Black Cube's improper conduct in this case.

[386] Undoubtedly privacy interests are in play, but no evidence was tendered about the privacy interests of the agents, nor was any specific argument made directed at those interests and how they might be balanced against other interests in play.

[387] It is also a little rich for a party to raise concerns about privacy interests when their business model involves lying to others in the hopes that they may inadvertently disclose otherwise private and confidential information. Black Cube appears to have been unconcerned about the privacy and dignity interests of former Justice Newbould or any of the West Face employees it conducted pretext interviews on. I have no doubt that Black Cube understands that if you live by the sword you die by the sword.

[388] At any rate, I am not prepared to grant the relief sought by Black Cube in the absence of a formal motion for that relief. The relief essentially amounts to a publication ban and there is a protocol in place that must be adhered to when such relief is requested. Specifically, a formal Notice of Motion must be served and notice of the motion must be provided to the media by completing and submitting the Notice of Request for Publication Ban described at Part V of the Superior Court's Consolidated Practice Direction.

[389] The redaction request is denied.

5. SUMMARY

[390] I have identified certain communications between Mr. Morris and Mr. Greenspan that are clearly subject to solicitor-client privilege. I am sure that there are other communications between the Catalyst parties and their various solicitors that are undoubtedly subject to solicitor-client privilege. I understand that the moving parties are not trying to get access to documents of that nature.

[391] With respect to the specific requests in the notices of motion, I find that:

(a) There is no sustainable claim to privilege, whether solicitor-client or litigation privilege, over any of the Elwood Documents, including the Schedule "C" document;

(b) There is no sustainable solicitor-client privilege or litigation privilege in any of the Tamara Global documents, Black Cube documents or Psy Group documents, save for:

(i) the third email from Brian Greenspan to Yossi Tanuri on September 1, 2017;

(ii) the email communication between Ms. Lutes and Mr. Tanuri dated September 14, 2017 produced at Tab 10 of volume one of Catalyst's Privileged Documents Brief; and,

(iii) any other direct communications between counsel and Tamara relating solely to the Wolfpack or Veritas actions. Again, I may be spoken to if there is any question about whether a particular document falls under this umbrella.

[392] West Face refers to the documents in issue generally as documents relating to the "Defamation Campaign". I prefer to steer clear of that kind of language, given that it is at the core of the litigation. That said, I believe my ruling should be clear that of the documents in issue, only the ones listed in subparagraphs (b)(i), (ii) and (iii) are properly subject to a sustainable claim of privilege. Any other documents related to Project Maple Tree or Project Camouflage or to the retainers of Tamara Global, Black Cube or Psy Group more generally, are not subject to established and sustainable claims of privilege.

[393] Again, to be clear, only a small fraction of the documents were presented to me for review and consideration. I have proceeded on the basis that those documents are representative of, and serve as a proxy for, all of the documents in issue.

[394] Catalyst, Tamara Global, Black Cube and Psy Group are each ordered to produce revised Affidavits of Documents within 30 days, reflecting the substance of this ruling and shall produce, upon request and within a reasonable time, all Schedule "A" documents reflected in their revised Affidavits of Documents.

6. THE FILING OF MOTION MATERIALS

[395] There is a good deal of sensitive material filed in relation to these motions. I am directing that the parties file copies of their notices of motion with the court and that they pay the associated filing fees. In addition, the affidavits filed in support of the motions must be filed, along with any exhibits referred to in the affidavits. But those affidavits and exhibits, as well as the parties' factums, will be sealed, subject to further order of the court.

[396] I recognize that one or another party may seek leave to appeal this ruling. The ruling contains references to documents over which privilege has been asserted. For that reason, I order that the ruling not be disseminated or published in any way, beyond counsel and the principals of the parties hereto, for a period of 30 days. If any party moves for leave to appeal this ruling within that 30 day period, then this publication ban will continue until the motion for leave has been determined by the Divisional Court. This publication ban expires if no party moves for leave to appeal within 30 days.

7. COSTS

[397] The parties are encouraged to reach an agreement on the issue of costs.

[398] Absent an agreement, the parties are invited to make written submissions on the issue of costs on a 14-day turnaround. The moving parties should serve and file their submissions by January 25, 2021 and the responding parties by February 8, 2021. Submissions should not exceed 3 pages in length, not including Cost Outlines and caselaw.

Boswell J.

Released: January 11, 2021