CITATION: The Catalyst Capital Group Inc. and Callidus Corporation v. West Face Capital Inc. et al., 2021 ONSC 1140
COURT FILE NO.: CV-17-587463-00CL
DATE: 20210212

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	*Richard Dearden, Marco Romeo, Matthew Karabus, David Moore* and *Ken Jones*, for the Plaintiffs
Plaintiffs	
– and –	
WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC., C.O.B ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC,	*Matthew Milne-Smith, Andrew Carlson* and *Maura O'Sullivan*, for the Defendants West Face Capital Inc. and Gregory Boland
FRIGATE VENTURES LP, ANSON INVESTMENTS LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS,	*Lucas Lung* and *Rebecca Shoom*, for the Defendants ClaritySpring Inc. and Nathan Anderson
SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN	*Devin Jarcaig*, for the Defendant Bruce Langstaff
BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL,	*Jennifer Saville*, for the Defendant Rob Copeland
GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10	*A.J. Freedman*, for the Defendant Bruce Livesey
Defendants	*Darryl Levitt*, self-represented Defendant
	Kevin Baumann, self-represented Defendant
– and –	
CANACCORD GENUITY CORP.	
Third Party	

AND BETWEEN:	)	
	)	
WEST FACE CAPITAL INC., and GREGORY BOLAND	)	*Matthew Milne-Smith, Andrew Carlson* and *Maura O'Sullivan*, for the Plaintiffs by Counterclaim
Plaintiffs by Counterclaim	)	
	)	
– and –	)	
	)	
THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION, NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSE, 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	)	*Richard Dearden, Marco Romeo, David Moore* and *Ken Jones,* for the Defendants to the Counterclaim the Catalyst Capital Group Inc., Callidus Capital Corporation, Newton Glassman, Gabriel De Alba and James Riley
Defendants to the Counterclaim	)	
	)	
	)	
AND BETWEEN:	)	
	)	
BRUCE LANGSTAFF	)	*Devin Jarcaig,* for the Plaintiff by Counterclaim
Plaintiff by Counterclaim	)	
	)	
– and –	)	
	)	
THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION	)	*Richard Dearden, Marco Romeo, Matthew Karabus, David Moore* and *Ken Jones,* for the Defendants to the Counterclaim
	)	
Defendants to the Counterclaim	)	
	)	
	)	**HEARD:** January 18 and 22, 2021

ENDORSEMENT

[1] This is the first of a number of endorsements that I will be releasing concerning refusals motions brought in this matter.

[2] Specifically, this Endorsement deals with motions brought by West Face Capital Inc. ("West Face"), as well as Nathan Anderson ("Anderson") and his company ClaritySpring Inc. (collectively the "Anderson Defendants") seeking to require the Catalyst Capital Group Inc. and Callidus Capital Corporation (collectively the "Catalyst Parties") to answer questions that were refused or taken under advisement during the cross-examination of James Riley ("Riley") on behalf of the Catalyst Parties. Riley was cross-examined with respect to the upcoming anti-SLAPP motions that I am hearing in May 2021.

[3] The within motions dealt with three discrete categories:

- West Face and the Anderson Defendants seek production of the "Strategic Review and Remediation Plan" that was prepared by Callidus's interim CEO, Patrick Dalton, and provided to Callidus's Board of Directors in late February 2019 (the "Dalton Report").

- West Face seeks production of several communications between the Catalyst Parties and Vincent Hanna, Daniel Guy, John Kingman Phillips, and/or Derrick Snowdy (collectively the "Guy Documents").

- The Anderson Defendants also seek production of communications between the Catalyst Parties and the Ontario Securities Commission (the "OSC") and the U.S. Securities and Exchange Commission (the "SEC").

[4] For the reasons that follow, I order production of all of the aforementioned documents and that the Catalyst Parties re-attend to answer questions arising from the production of those documents.

OVERVIEW

[5] This Endorsement follows the lengthy decision of Boswell J.: see *The Catalyst Capital Group Inc. v. The West Face Capital Inc.*, 2021 ONSC 125. Boswell J. comprehensively set out the background of this enormous, fractious litigation. I commend those reasons to the reader of this Endorsement for a fulsome description of the circumstances surrounding this litigation.

[6] Briefly, for the purposes of this Endorsement, I would simply reiterate that the Catalyst Parties commenced this action (commonly referred to as the "Wolfpack Action") primarily accusing West Face and others, including the Anderson Defendants, of conspiring to "short and distort" the shares of Callidus. Anderson is the principal of ClaritySpring Inc. He is a business analyst, professional whistleblower and short seller. Anderson researched Catalyst and Callidus,

subsequently prepared Whistleblower Submissions (the "Whistleblower Submissions") for the OSC and engaged in the short selling of Callidus shares.[1]

[7] The defendants West Face, its principal Gregory Boland ("Boland") and the defendant Bruce Langstaff ("Langstaff") then commenced counterclaims against the Catalyst Parties and some of their principals including Newton Glassman ("Glassman"), the founding partner of Catalyst and Chief Executive Officer of Callidus, and Riley, an executive of Catalyst.

[8] All of this litigation follows earlier significant and, at times, nasty litigation between Catalyst and West Face, which is well set out in the reasons of Boswell J. The ill will in the earlier litigation has spilled over into these proceedings.

[9] Insofar as these motions are concerned, with respect to the pending anti-SLAPP motions, I begin by noting that none of the parties raised any issues with respect to whether I had jurisdiction to hear the motions. This issue was raised before Boswell J. He found that he had jurisdiction to hear similar motions: see paras. 194-216. Since it was not raised before me, I assume that this is now a dead issue but, in any event, I agree with Boswell J. that I have jurisdiction to hear the motions in advance of the anti-SLAPP motions.

[10] Further, the documents in question in these motions were provided to me on a confidential basis on the day of the motion by the Catalyst Parties for review. No other party objected to this method of proceeding, and it was supported by West Face and the Anderson Defendants.

[11] I will now turn to the three areas of dispute: first, the Dalton Report; second, the Guy Documents; and third, the OSC/SEC Documents.

THE DALTON REPORT

[12] I do not propose to deal with each and every argument raised by the parties, but rather those that I believe are most germane to the dispute.

[13] By way of background, Patrick Dalton ("Dalton") was employed by Callidus as a consultant and interim CEO from November 2018 until March 2019. While there, he prepared a detailed plan for completing the financial and business restructure of Callidus's business – the Dalton Report.

[14] It was presented to Callidus's Board of Directors at a February 2019 meeting. The meeting was also attended by Rocco DiPucchio ("DiPucchio"), a managing director of Catalyst who was also acting in a General Counsel role, and Jon Levin, a lawyer who performed legal work for Callidus.

---

[1] For a full explanation of the basics of short selling, see the decision Boswell J., at para. 117, n 3.

[15] The Catalyst Parties claim that the Dalton Report is subject to solicitor-client privilege. The Catalyst Parties concede that the Dalton Report itself did not include legal advice but submit that Dalton was directed to prepare a report concerning restructuring options for Callidus which, given its affiliation with Catalyst, would have to be acceptable to Catalyst. Moreover, the Catalyst Parties submit that the Callidus Board knew that the Dalton Report would be provided to DiPucchio, Glassman and Riley for their review.

[16] In the above circumstances, the Catalyst Parties contend that the Callidus Board considered that the Dalton Report would be confidential and subject to solicitor-client privilege. They further submit that this intention was reflected by the notation on the first page that the Report was "Confidential Attorney-Client Privilege" and a disclaimer on the last page of the Dalton Report:

> The information contained in the document is intended for the Board of Directors of Callidus Capital and their respective Counsel. Circulation or reproduction of this document outside of Callidus Capital Corporation or its Affiliates is not permitted. The information contained in the [*sic*] this document is proprietary and confidential.[2]

[17] In this regard, the Catalyst Parties submit that the purpose and scope of the Dalton Report was to enable DiPucchio to provide legal and strategic advice to Catalyst.

[18] Indeed, DiPucchio did review the Dalton Report and certain information was added to it upon his recommendation. Ultimately, I accept that DiPucchio did use the Report to give legal advice to Catalyst and its principals concerning the proposed restructuring.

[19] In short, the Catalyst Parties submit that the purpose of the Dalton Report, its disclosure to DiPucchio, his work on the Report and his attendance at the board meeting enabled DiPucchio to provide legal advice to Catalyst with respect to possible restructuring proposals and, as such, is subject to solicitor-client privilege. I disagree.

[20] The Catalyst Parties also primarily rely upon three cases, each of which is distinguishable:

- In *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 ONSC 1338, aff'd 2014 ONSC 4894, the Court was not simply dealing with a report generated by a corporation but rather, the documents in question were specifically prepared by the corporation and its professional advisors, including legal counsel, with the goal of maximizing the success of the CCAA proceeding. Conversely, Dalton did not receive legal advice in the preparation of his Report, nor was it prepared for the purposes of litigation, although DiPucchio did provide advice with respect to restructuring. In my view, however, that is not enough.

---

[2] I accept that Affiliates would include Catalyst and it also bears noting that the disclaimer also expressly stated that nothing in the Dalton Report constituted legal, tax or other advice.

- Similarly, in *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, the documents over which privilege was asserted, and accepted by the Court, related to ongoing expropriation where the lawyer and consultant worked closely as a unified team to prepare a report for the Transportation Authority, which was carrying out the expropriation. Of note is the fact that the Court denied privilege over documents between the lawyer and the appraiser, which are more akin to the within case.

- In the third case, *Royal Bank v. Société Generalé (Canada)*, 2005 CanLII 36727 (Ont. S.C.), the Court dealt with a case in which general counsel struck a committee to deal with an issue of forged bank drafts, which is far different from the within case where Dalton prepared a report to deal with business advice.

[21] I prefer the arguments of West Face and the Anderson Defendants who submit that the Dalton Report is not subject to solicitor-client privilege for the following reasons:

- As noted, the Dalton Report was not prepared for the specific purpose of obtaining legal advice for Callidus.

- The Dalton Report was an analysis of the business of Callidus; it was intended to assess Callidus's business realities relating to the cause of its financial problems and to offer recommendations regarding its future activities.

- The Dalton Report was created as a briefing document for review by the Callidus Board and, therefore, does not attract solicitor-client privilege: *Nova Chemicals (Canada Ltd.) v. Ceda-Reactor Ltd.*, 2014 ONSC 3995, at paras. 34 and 37.

- The fact that DiPucchio and/or Levin were involved in the preparation of the document does not automatically result in the Dalton Report being subject to solicitor-client privilege. Solicitor-client privilege is not intended to protect all communications or materials deemed useful by a lawyer to properly advise their client: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C. A.), at paras. 127-128; *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 50; *XCG Consultants Inc. v. ABB Inc.*, 2014 ONSC 1111, at para. 38.

- The fact that the Dalton Report was marked as being "Confidential Attorney-Client Privilege" does not make it so. In this regard, I echo the comments of Boswell J., at para. 242 of his decision, where he noted that "[o]ne cannot make a non-privileged document privileged by just writing 'Privileged' on it." The fact that DiPucchio and Levin attended at the board meeting does not necessarily render the Dalton Report privileged, nor does the fact that DiPucchio reviewed the draft version of the Dalton Report and proposed changes.

- DiPucchio, at the time, was not in the employ of Callidus, but rather the related company Catalyst. At the time, Catalyst was not a shareholder of Callidus, although Catalyst's related companies did hold shares in Callidus. DiPucchio, therefore, was not a lawyer for Callidus and, in my view, his participation cannot establish a solicitor and client relationship with Callidus such that the Dalton Report would have been considered to be privileged.

[22] The simple fact is that the Dalton Report was intended to and, in fact, did assess the business realities of Callidus. A plain reading of the document discloses this. While it may be that counsel ultimately used the Dalton Report to formulate legal advice, the Dalton Report, in and of itself, did not contain legal advice; it contained Dalton's business analysis for Callidus.

[23] In coming to this conclusion, I also reviewed and rely upon the decision of Boswell J. with respect to the law of solicitor-client privilege: see paras. 217-222.

[24] Although not raised in their factum, the Catalyst Parties also raised the issue as to whether the Dalton Report was relevant to the anti-SLAPP motions. In my view, it is. In this $450 million lawsuit, the Catalyst Parties claim that the defendants caused them significant damages due to the alleged "short attack" which drove down Callidus's share price, impaired their ability to raise funds and, overall, caused them significant damages. At the same time, the Catalyst Parties concede that they were experiencing significant financial difficulties. In my view, the Dalton Report is, therefore, relevant to the anti-SLAPP motions since it deals with Callidus's overall financial difficulties during the relevant timeframe.

[25] In all of the above circumstances, I am of the view that the Dalton Report is not subject to solicitor-client privilege and should be produced.

THE GUY DOCUMENTS

[26] Shortly after the Wall Street Journal published the article concerning the Catalyst Parties, which led to the Catalyst Parties commencing a separate action against Rob Copeland (the author of the article), Dow Jones (the owner of the Wall Street Journal) and others, Glassman received an email from a person purporting to be "Vincent Hanna" ("Hanna") which referred to a "cabal" of conspirators who, amongst other things, had a goal to "bring down" Callidus and Glassman. The cabal, according to Hanna, included West Face and Boland, amongst others.

[27] The Catalyst Parties, after receiving Hanna's email, consulted with counsel. Thereafter, twenty-six emails flowed between the Catalyst Parties and a number of others, including Hanna (which the Catalyst Parties now believe to be the alias of Daniel Guy ("Guy"), a claim which Guy denies), Guy himself, John Kingman Phillips ("Phillips") who was Guy's lawyer, Guy's private investigator Derrick Snowdy "(Snowdy"), Marc Cohodes ("Cohodes") who is a U.S. investor and short seller and Brian Greenspan ("Greenspan") who has acted as legal counsel for the Catalyst Parties. Various members of the Catalyst Parties were involved in the emails, including Glassman and Riley.

[28] The Catalyst Parties assert common interest privilege over these documents.

[29] In order to successfully assert common interest privilege, the Catalyst Parties must demonstrate that:

(i) the underlying information shared with the third party is privileged;

(ii) the third party shares a common interest with the sharing party at the time of disclosure; and

(iii) the privilege has not been abrogated through waiver, disclosure or otherwise at law: see *Milicevic v. T. Smith Engineering Inc.*, 2016 ONSC 2166, at paras. 136-137.

[30] In brief, common interest privilege ensures that a document or communication that is protected by solicitor-client privilege or litigation privilege does not lose that protection when it is shared between parties who share a common interest in either litigation or a transaction. Accordingly, in order to make out a claim for common interest privilege, there must also be an underlying privilege claim established.

[31] In my view, the Catalyst Parties have failed to establish an underlying claim of privilege or common interest. In any event, given the production of the first Vincent Hanna email, the Catalyst Parties have waived privilege with respect to the emails that followed.

[32] I begin my comments with my general concern about the murky nature of the Guy Documents. As noted, Guy disputes that he is Hanna. The Catalyst Parties believe he is. Further, Cohodes is also included in the emails, which would suggest that he has a common interest with the others. But other documentation in the Catalyst Parties' productions, including a decision of Perell J., *Harrington Global Opportunities Fund S.A.R.L. v. Investment Industry Regulatory Organization of Canada*, 2018 ONSC 7739, upon which they rely, notes that Harrington (Guy's company) was looking at pursuing litigation against Cohodes. This certainly does not speak of any common interest between them. All of this, of course, must be read in context with Boswell J.'s reasons wherein he was highly critical of some of the investigations carried out by entities hired by Catalyst.

[33] Insofar as an underlying claim of solicitor-client privilege is concerned, I once again agree with the statement of law set out by Boswell J., at paras. 217-221 of his decision. As is later stated in Boswell J.'s reasons, commencing at para. 233, solicitor-client privilege attaches to a communication that is between a solicitor and their client.

[34] None of the aforementioned Guy Documents amount to such a communication. Although Greenspan is included in some of the emails as one of a number of people being copied, he is not the author of any of the Guy Documents. Furthermore, the Guy Documents find their genesis in an unsolicited email sent by Hanna (whoever that might be) to Glassman, via a secure Norwegian server designed to provide maximum encryption. Thereafter, communications flew with respect to the allegations contained in Hanna's original email. I cannot see how the unsolicited email and those that followed can be subject to solicitor-client privilege.

[35] In addition, the emails on occasion included Cohodes and others, including Adam Spears who is a defendant in the Wolfpack Action. None of the emails refer to any communications between a solicitor and a client.

[36] Riley's assertions that the emails exchanged were "for the purpose of investigating the allegations that Callidus was subject to a short and distort attack, [and] obtaining legal advice" are vague and unparticularized and not supported by the contents of the email transmissions

themselves. As such, they cannot be subject to solicitor-client privilege: see *Chrusz*, *supra*, at para. 95.

[37] Similarly, I do not believe that litigation privilege can exist over the Guy Documents.

[38] It cannot be credibly said that the Guy Documents were created for the dominant purpose of assisting a solicitor in preparing for this litigation or any other contemplated litigation as required: see *Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256, at paras. 26, 27, 30-32. To assert such a claim, the Catalyst Parties must establish "a dominant purpose" for each document. As noted, Riley's affidavit provides only generalized and largely unsubstantiated assertions of privilege. By way of example, he cannot possibly give such evidence with respect to the genesis behind the emails authored by Hanna – a pseudonym perhaps used by Guy. It is certainly not within Riley's purview to comment upon the genesis of those emails. Similarly, most of the Guy Documents involved emails being sent to the Catalyst Parties from others.

[39] Once again, my analysis above is consistent with the position taken by Boswell J. at the motion before him, commencing at para. 258 and the law he sets out therein.

[40] In any event, even if I am wrong with respect to the underlying claims of privilege, I do not find that the Catalyst Parties have established a "common interest" existing between the participants in the emails which constitute the Guy Documents.

[41] The Catalyst Parties, in this regard, rely upon notes prepared by Naomi Lutes ("Lutes") who is a lawyer in the Greenspan office. On a number of occasions, Lutes prepared notes (which are not the subject matter of this production motion) concerning meetings that she attended with Riley, Snowdy, Phillips and others concerning issues raised in the Guy Documents over which she notes that "joint interest privilege" is being asserted. Once again, just because a lawyer says notes are privileged does not mean this is so. Further, the Catalyst Parties did not provide any evidence on this motion from Lutes to explain these notations and, particularly, who exactly was involved in this assertion of joint interest privilege. Lutes's notes themselves provide very little context and are unpersuasive on this issue.

[42] Further, Lutes's notes do not refer to the Guy Documents themselves but rather to the minutes of the meetings that were held. Also, it is important to note that there is no evidence whatsoever directly from Hanna and/or Guy or any of the other non-parties referred to in the Guy Documents stating that they too believe that common interest privilege applies to this case. This is particularly important where the Guy Documents genesis is found in the unsolicited email from Hanna. In my view, the absence of evidence is fatal in this case: see *Chrusz*, *supra*, at paras. 58-60.

[43] Also, there is no evidence in the Guy Documents that the parties anticipated litigation against a common adversary, such as West Face or Dow Jones: see *Genier v. CGI Capital Ltd.*, 2008 CarswellOnt 209 (S.C.), at para. 18.

[44] Last, even if I am in error with respect to my aforementioned findings, it is my view that the Catalyst Parties waived privilege over the Guy Documents when they produced the initial

unsolicited Hanna email. They rely upon this email to support the theory of their case against the defendants in the Wolfpack Action and allege that the email justifies one of the publications that West Face takes issue with in its counterclaim against the Catalyst Parties.

[45] In my view, the Catalyst Parties cannot pick and choose what documents they rely upon and then claim some form of privilege over the others. This is manifestly unfair and runs counter to the existing case law, in which it has been held that selective disclosure will waive any privilege attaching over closely related materials: see *Ranger v. Penterman*, 2011 ONCA 412, 342 D.L.R. (4th) 690, at para. 16. Riley has denied any intent to waive such privilege, but this is not his call to make. Waiver has occurred.

[46] For all of the above-mentioned reasons, I order that the Catalyst Parties disclose the twenty-six emails in dispute.

THE OSC/SEC DOCUMENTS

[47] The Catalyst Parties assert that the OSC/SEC Documents are protected by case-by-case privilege. These documents consist of numerous correspondence passing between Callidus and Catalyst, their counsel and the OSC/SEC.

[48] The law concerning case-by-case privilege was well set out by Conway J. in the decision of *In the Matter of B*, 2020 ONSC 7563, at paras. 20-24, wherein she stated:

> The Applicant asserts that case-by-case privilege should extend to all of the Information as it is covered by the Confidentiality Clause. The Applicant acknowledges that the employer has not been served with this Application due to the confidential nature of the Investigation under s. 16 of the Act. The Applicant submits that as the custodian of the Information, it is up to the Applicant to defend it based on their unequivocal promise of confidentiality.
>
> Case-by-case privileges, unlike class privileges, do not carry a presumption of inadmissibility. Instead, the Court will consider, in any given case, whether a case-by-case privilege should be recognized, with reference to the four "Wigmore criteria", as adopted by the Supreme Court of Canada in *Slavutych v. Baker*, [1976] 1 S.C.R. 254, at p. 260:
>
> a. The communications must originate in a *confidence* that they will not be disclosed.
>
> b. This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> c. The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

> d. The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.
>
> [emphasis in original]
>
> These criteria are not "carved in stone". They are considerations, which provide a general framework within which policy considerations and the requirements of fact-finding can be weighed and balanced on the basis of their relative importance in the particular case before the court: *R. v. Gruenke*, [1991] 3 S.C.R. 263, at p. 290.
>
> Case-by-case privilege can apply in novel circumstances. The Supreme Court of Canada has recognized that the common law permits privilege in new situations where reason, experience and application of the principles that underlie the traditional privileges so dictate: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 20
>
> Case-by-case privilege need not be blanket or absolute. Courts have the power to impose partial privilege to the extent it is required to strike the proper balance between the interest in protecting the communication from disclosure and the interest in proper disposition of the litigation: *Ryan*, at paras. 18, 33.

[49] I will begin my comments with the OSC Documents and then turn to the SEC Documents. As I noted at the outset of this Endorsement, I find that both sets of documents ought to be produced.

The OSC Documents

[50] Generally speaking, these communications involved investigations being carried out by the OSC with respect to Callidus, which at that time was a public company, concerning its disclosure record and its responsibility to comply with the applicable securities legislation. Ultimately, the investigations led to Callidus amending its reporting concerning how it treated unrecognized yield enhancements. This issue is relevant to the issues in the anti-SLAPP motions surrounding Callidus's financial health and how it reported to the OSC.

[51] Insofar as the first Wigmore criterion is concerned, I do not believe that the OSC records could be considered communications originating in a confidence that they would not be disclosed. The OSC specifically stated in its correspondence that OSC staff would not place the information from documents that Callidus provided in the public file, but went on to note that the information would only be disclosed as permitted by the Ontario *Securities Act* or *as otherwise required by*

law. The Catalyst Parties concede that this statement provides this Court with the jurisdiction to order production. I agree.

[52] I am of the view that the confidentiality promised by the OSC wholly related to the fact that it would not publicly disclose Callidus's responses except as permitted by the Ontario *Securities Act*. There is, therefore, no evidence to support the Catalyst Parties' position that the communications originated in confidence vis-à-vis the world at large. This is consistent with the decision in *In the Matter of B, supra*.

[53] Further, I am of the view that the Catalyst Parties cannot reasonably expect that confidentiality would extend to circumstances where they have commenced significant litigation against the Wolfpack Defendants, seeking $450 million in damages and alleging a conspiracy. In such circumstances, given the allegations of conspiracy and the counter-allegations made by the defendants and plaintiffs by counterclaim, the OSC Documents are relevant, do not enjoy class privilege and ought to be produced.

[54] This is particularly so when Riley, in his examinations, has provided rather extensive oral evidence relating to the OSC's concerns and investigation and provided an explanation as to why, in his view, Callidus's reporting was satisfactory.

[55] Insofar as the second Wigmore criterion is concerned, I am also of the view that the Catalyst Parties have failed to establish, in the context of this case, that an element of confidentiality was essential to the full and satisfactory maintenance of the relation between Callidus and the OSC.

[56] I accept that confidence can be essential but only in the context of an ongoing enforcement investigation. There is no evidence that confidentiality was essential to the relation between Callidus and the OSC where a routine compliance review was taking place. While in the view of the Catalyst Parties, confidentiality would be desired in these circumstances, there is nothing in the record before me to suggest that the OSC or Callidus took the position that confidentiality was essential in a routine compliance review.

[57] With respect to the third Wigmore criterion, I accept that the relationship between the OSC and a reporting issuer, such as Callidus, is one that should be sedulously fostered since there is public interest in the proper regulation of capital markets. The Anderson Defendants agree.

[58] I also do not accept that the Catalyst Parties have satisfied the fourth Wigmore criterion – that the injury that would inure to the relation by the disclosure of the communications is greater than the benefit gained for the correct disposal of the litigation.

[59] In my view, the balancing of interests favours disclosure. The OSC investigation with respect to Callidus's use of unrecognized yield enhancements is long resolved. There are no ongoing investigations. Callidus is no longer a publicly traded company and, therefore, has no further disclosure obligations to the OSC. The Catalyst Parties have also not produced any evidence that they would suffer harm if their communications are disclosed. Instead, the Catalyst Parties submit that only relevant corporate documents should be produced, and that any

communications between Callidus and the OSC explaining or describing those documents are not evidence but, rather, opinions which hold no weight. I disagree. In my view, the Catalyst Parties are seeking to unduly restrict the breadth of the disclosure in a significant lawsuit. While ultimately such communications may not be given much weight, and this remains to be seen, they are relevant and producible.

[60] Furthermore, the Anderson Defendants' Whistleblower Submissions to the OSC relate to Callidus's use of the unrecognized yield enhancements in its public disclosure. The Catalyst Parties claim that the claims raised by the Anderson Defendants in the Whistleblower Submissions are false. I am, therefore, of the view that the communications between the OSC and Callidus, and its representations, are relevant to this issue and relate directly to the anti-SLAPP motions.

[61] Last, the Anderson Defendants submit that the Catalyst Parties have waived any privilege since Riley, as noted, has provided evidence about the substance of the plaintiffs' dealings and communications with the OSC. I have reviewed Riley's evidence. I do not agree that it is significant enough to establish waiver or indicate any intent to waive privilege. For the reasons above, however, the issue of waiver is immaterial.

The SEC Documents

[62] In my view, the reasoning above concerning the OSC Documents also applies to the SEC Documents.

[63] Insofar as the SEC Documents are concerned, however, the Catalyst Parties raise additional objections to production.

[64] The first objection is that none of the SEC communications were ever referred to in the Anderson Defendants' complaints and, therefore, production of the SEC Documents is not relevant. I disagree for the reasons above. It is my view that the SEC Documents are equally relevant as the OSC Documents in this regard and ought to be produced.

[65] The Catalyst Parties also rely upon "developing privilege" in the U.S. attaching to communications related to the SEC regulatory inquiries. They rely upon some articles, as well as a statement from Roel Campos ("Campos"), a former Commissioner of the SEC. The Catalyst Parties admittedly do not present Campos as an expert but, rather, as providing a statement of what he believes the applicable principles to be with respect to disclosure of SEC Documents. I frankly question why this does not fall into the area of expert evidence but, in any event, the Catalyst Parties agree that none of the aforementioned sources are binding upon me. I do not find sufficient authority in the statement of Campos, the articles or the case law to support a claim for privilege.

[66] Of significance, in this regard, the Anderson Defendants have provided case law and an article showing that U.S. Courts have specifically rejected the existence of privilege attaching to SEC communications: see *Kirkland v. Superior Court (Guess?, Inc.)* (2002), 95 Cal. App. 4th 93; *D'Addario v. Gellar* (2005), 129 Fed. App'x 1 (4th Cir.); Phillip M. Aidikoff et al. "Discovery of Regulatory Documents: Debunking the Myth of an 'SEC Privilege' in Securities Arbitration" (2011) 18:2 PIABA Bar J 187.

[67] Further, and in any event, the thrust of the submissions with respect to the U.S. authorities speaks to the obligations of the SEC to make disclosure and is not relevant to the parties in this lawsuit or the Wigmore factors.

[68] I also pause here to note that with respect to the OSC/SEC Documents (and indeed the Guy Documents and the Dalton Report), I agree with the sentiments of Boswell J., at para. 339 of his decision, that "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." In my view, this statement rings true in this case which involves high-stakes litigation, allegations of conspiracy and defamation, amongst other significant allegations, and extensive litigation on a level seldom seen by our courts. In these circumstances, and considering that the parties have already exchanged hundreds of thousands of documents, it is fair to lean towards full disclosure. As Boswell J. noted, "[t]his is not a David and Goliath battle. This is Goliath v. Goliath."

ADDITIONAL COMMENTS

[69] It also bears noting that the parties filed thousands of pages of documents on this motion. This included the Catalyst Parties, as noted, providing me with the privileged documents on the day of the motion. These included not only the documents in dispute but also documents not in dispute involving communications between the Catalyst Parties and their solicitors, communications between Glassman and Guy using the WhatsApp platform, as well as handwritten notes, as referred to above, of Lutes.

[70] Counsel for West Face invited me to also make determinations of privilege with respect to these documents. I declined to do so since there was no motion record before me and, frankly, the volume of documents produced, including these documents (which were not provided to me in their entirety), made such an endeavour unworkable.

[71] Now that the parties have the benefit of these reasons, and the reasons of Boswell J., I would urge them to try to resolve their differences concerning the production of those documents.

[72] If they cannot, I can be spoken to and they can be added to the future motions that I am scheduled to hear.

[73] It is imperative that all production motions be determined well in advance of the May 17, 2021 hearing date for the anti-SLAPP motions.

DISPOSITION

[74] For the reasons above, I order that the Catalyst Parties produce the Dalton Report, the Guy Documents and the OSC/SEC Documents. I further order that Riley reattend to answer questions arising out of the production of the documents that were refused or taken under advisement at his previous cross-examination.

[75] In this regard, I note that the Anderson Defendants specifically provided questions to this Court appended to their notice of motion. These specific questions were not dealt with at the

motion. If any disputes arise between the parties I can be spoken to, although I would expect that the parties can resolve these differences between themselves.

[76] Like Boswell J., I recognize that one party or another may seek to appeal this ruling. I similarly order that this Endorsement not be disseminated or published in any way, beyond counsel and their clients for a period of thirty days. If any party moves for leave to appeal within the thirty day period, then this publication ban will continue until the motion for leave to appeal has been determined by the Divisional Court. The publication ban will expire if no party moves for leave to appeal within the thirty days.

[77] If the parties cannot agree on the issue of costs, I can be spoken to at a thirty minute case conference concerning further steps with respect to the delivery of written submissions.

McEwen, J.

Released: February 12, 2021