Divisional Court File No. 157/21
Court File No. CV-17-587463-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs
(Moving Parties)

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 and JOHN DOES #1-10

Defendants
(Responding Parties)

FACTUM OF THE MOVING PARTIES

PART I - OVERVIEW

1. The Catalyst Capital Group Inc. ("**Catalyst**") and Callidus Capital Corporation ("**Callidus**") (collectively, the "**Moving Parties**") seek leave to appeal from the decision of the Honourable Justice McEwen (hereinafter the "**Motions Judge**") dated February 12, 2021.[1]

2. The Motions Judge determined that no valid privileges applied to four different categories of documents:

(a) **Category One:** A report prepared a consultant and interim CEO of Callidus, at the request of counsel, for the specific purpose of enabling counsel to provide legal advice and which the Motions Judge acknowledged was in fact used to give legal advice (the "**Dalton Report**").

(b) **Category Two:** Communications and documents that the uncontradicted evidence showed were solicitor-client communication pertaining to, and/or were created for the dominant purpose of an investigation of a short and distort against Callidus. These documents were exchanged with a third party that was engaged in litigation against a common adversary, and pursuant to a common interest agreement with that third party (the "**Guy Documents**").

(c) **Category Three:** Confidential documents that were exchanged with the Ontario Securities Commission (the OSC) under compulsion ("**OSC Documents**") and were protected by case-by-case privilege as defined by Wigmore and adopted in the unanimous decision of the Supreme Court of Canada in *Slavutych v Baker*.

(d) **Category Four:** Communications with the U.S. Securities and Exchange Commission ("**SEC"**) (the "**SEC Documents**") which were subject to both statutory

[1] This leave to appeal application and this Factum relate to two separate motions heard by Justice McEwen: (1) a motion by the West Face Parties (supported by counsel for the Anderson Parties) relating to privileges claimed in respect of the Dalton Report and the Guy Documents, and (2) a separate motion by the Anderson Parties for production of the OSC and SEC Documents. The orders and submissions with respect to these two motions are being combined for the purpose of this Factum and the other materials being filed with the Court.

guarantees of confidentiality as well as assurances of non-public treatment given by the SEC. The Motions judge referred to a conflict in the US District Court case law that such documents are privileged, but did not recognize that U.S. practices, concerns, and policies with respect to the confidentiality and production of the SEC documents were relevant to the Wigmore analysis, as disclosed in the U.S. case law.

PART II - CONCISE SUMMARY OF THE FACTS

3. This motion arises out of a conspiracy action (the "**Conspiracy Action**") and a libel action (the "**Dow Jones Action**"). The actions claim that the defendants engaged in a wrongful conspiracy to harm the Catalyst Parties, including through unlawful steps taken by short sellers and others to depress the share price of Callidus by causing a false and defamatory article to be published by the Wall Street Journal accusing Catalyst and Callidus of fraud (the "**WSJ Fraud Article**").[2]

A. Category One: The Dalton Report

4. Patrick Dalton ("**Dalton**") was a consultant and interim CEO of Callidus from November 5, 2018 to March 8, 2019.[3]

5. Through the Funds it controlled Catalyst was Callidus' largest shareholder.

6. By 2018, Callidus was suffering from financial difficulties which were well publicized,[4] and was also highly dependent upon Catalyst for various financings described in Callidus' continuous disclosure.[5]

[2] Riley Affidavit, para 13 to 19, Catalyst Motion Record Vol 9 Tab 2 at MR-1777-1779.

[3] Transcript from the Cross-examination of Patrick Dalton on January 5, 2021 ("**Dalton CXM**"), p. 16 q. 48, Catalyst Motion Record Vol 10 at MR-1986; Item #28 to the Answers to Questions Taken Under Advisement at the Cross-Examination of James Riley on January 5, 2021 ("**Answers to Riley Under Advisements**"), Catalyst Motion Record Vol 10 Tab 4 at MR-2032.

[4] Item #34 of the Riley Answers to Under Advisements, Catalyst Motion Record Vol 10 Tab 4 at MR-2035 to 2036.

[5] Item #34 of the Riley Answers to Under Advisements, Catalyst Motion Record Vol 10 Tab 4 at MR-2035 to 2036.

7. Mr. Dalton was directed to prepare a report for Catalyst's general counsel to provide legal advice regarding potential restructuring options.[6] The uncontradicted evidence as to the ***purpose*** of preparing the Dalton Report was to enable counsel to provide legal and strategic advice to Catalyst.

> I was asked by Callidus to prepare the Dalton Report in response to a request by Catalyst for information about a proposed restructuring, so that the Dalton Report could be provided to Catalyst's counsel to enable him to review and consider its contents in providing legal and strategic advice to Catalyst, which was being asked to accept and support possible restructuring proposals.

8. Counsel for Catalyst, Rocco DiPucchio ("**DiPucchio**"), was provided with copies of the draft and final versions of the Dalton Report and asked Mr. Dalton tor supplement the draft report so that DiPucchio would be better able to advise Catalyst about the proposed restructuring.[7]

9. In fact, Catalyst's legal counsel relied on the report to give legal advice,[8] as it was intended.

B. Category Two: The Guy Documents

10. Following the publication of the WSJ Fraud Article, the defendant Newton Glassman received an anonymous email stating that Callidus had been the subject of a short and distort attack by a cabal of conspirators who had caused the publication of the WSJ Article:[9]

> …
>
> This letter is to inform you that you have been targeted by a group of funds in Canada and abroad whose sole goal is to bring down your public vehicle Callidus and you personally. They are acting in concert to short your stock and to spread false rumors in the market place mostly through Bruce Langstaff at Canaccord but through any broker who will listen. The Wall Street Journal is a prime example of this coordinated effort. The "cabal" does have private investigators following you and most likely have Russians hackers attacking your office emails and servers/cloud. The RCMP and FBI are aware of this "cabal" from a criminal investigation but that doesn't help you in the short term. I am sure you are not surprised but the funds are:

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[6] Affidavit of Patrick Dalton sworn January 4, 2021 ("**Dalton Affidavit**) at paras 3-4, Catalyst Motion Record Vol 9 Tab 3 at MR-1841 to 1842.

[7] Dalton Affidavit para 4, Catalyst Motion Record Vol 9 Tab 3 at MR-1842.

[8] Reasons, para 18, Catalyst Motion Record Vol 1 Tab 3 at MR-31.

[9] Email from Vincent Hanna to Newton Glassman, August 11, 2017, Riley Affidavit Exhibit B, Catalyst Motion Record Vol 9 Tab 2B.

Greg Boland – WestFace Capital.
Roland Keiper – Clearwater Capital.
Sunny Puri/Moez Kassam – Anson Partners.
Shawn Kimmel – K2 Partners
Principals – MMCAP
Marc Cohodes – US Short Seller and his huge global network.
…

11. The Catalyst Parties immediately sought legal advice about this email from both internal and external counsel.[10] The Catalyst Parties also took steps following the email to investigate the veracity of the allegations for the purpose of potential litigation.[11] These steps included:

(a) emails exchanged with and inquiries made with "Vincent Hanna," the sender of the email[12]

(b) correspondence with Daniel Guy, who is the founder of Harrington Global Limited, a private equity firm based in Toronto that was also subject of a short attack,[13] who the Catalyst Parties later discovered was Vincent Hanna; and

(c) Correspondence and meetings with Mr. Guy's lawyer John Kingman Phillips, and his private investigator Derrick Snowdy.[14]

12. The uncontradicted evidence was that the interactions between the Catalyst Parties and the Guy Parties was subject to an express common interest agreement.[15]

13. The subject of the privileged communications between the Catalyst Parties and the Guy Parties was their common interest in defending themselves and litigating against short sellers

[10] Riley Affidavit, para 22, Catalyst Motion Record Vol 9 Tab 2 at MR-1779
[11] Riley Affidavit, para 22, Catalyst Motion Record Vol 9 Tab 2 at MR-1779
[12] Riley Affidavit, para 20, Catalyst Motion Record Vol 9 Tab 2 at MR-1777.
[13] Riley Affidavit, para 21, Catalyst Motion Record Vol 9 Tab 2 at MR-1777.
[14] Riley Affidavit, para 21, Catalyst Motion Record Vol 9 Tab 2 at MR-1777.
[15] Riley Affidavit, para 24, Catalyst Motion Record Vol 9 Tab 2 at MR-1777 to 1778.

targeting Callidus and Harrington.[16] The Guy and Catalyst Parties had a common adversary in that they were both targeted by short sellers in general[17] and Mr. Cohodes and Anson in particular.

14. Under the protection of common interest privilege, the Catalyst Parties and the Guy Parties shared information and legal advice regarding options about litigation against wrongdoers who had harmed them, including short sellers. The information shared was subject to solicitor-client privilege and litigation privilege.[18]

15. The Catalyst Parties and the Guy Parties have not disclosed any of the privileged information which was exchanged after the Vincent Hanna Email (when they started taking legal advice and had the dominant purpose of litigation), and so the privilege has not been waived.[19]

C. Category Three: Correspondence and communication with the Corporate Finance Branch of the OSC

16. Callidus was subject to a continuous disclosure review by the OSC pursuant to section 20.1 of the Ontario *Securities Act*[20] pursuant to which extensive documents were provided to the OSC. This occurred under the threat of sanction[21] and following assurances of confidentiality given to Callidus by the OSC.[22]

17. The Motions Judge held that because the Courts have ultimate jurisdiction to determine whether the documents should be disclosed, the documents could not have originated in a confidence that they would not be disclosed.[23]

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[16] Riley Affidavit, para 23 to 25, Catalyst Motion Record Vol 9 Tab 2 at MR-1778 to 1779.
[17] Riley Affidavit, para 23, Catalyst Motion Record Vol 9 Tab 2 at MR-1780.
[18] Riley Affidavit, para 23 to 23, Catalyst Motion Record Vol 9 Tab 2 at MR-1780
[19] Riley Affidavit, para 26, Catalyst Motion Record Vol 9 Tab 2 at p. 14.
[20] Riley Affidavit, para 49, Catalyst Motion Record Vol 9 Tab 2 at MR-1788.
[21] Riley Affidavit, para 52, Catalyst Motion Record Vol 9 Tab 2 at MR-1789.
[22] Riley Affidavit, para 53, Catalyst Motion Record Vol 9 Tab 2 at MR-1789.
[23] Reasons, para 51, Catalyst Motion Record Vol 1 Tab 3 at MR-37.

18. The Motions judge further found that:

(a) there was "no evidence" that confidentiality was essential to the relation between Callidus and the OSC,[24] despite the OSC's own letter referring to the assurances of confidentiality Callidus had received; and

(b) the documents ought to be produced to the defendants as part of their case, even though there were no regulatory administrative or enforcement actions taken by the OSC against Callidus.[25]

D. Category Four: Communications with the SEC

19. Catalyst was subject of a compliance review by the SEC pursuant to the *Investment Advisers Act* of 1940 (the "*Advisers Act*").

20. When Catalyst provided documents and information to the SEC, its responses were subject to confidential treatment under the *Freedom of Information Act*.[26]

21. Catalyst produced documents to the SEC under express compulsion.27 Failure to produce documents to the SEC can result in a fine of up to $10,000, imprisonment for up to five years, or both. Such investment adviser could also be censured or be subject to suspension, revocation, or other sanctions related to its investment adviser's registration.[28]

22. The motions cited conflicting US decisions dealing with whether or not such documents are subject to privilege. The motions judge did not address the 8th District authority provided by the

[24] Reasons, para 56, Catalyst Motion Record Vol 1 Tab 3 at MR-38

[25] Riley Affidavit, para 50, Catalyst Motion Record Vol 9 Tab 2 at MR-1789.

[26] Riley Affidavit, para 59, Catalyst Motion Record Vol 9 Tab 2 at MR-1791.

[27] Riley Affidavit, para 56 to 58, Catalyst Motion Record Vol 9 Tab 2 at MR-1790 to 1791.

[28] Declaration of Roel Campos, para 7, Catalyst Motion Record Vol 9 Tab 1 at MR-1769.

Moving Parties which holds that such documents are privileged, and instead relied entirely on the 9th District jurisprudence cited by the Anderson Parties.[29]

23. More importantly, the Motions Judge did not conduct any Wigmore analysis at all with respect to the SEC Documents before ordering the production of the documents.

PART III - STATEMENT OF ISSUES RAISED, LAW AND ARGUMENT

A. Test for Leave to Appeal

24. Rule 62.02(4) of the *Rules of Civil Procedure* prescribes the test for leave to appeal an interlocutory decision of the Superior Court:

> 62.02 (4) Leave to appeal shall not be granted unless,
>
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.[30]

25. For the purposes of Rule 62.02(4)(a), two decisions are in conflict where two courts have taken differing approaches to the principles chosen as a guide to the exercise of their discretion.[31]

26. With respect to Rule 62.02(4)(b):

(a) the phrase "good reason to doubt the correctness of a decision", does not require a conclusion that the decision in question was wrong or even probably wrong. <u>The test is whether the decision is open to serious debate</u>;[32] and

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[29] Reasons, para 66, Catalyst Motion Record Vol 1 Tab 3 at MR-39.

[30] Rule 62.02(4) of the *Rules of Civil Procedure*, Schedule B below.

[31] *Comtrade Petroleum Inc. v. 490300 Ontario Ltd*., (1992), 7 O.R. (3d) 542 (Div. Ct.) at para 7

[32] *Judson v Mitchele*, 2011 ONSC 6004 at paras 13-16

(b) the phrase “matters of such importance” refers to issues that extend beyond the interests of the litigants and relate to matters of public importance and matters relevant to the development of the law and the administration of justice.[33]

(c) general importance relates to matters of public importance and matters relevant to the development of the law and the administration of justice. This may include "the interpretation [or] clarification of [a] general rule or principle of law" which is of potential significance in Ontario.[34]

27. Leave to appeal to the Court of Appeal should be granted where the issue involves the interpretation, or clarification of a rule or principle of law of broad or general application.[35]

28. The decision of the Honourable Justice Hartt in *Bank Leu AG v. Gaming Lottery Corporation*[36] applied the above tests, and granted leave to appeal a case where the scope of legal professional privilege was in dispute. The issue was whether a client suing a former lawyer for damages impliedly waived privilege over communications relevant to the solicitor’s alleged breach of duty. Justice Hartt concluded that the issue was one of importance in the area of legal professional privilege and that the decision sought to be appealed was open to serious legal debate. For the reasons detailed below, it is submitted that the same conclusions apply here and that leave to appeal should be granted.

[33] *Judson v Mitchele, supra*.

[34] *Greslik v. Ontario Legal Aid Plan,* 1988 CarswellOnt 436 (Div Ct)

[35] *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie,* [1973] 2 O.R. 479 (Ont. C.A.)

[36] *Bank Leu AG v. Gaming Lottery Corporation et al.*, unreported decision of Justice Hartt, Divisional Court, November 26, 1999 (General Division Court File No. 96-CU-101891B, Commercial List File No. 97-CL-556)

B. Issues Sought to be Raised in the Proposed Appeal

29. The issues sought to be raised in the proposed appeal, and the position of the Moving Parties in respect of those issues, are as follows:

(a) **Issue #1 – The Dalton Report:** Are documents prepared by a third party consultant for the purpose of enabling a lawyer to give legal advice to clients protected by solicitor client privilege, even if that legal advice pertains to business matters?

Position of the Moving Parties: Where the third party's expertise is required to interpret or translate for the solicitor information provided by the client so that the solicitor can understand that information and assess its significance to the legal issues that the solicitor must address, the third party's retainer extends to a function which is essential to the existence or operation of the client-solicitor relationship and that information is privileged.

(b) **Issue #2 – The Guy Documents:** What burden of proof rests on a party to show that a document is privileged?

Position of the Moving Parties: A party seeking to establish that a privilege exists is required only to provide general evidence of the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought or rendered seeking to rely on. The Motions Judge erred in requiring the Moving Parties to provide so much information that it would constitute a waiver of the very privilege that is claimed.

(c) **Issue #3 – The Guy Documents:** What is the nature of the "common interest" that must exist between parties such that their communication related to privilege matters will not amount to a waiver of privilege?

Position of the Moving Parties: It is accepted law that a common interest can be established when parties have a "common adversary". The Moving Parties and the Guy Parties had a common adversary in their respective litigation against the Anson parties. The Motions Judge erred is failing to apply this principle, even as he recognised that the Guy Parties were targeted by the same short seller as the Moving Parties, namely "g Adam Spears who is a defendant in the Wolfpack Action."

(d) **Issue #4 – The OSC Documents: Are confidential communications between a public issuer and the OSC protected by case-by-case privilege?**

Position of the Moving Parties: Where communications between a public issuer and its regulator originate in a confidence that they would not be disclosed, and where no proceedings are brought, it is consistent with public policy to recognise case-by-case privilege over these communications.

(e) **Issue #5 – The SEC Documents:** Should a Court Considering Wigmore Privilege Over Documents Consider the Privileged Treatment of those Documents in Foreign Jurisdictions?

Position of the Moving Parties: The law of a foreign jurisdiction holding that materials of privileged should be considered in the fourth steps of the Wigmore test, pertaining to the injury that would inure to the relation by the disclosure of the communications, as to hold otherwise would effectively allowing a private litigant to forum shop to gain access to privileged material.

C. Issue #1 – The Dalton Report: Are documents prepared by a third party consultant for the purpose of enabling a lawyer to give legal advice to clients protected by solicitor client privilege, even if that legal advice pertains to business matters?

30. The Motions Judge held that no privilege applied to the Dalton Report on the basis that it did not itself contain legal advice,[37] notwithstanding the uncontracted evidence of Mr. Riley[38] and Mr. Dalton[39] was that the purpose of the report was to provide legal advice and, as recognised by the Motions Judge,[40] that Mr. DiPucchio and did in fact provided legal advice to Catalyst with respect to possible restructuring proposals.

[37] Reasons para 15, Catalyst Motion Record Vol 1 Tab 3 at MR-31

[38] Riley Affidavit, para 46, Catalyst Motion Record Vol 9 Tab 2 at MR-1787 to 1788.

[39] Dalton Affidavit, para 4, Catalyst Motion Record Vol 9 Tab 3 at MR-1842.

[40] Reasons, para 18, Catalyst Motion Record Vol 1 Tab 3 at MR-31

31. Solicitor client privilege can extend to investigations conducted by counsel on behalf of a client in order to gather the facts necessary to render legal advice. This privilege can also extend to communications between legal counsel and third party consulting experts, and between clients and such experts.[41]

32. The application of solicitor-client privilege is very broad and includes not just the provision of "legal advice" but also the protection of factual, financial and administrative information provided to legal counsel, for the purpose of allowing legal counsel to give legal advice (so long as the advice is not purely business advice). It is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communications in which the solicitor tenders advice.[42]

33. The privilege also extends to communications and circumstances where the consultant employs expertise in assembling information provided by the client and provides or explains that information to the solicitor. In doing so, the consultant makes the information relevant to the legal issues on which the solicitor's advice is sought.[43]

34. The Motions Judge distinguished three cases relied on by the Moving Parties, even though they squarely addressed the principles to be applied to documents such as the Dalton Report:

(a) The Motions Judge erred in distinguishing *Trillium Motor World Ltd. v. General Motors of Canada Ltd*., 2014 ONSC 1338, aff'd 2014 ONSC 4894, by saying that 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

[41] *College of Physicians of British Columbia (College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at para. 39.

[42] *Currie v. Symcor Inc.* 2008 CarswellOnt 4525 para 46; *Cusson v. Quan* (2004), 10 C.P.C. (6th) 308 (Ont. Master) at para.8, per Master Beaudoin.

[43] *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA) para 111.

professional advisors, including legal counsel.[44] That is precisely what happened in this case where Mr. Dalton receive legal instructions to prepare his Report.[45]

(b) The Motions Judge erred in distinguishing *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88, where the lawyer and consultant worked closely as a unified team to prepare a report for the Transportation Authority,[46] which is exactly akin to the respective roles of Messrs. Dalton and DiPucchio in providing advice to Catalyst. (The Motions Judge also noted that *Camp Development* as "akin to the within case" because it denied privilege over documents between the lawyer and the appraiser,[47] even though the Moving Parties conceded that only documents like the Dalton Report prepared for the specific purpose of facilitating legal advice were privileged, and that historical non-privileged documents were not shielded from production).

(c) The Motions Judge erred in distinguishing *Royal Bank v Société Générale (Canada)*,[48] where the report in issue was prepared ***by an auditor*** pertaining to forged bank drafts, so that counsel could understand what had happened so as to provide legal advice to a breakout committee of the RBC board. As with the Dalton Report, there was no legal advice in the report, but it was privileged since purpose of the report was to give legal advice.[49]

35. In summary, it is respectfully submitted that where a lawyer obtains a communication from or through a client that contains documentation and information which is:

(a) to be used by the lawyer to provide legal advice to the client, and

(b) intended to be confidential,

the communication is privileged.

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[44] Reasons, para 20, Catalyst Motion Record Vol 1 Tab 3 at MR-31

[45] See paragraph 7 herein, and footnote 6.

[46] Reasons, para 20, Catalyst Motion Record Vol 1 Tab 3 at MR-32

[47] Reasons, para 20, Catalyst Motion Record Vol 1 Tab 3 at MR-32

[48] *Royal Bank v. Société Générale (Canada)*, 2005 CanLII 36727 (ONSC)

[49] *Royal Bank v. Société Générale (Canada)*, 2005 CanLII 36727 (ONSC) at paras 10-11

36. The above principles do not depend upon whether the documentation provided to the lawyer contains legal advice. Indeed, such a requirement stands the analysis on its head – the very purpose of the communications in issue is to enable the lawyer to provide legal advice. Similarly, the principles do not change because the lawyer receiving the documentation in issue is an in house counsel.

37. Here, one of the parties receiving legal advice based on the Dalton Report was Catalyst, and the lawyer who provided that advice was its in house counsel, Rocco DiPucchio.

38. Any consideration of the privilege issues relating to the Dalton Report must comply with the directive contained in *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, that a contextual approach is essential:

> 96 It is also necessary to consider the context of the claim, by which I mean the circumstances in which the privilege is claimed. For example, in this case, the insurer claims client-solicitor privilege against its insured in part in respect of the product of its investigation of a possible claim by the insured under its policy. The preexisting relationship of the insured and insurer and the mutual obligations of good faith owed by each to the other must be considered in determining the validity of the insurer's assertion that it intended to keep information about the investigation confidential vis-à-vis its insured. The confidentiality claim cannot be approached as if the parties were strangers to each other.
>
> 97 The confidentiality of the communications is an underlying component of each of the purposes which justify client-solicitor privilege. In *McCormick*, supra, at 333, it is said:
>
> > It is of the essence of the privilege that it is limited to those communications which the client either expressly made confidential or which he could reasonably assume under the circumstances would be understood by the attorney as so intended.
>
> 98 The centrality of confidentiality to the existence of the privilege helps make my point that the assessment of a claim to client-solicitor privilege must be contextual. Sometimes the relationship between the party claiming the privilege and the party seeking disclosure will be relevant to determining whether the communication was confidential. For example, the reciprocal obligations of an insured and an insurer to act in good faith towards each other are well-established: *Canadian Indemnity Co. v. Canadian Johns-Manville Co.*,

[1990] 2 S.C.R. 549 (S.C.C.) at 620-21; *Coronation Insurance Co. v. Taku Air Transport Ltd*., [1991] 3 S.C.R. 622 (S.C.C.) at 636.[50] [Underlining added.]

39. In the case at bar, the relevant context was as follows:

(1) Both Callidus and Catalyst knew and intended that the Dalton Report and its contents would be treated as confidential;

(2) Both Callidus and Catalyst knew and intended that this confidential material would be communicated to legal counsel, Mr. DiPucchio;

(3) Both Callidus and Catalyst knew and intended that the underlying purpose of the document was to enable DiPucchio to provide legal advice to Catalyst, and,

(4) Both Callidus and Catalyst knew and intended that the disclosure of such documentation and the resulting legal advice were essential to Callidus' ability to move forward with any of the recommendations contained in the Dalton Report;

40. The context and analysis mandated in *Chrusz* also required consideration of the following facts:

(1) the necessity for Catalyst to assess and support the Dalton Report's recommendations was not simply because Catalyst exercised ownership control over Callidus;

(2) rather, the context was that Callidus, then a reporting issuer, was in financial distress and was economically dependent upon Catalyst: without Catalyst's support for any restructuring plan, no such plan would be possible;

(3) Callidus' ability to proceed with its privatization plan was also dependent upon Catalyst's informed support of any restructuring proposed by the Dalton Report;

(4) Catalyst (through DiPucchio) not only received the Dalton Report, but also interacted with Dalton about additional information that the report should contain;

(5) Dalton acted upon DiPucchio's request to supplement the Dalton Report so that it would contain sufficient information to enable Catalyst to receive the legal advice central to any implementation of Dalton's recommendations.

[50] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321, at paras 96-98

41. There are two principal conclusions that form the basis of the Motions Judge's decision to reject solicitor-client privilege for the Dalton Report.

42. First, Justice McEwen accepted West Face's submission that the Report could not be subject to solicitor-client privilege:[51]

> 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. [Underlining and bolding added.]

43. This conclusion was reached without giving effect to the vital context summarized above, which showed the close communication, interdependence and interaction between Catalyst and Callidus. It is respectfully submitted that the Motions Judge was obliged in law to consider this context, and that in the circumstances the appropriate legal approach was to consider Catalyst and Callidus as a single client, rather than to artificially divide them.

44. This submission accords with the purposive and substantive approach adopted by Justice Boswell in his January 11, 2021 decision (on which Justice McEwen relied elsewhere in his reasons) which dealt with privilege issues applicable to the Black Cube and Psy documents:[52]

> [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. [Underlining added.]

45. It is submitted that the Motions Judge's holding that it was impossible for DiPucchio to establish a solicitor-client relationship attracting privilege is, at least, open to serious debate.

[51] Reasons, para 21, Catalyst Motion Record Vol 1 Tab 3 at MR-32

[52] Reasons of Boswell J., para 234, Catalyst Motion Record Vol 11 Tab 1 at MR-2073

46. Justice McEwen also based his decision on the absence of legal advice in the Dalton Report:[53]

> [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.

47. This is factually correct, but is beside the point. The key point is that the Dalton Report was intended to be confidential and its fundamental purpose was to allow DiPucchio to <u>give</u> (not receive) legal advice based on its contents. This is evident from the logo on the front of the Dalton Report:

> "Confidential
> Attorney Client Privilege"

It was also confirmed by the wording contained at the end 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 this [sic] document is proprietary and confidential.

48. While this logo and these words are not dispositive, they are an important contemporaneous corroboration of the fact that Callidus and Catalyst knew and intended that the overriding purpose of the Dalton Report was for it to be used by DiPucchio to provide legal advice and that it would be privileged.

49. The Motions Judge's decision in respect of the Dalton Report has ramifications beyond the case at bar. It is highly relevant to the appropriate principles to be applied in assessing privilege issues in the context of close inter-corporate relationships where <u>substance</u> (not form) and <u>context</u> (negating artificial corporate distinctions) should govern.

[53] Reasons, para 22, Catalyst Motion Record Vol 1 Tab 3 at MR-33

50. Put differently, where corporate entities with the degree of interrelationship, interdependence, community of interests, and coordination established by the context in this case, cooperate and agree:

(1) to prepare a report which they intend to be confidential;

(2) that the report should be provided to counsel to give legal advice about the recommendations contained in the report for the benefit of all;

(3) that it is critical that the entities support the recommendations contained in the report and that absent such concurrence, the recommendations cannot be implemented, and

(4) that the report is meant to be subject to privilege,

is it critical to determine whether privilege exists, which entity receives the legal advice deemed to be so essential?

51. The answer to this question is open to serious legal debate, and is of general application and importance.

D. Issue #2 – The Guy Documents: What burden of proof applies?

52. The Motions Judge held that the Catalyst Parties failed to establish an underlying claim of privilege in respect of the Guy Documents.[54] In doing so, the Motions Judge held the Moving Parties to an impossible onus and thereby erred in principle.

53. The Moving Parties have the onus of establishing that privilege exists in respect of the Privileged Documents. It does not follow however that every time a claim is contested a party must disclose the details of the material over which privilege is claimed.

[54] Reasons para 31, Catalyst Motion Record Vol 1 Tab 3 at MR-34

54. Litigation privilege is established where the "dominant purpose" of the communication is litigation or anticipated litigation.[55]

55. Canadian courts have taken a broad view of when litigation is contemplated. The party asserting litigation privilege need only have looked thoughtfully at the possibility of litigation (in a manner that is something more than fleeting).[56]

56. Solicitor Client privilege on the other hand applies to (i) any communication between a client and a solicitor, (ii) which entailed the seeking or giving of legal advice and (iii) which the client intended to be confidential. The dominant purpose test does not apply to solicitor client privilege. Once established, solicitor client privilege applies to any communication that falls within the framework of the professional relationship. It covers any consultation for legal advice, whether litigious or not. It is broad and all encompassing. It is nearly absolute and exceptions to it are rare.[57]

57. To determine whether the lawyer is acting in a professional legal capacity at the relevant time, the court will consider ***general*** evidence of the nature of the relationship, the subject matter of the advice, and the circumstances in which it was sought or rendered.[58]

58. Lawyers asserting privilege must be careful to avoid providing so much information that it will constitute a waiver of the very privilege that is claimed.[59] The privilege claim would be meaningless if the party who claims privilege with respect to a certain class of documents was

[55] *Blank v Canada (Minister of Justice)*, 2006 SCC 39 at para. 27-28, 31 and 34
[56] *CIT Financial Ltd v JDS Uniphase Corp*, [2003] OJ No 2991 at para. 7-12 (SCJ)
[57] *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809 at para. 15-16 and 18
[58] *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2006 BCSC 1180 at para 64
[59] *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2006 BCSC 1180 at para 64

automatically required to provide details that would, in essence, reveal the contents of the document.[60]

59. When the documentation is voluminous and the reason for finding the existence or non-existence of privilege can be applied to categories of documents, it may be more helpful to group documents,[61] which is precisely what the Moving Parties did in respect of the three categories of Privilege Documents.

E. Issue #3 – The Guy Documents–Common Interest: What is the nature of the "common interest" that must exist between parties such that their communication related to privilege matters will not amount to a waiver of privilege?

60. The Ontario Court of Appeal in *General Accident Assurance Co. v. Chrusz* acknowledged that in some circumstances litigation privilege may be preserved and not lost even though the information is shared with a third party, so long as there is a common interest in the existing or anticipated litigation.[62]

61. While the waiver exception of common interest arose in the context of ongoing litigation, common interest privilege has been extended to situations in which parties "anticipate litigation against a common adversary on the same issues or issue".[63] The Supreme Court of Canada has also described the common law privilege exception as applying where the information is disclosed to a party "sharing a common goal or seeking a common outcome".[64]

[60] *New Brunswick v. Enbridge Gas New Brunswick Limited Partnership* 2016 NBCA 17 at para 24

[61] *Huang v. Silvercorp Metals Inc*. 2017 BCSC 795 at para 94 to 95

[62] *General Accident Assurance Co. v. Chrusz* at para 42 – 46.

[63] *Genier v CCI Capital Canada Ltd.*, 2008 CanLII 1175 (ONSC), at para 18.

[64] *Pritchard v Ontario*, 2004 SCC 31, at para 24.

62. When persons having a common interest share information on the basis of confidentiality There must be a demonstrated clear intention to waive an existing privilege.[65]

63. Moreover, where privileged information shared pursuant to common interest privilege is a joint privilege that requires the consent or waiver of both parties. For example, in *578115 Ontario Inc v Sears Canada Inc*, the Ontario Superior Court of Justice held that both parties must waive common interest privilege. In particular, the Court stated that:[66]

> If the party who claims common interest privilege does not waive privilege, then it can maintain privilege on all internal discussions and productions related to the document even if the other party with common interest discloses the document. Otherwise, a party who had a common interest privilege could get access to all of the adverse party's privileged communications by choosing to waive privilege.

64. In this case, the Motions Judge erred in principle by failing to consider, as part of his enunciation for the test of whether a common privilege was waived, whether the party than shared the privilege also waived it. Nor could he have done so, because he recognised that no evidence from the Guy Parties on the Motion,[67] as the Responding Parties had not adduced any.

65. A waiver of privilege is not blanket in its nature. The scope of the waiver only applies to those records with the same subject matter that fairness and consistency require to be waived in order to avoid selective disclosure that could mislead the parties and the court.[68]

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[65] *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, 2001 CarswellOnt 514 (SCJ) at para 31.

[66] *578115 Ontario Inc v Sears Canada Inc*, 2013 ONSC 4135 at paras 38 & 39, adopting the holding from *Almecon Industries Ltd v AnchorTek Ltd*, [1998] FCJ No 1664.

[67] Reasons para 38, Catalyst Motion Record Vol 1 Tab 3 at MR-35

[68] *O'Scolai v Antrajenda*, [2008] AJ No 241 (Q.B.) at para 16

66. Fairness and consistency typically only mandate a waiver of privilege where a party has injected its reliance on its state of mind regarding legal advice into the heart of the substantive matter to be determined at trial.[69]

67. In this regard, the Alberta Court of Appeal in *Can-Air Services Ltd. v. British Aviation Insurance Co.* recognized that privilege is not waived over information simply because a lawyer uses privileged information to assist in drafting a claim:[70]

> … Litigation lawyers interview non-party witnesses and investigate records, so learning facts unknown to their clients. They then use their training and libraries to select legal authorities. All that information is and stays privileged, though the facts they plead must partly reflect that knowledge. *Rubinoff v. Newton* means that by filing any pleading a party waives virtually all the privilege he and his lawyer possess. That is not the law; a party need not choose between loss by default and privilege. Privilege is not to be whittled away: *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860 at 880-81, 28 C.R. (3d) 289, 70 C.C.C. (2d) 385, 141 D.L.R. (3d) 590, 1 C.R.R. 318, 44 N.R. 462 [Que.].

68. The Motions Judge held that because the Catalyst Parties disclosed the Vincent Hanna email, which was not generated for the dominant purpose of litigation or to obtain legal advice,[71] they had waived privileged over the Guy Documents, which were generated for the dominant purpose of litigation and/or to obtain legal advice.[72]

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[69] *Angus Partnership Inc v Salvation Army (Canada)*, [2011] AJ No 915 at para 11-13

[70] *Can-Air Services Ltd. v. British Aviation Insurance Co*. 1988 ABCA 341 at para 13

[71] Riley Affidavit para 20, Catalyst Motion Record Vol 9 Tab 2 at MR-1779

[72] Riley Affidavit para 24, Catalyst Motion Record Vol 9 Tab 2 at MR-1780

F. Issue #4: Are confidential communications between a public issuer and the OSC protected by case-by-case privilege?

G. Issue #5: Should a Court Considering Wigmore Privilege Over Documents Consider the Privileged Treatment of those Documents in Foreign Jurisdictions?

69. The privileges asserted with respect to the OSC and SEC Documents overlap and depend upon the application of the principles applicable to case-by-case privilege, emerging from the decision of the Supreme Court of Canada in *Slavutych v. Baker* [1976] 1 S.C.R. 254.

70. The basic requirements for case-by-case privilege are well known:

(1) The communications must originate in a *confidence* that they will not be disclosed.

(2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.

(3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered*.

(4) 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.

71. The case law indicates that the above criteria are not carved in stone, and that a flexible approach is appropriate:[73]

> [22] 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.
>
> [23] 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.
>
> [24] 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

[73] *In the Matter of B*, 2020 ONSC 7563 (S.C.J.)

> interest in protecting the communication from disclosure and the interest in proper disposition of the litigation: *Ryan*, at paras. 18, 33.

72. It is respectfully submitted that Justice McEwen's decision to reject case-by-case privilege over the OSC and SEC Documents is open to serious legal debate.

73. Firstly, in respect of the OSC Documents, Justice McEwen held that the first element of the *Slavutych* test – the communications originated with an expectation of confidentiality – could not be met because the confidentiality promised by the OSC was subject to a proviso that the information would only be disclosed as permitted by the Ontario *Securities Act* or "as otherwise required by law."

74. Referring to the decision of Justice Conway in *In the Matter of B*, 2020 ONSC 7563 (S.C.J.), McEwen J. held that such a qualification was fatal to any expectation of confidentiality. Therefore, case-by-case privilege could not be invoked:

> [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*. [Underlining and bolding added.]

75. *In the Matter of B* does not stand for the general proposition adopted by Justice McEwen. It is a case in which the issue was whether a private confidentiality clause as between and employer and employee – to which the OSC was not a party – could frustrate the OSC's statutory power to investigate matters under sections 11 and 13 of the *Securities Act*. As held by Justice Conway, this result could not have been reasonably expected, and the confidentiality provision in the examiner's employment contract was unavailing to block the OSC's ability to utilize its investigatory powers:

> [29] In *Tower v. Minister of National Revenue*, 2003 FCA 307, at para. 41, the Court held that accountants know, or should know, that their confidentiality is restricted by the power of the

> Minister to require disclosure pursuant to s. 231.2(1) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.). Therefore, the taxpayers in that case had not discharged their onus of showing that the relationship in issue carried with it an expectation of confidentiality sufficient to meet the first Wigmore principle.
>
> [30] Likewise, while an employer can expect that an employee will adhere to its contractual obligations to maintain confidentiality, it cannot possibly expect that the employee will maintain that confidentiality in the face of a summons issued by the OSC pursuant to its statutory powers under s. 13 of the Act. To hold otherwise would encourage an employer to deliberately exclude the language "except for disclosure required by law" from the confidentiality provisions in an employment agreement, in order to insulate the employer from investigation by securities regulators. I cannot accept that position. The Applicant has failed to meet the first Wigmore criterion. [Underlining added.]

76. The case at bar is fundamentally different. Here, the expectation of privacy was based on promises contained in communications from the OSC itself. The resulting expectations were confirmed in Callidus' responses, which expressed a belief that its responses were and would be confidential.

77. It is submitted that the fact that such assurance was not absolute does not destroy the expectation of confidentiality. It is further submitted that it is an extension of the case law for Justice McEwen to hold that, absent an unequivocal promise of confidentiality, there is no evidence to support the position that the communications originated in confidence.

78. An absolute assurance of confidentiality can never be given, and the possibility of disclosure is not sufficient to displace the applicability of the first element of the case-by-case privilege test:

> The first requirement for privilege is that the communications at issue have originated in a confidence that they will not be disclosed. The Master held that this condition was not met because both the appellant and Dr. Parfitt had concerns that notwithstanding their desire for confidentiality, the records might someday be ordered disclosed in the course of litigation. With respect, I do not agree. The communications were made in confidence. The appellant stipulated that they should remain confidential and Dr. Parfitt agreed that she would do everything possible to keep them confidential. The possibility that a court might order them disclosed at some future date over their objections does not change the fact that the

> communications were made in confidence. With the possible exception of communications falling in the traditional categories, there can never be an absolute guarantee of confidentiality; there is always the possibility that a court may order disclosure. Even for documents within the traditional categories, inadvertent disclosure is always a possibility.[74]

79. It is further submitted that a proper interpretation and application of Justice Conway's decision in *In the Matter of B* to the case at bar is this: if Callidus had argued that the assurances provided by the OSC ousted the jurisdiction of this Court to order the production of relevant documents, that expectation would be unreasonable.

80. It is submitted that there is nothing unreasonable for a registrant under the *Securities Act* to expect where the production of *prima facie* confidential communications with its regulator was in issue, the Court would at least consider (along with the other elements of the case-by-case privilege) whether such production should occur. This is quite different from expecting that a confidentiality clause would override a specific statutory provision (such as under the *Securities Act* or the *Income Tax Act*) empowering a governmental authority to make inquiries and require the production of documents.

81. The implication of the ruling that there was no evidence to satisfy the first element of the case-by-case test means that no reporting issuer answering inquiries from the OSC Corporate Finance Branch could ever assert case-by-case privilege over such communications.

82. This is a principle of broad application which is, at least, open to serious legal debate.

83. The Court next concluded that the second branch of *Slavutych* had not been met because Catalyst had failed to show that confidentiality over the communications in issue was essential to its relationship with the OSC.

[74] *M(A) v. Ryan*, [1997] 1 S.C.R. 157, at para. 24.

84. It is submitted that the importance of confidentiality with respect to the type of communication in issue – to encourage candour and cooperation – is a matter of common sense,[75] which has been recognized by several courts in differing contexts, both in Canada and in the United States.

85. In this regard, The Canadian case law recognizes that confidentiality in a medical quality control review is important. In *Steep (Litigation Guardian of) v Scott*, the Ontario Superior Court held that the free exchange of information in a medical quality control review is indeed promoted by confidentiality, so as to satisfy the second case-by-case privilege criterion.[76] The same considerations have been held to be important in communications between the Law Society and a lawyer subject to its regulation:[77]

> 140 I also accept that honest and open communications between lawyers and the Law Society, in its regulatory capacity, are essential to this oversight relationship and maintaining confidentiality is critical to fostering frank and full communications. Rule 6 of the Law Society's Rules of Professional Conduct speaks to the responsibility of lawyers to the Law Society and this includes the obligation to reply promptly to any communications with the Law Society. I accept the respondents' argument that it is in the public interest to promote and protect honest and open communications between lawyers and the Law Society. As such, I find that the first three branches of the Wigmore analysis are satisfied.
>
> 141 This leaves me to consider whether the interest served by protecting the communications outweighs the interest in disposing correctly of the merits of the human rights allegations. This involves a balancing of the risk of potential harm to the confidential relationship and potential injustice with respect to the Application. Obviously, both parties have an interest in establishing the truth to their claims, but they dispute whether exposure of the communications achieves or hinders this object. I find the balance favours preserving the confidential nature of the communications. I do not agree with the applicant's position that pursuing the truth underlying the reprisal allegations warrants setting aside the confidentiality of the communications arising out of the important regulatory relationship. I agree that the setting aside confidentiality in these types of circumstances would likely have a chilling effect on the candour of lawyers' communications with the Law Society to

[75] See *MacRae v. BDO Dunwoody*, 2010 ONSC 3404, at para. 51.

[76] *Steep (Litigation Guardian of) v Scott*, 2002 CanLII 53248 (ONSC), at paras 25-26.

[77] *Visic v. Elia Associates*, 2011 HRTO 1230 at paras 140-141, affirmed 2015 ONSC 7163 (Div. Ct.)

> the detriment of the public interest. There is a significant and substantial public interest in the regulatory relationship between lawyers and the Law Society because the public relies upon the Law Society and its investigatory and quasi-judicial powers for the protection and the advancement of justice. [Underlining added.]

86. It is submitted that there is no basis to distinguish the above conclusions reached in the above contexts from the OSC regulatory review in issue in the case at bar.

87. This conclusion is supported by the submissions herein (at paragraphs 95 - 97 below) with respect to the SEC Documents.

88. The Motions Judge also held that confidentiality could only be essential in the context of an OSC enforcement investigation:[78]

> [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. [Underlining added.]

89. Finally, the Motions Judge concluded that the fourth element of the *Slavutych* test required disclosure of the communications in issue. In assessing this conclusion, it is essential to bear in mind that this is not a case where the documents and/or communications relate to a hearing commenced by the OSC, much less any adverse decisions holding that Callidus' continuous disclosure (or any other conduct) violate any provision of the *Securities Act*. Rather, the case at bar stands for the proposition that questions, comments, and related back and forth musings, where no proceedings or order result, are producible.

90. It is respectfully submitted that the reasons for decision of the Motions Judge on this point are open to serious legal debate, based on the analysis that securities regulators (the SEC, in

[78] Reasons, para 56, Catalyst Motion Record Vol 1 Tab 3 at MR-38

particular) have themselves expressed about the probative value and the importance of the types of communications in issue.

91. To require production of such documents when no allegation of misconduct was ever advanced, when no hearing or proceeding was even instituted, and when no adverse ruling was ever made by the OSC, is an extension of the existing case law where production/disclosure has been ordered where there have been regulatory proceedings and adverse decisions against a registrant. It is also a departure from the focus in the case law upon the production of relevant documents:

> *Merrill Lynch, Royal Securities Ltd v Granove*, 1985 CarswellMan 193 (CA)
> *Huang v Silvercorp Metals Inc*, 2017 BCSC 795
> *Schwoob v Bayer Inc*, 2018 ONSC 166

92. The above issues and arguments also apply to the Motions Judge's rejection of case-by-case privilege in relation to the SEC Documents.

93. Here, the Motions Judge misapprehended Callidus' position. As expressly stated in its factum, Callidus did not ask the Motions Judge to accept and adopt a new claim of privilege based upon the "limited waiver" doctrine referred to in some of the U.S. decisions cited, but submitted that the factual context described and the analysis contained in these decisions was relevant to case-by-case privilege in Ontario. Moreover, Callidus' Factum made specific reference to the fact that the jurisprudence in the United States was and continues to be divided about some of these issues: [79]

> 72. In addition, Catalyst's position in this matter is not that this is a case where conflicts of laws issues arise by reason of any exclusive jurisdiction or attornment provisions. Catalyst does not contend that this Court is bound to apply U.S. legal principles to the current motion,

[79] Catalyst Factum (motion before McEwen J.), Catalyst Motion Record Vol 11 Tab 2 at MR-2121 to 2124.

so as to require proof of foreign law by expert reports. Hence, the reference to U.S. legal principles in Catalyst's materials are not for this purpose.

73. Rather, the declaration of Roel Campos, a former Commissioner of the SEC, and the references and the citations in this factum to U.S. law are to illustrate that the context, considerations, and principles applicable to the disclosure of the SEC documents in the United States are similar to the context, considerations, and principles recognized under Canadian law in the application of the Wigmore case by case privilege criteria. Catalyst's submission is that the principles discussed in the U.S. authorities are of assistance in assessing the issues regarding the production of the SEC documents, and warrant consideration by this Court in its application of Ontario law.

. . .

79. Thirdly, U.S. case law includes developing principles of privilege relating to regulatory communications with the SEC, based upon a concept known as "selective waiver". It should be noted that the validity of this privilege has not been adjudicated by the U.S. Supreme Court, and is not recognized or applied uniformly in the U.S. Circuit Courts where the issue has arisen.[80]

80. Catalyst does not contend that this Court should adopt the doctrine of selective waiver as part of Ontario law. Rather, it is evident from the case law and commentaries noted that the SEC has recognized that maintaining confidentiality over responses to its regulatory inquiries is beneficial to those processes, and that the U.S. case law reveals that similar observations and concerns have animated the recognition of such a privilege in regulatory inquiries by bank examiners.[81] [Underlining added.]

94. This misapprehension of Callidus' position was compounded by a more fundamental problem in the reasons of the Motions Judge, namely that the U.S. authorities cited were irrelevant to the Wigmore factors:[82]

> [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. [Underlining added.]

95. It is respectfully submitted that the U.S. authorities cited by Catalyst regarding the SEC Documents are not irrelevant: they describe the factual circumstances referable to the SEC

[80] See Keyawna Griffith, "From Compulsion to Compensation: How Selective Waiver Compensates Corporations for Involuntary Disclosures", (2019) 13 *Va. L. and Bus. Rev.* 41

[81] *In re Subpoena*, 967 F.2d 630 (United States Court of Appeal, District of Columbia)

[82] Reasons, para 67, Catalyst Motion Record Vol 1 Tab 3 at MR-40

Documents and explain U.S. practices, policies and concerns about the production of such documents.

96. For example, the U.S. authorities cited by Callidus are highly relevant to the second component of the case-by-case tests (the importance of confidentiality to the SEC-registrant relationship):[83]

> 81. As explained in the Herrington commentary noted below, in an unpublished submission filed in the Putnam case, the SEC set out the policy reasons why confidentiality should apply to communications made pursuant to the examination procedures of the Advisers Act:
>
> > As the policy rationale for the proposed examination privilege, the SEC stated that the OCIE examination process requires a candid dialogue and a willingness to compromise that could not be achieved if OCIE's communications with the registered entity were subject to disclosure. As OCIE's Chief Counsel explained in a declaration in support of the SEC's motion:
> >
> > > [T]he examination staff depends on the confidential nature of the deficiency letters to allow it to have free and open communications with the registered entities, not adversarial discussions in which registered entities feel a continuous need to defend and justify all of their conduct because of fear that communications will be disclosed to competitors, customers or investors who may use such communications against them.
> >
> > The SEC thus maintained that "[p]rotection of documents related to examinations is crucial," because disclosure of these materials "could change and harm the examination process."
>
> 82. As Herrington further describes, in addition to the above policy argument, three arguments have been advanced by the SEC in support of such confidential treatment:
>
> > **In addition to this policy argument**, the SEC identified three grounds to support its proposed privilege. First, the Freedom of Information Act ("FOIA") exempts such examination materials from disclosure. While FOIA generally requires disclosure of agency documents, Exemption 8 protects materials "contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions." Courts have construed "financial institutions" as used in FOIA to include most entities subject to SEC examination, including broker-dealers, investment advisers, and stock exchanges." While the SEC acknowledged that FOIA exemptions do not ordinarily create evidentiary or discovery privileges, it maintained that Exemption 8 "shows that Congress recognizes the need to protect the examination process and prevent disclosure of all documents relating to examinations of financial institutions."
> >
> > **Second**, the SEC cited Section 3 1(c) of the Investment Company Act, which provides that the Securities and Exchange Commission "shall not be compelled to disclose any internal

[83] Catalyst Factum (motion before McEwen J.), Catalyst Motion Record Vol 11 Tab 2 at MR-2124 to 2126.

compliance or audit records, or information contained therein, provided to the Commission under this section."

Third, the SEC pointed to the "bank examination privilege" as supporting a privilege for communications arising out of SEC examinations." The bank examination privilege protects examination reports prepared by agencies, such as the Office of the Comptroller of the Currency and the Federal Reserve, that oversee banks." As one court explained, this privilege is based on the need for candid communication between the bank and its regulator:

> Bank safety and soundness supervision is an iterative process of comment by the regulators and response by the bank. The success of the supervision therefore depends vitally upon the quality of communication between the regulated banking firm and the bank regulatory agency....Bank management must be open and forthcoming in response to the inquiries of bank examiners, and the examiners must in turn be frank in expressing their concerns about the bank. These conditions simply could not be met as well if communications between the bank and its regulators were not privileged."

83. It should be noted that this commentary notes that the application of such principles would be subject to limitations and exceptions, including, importantly, that the bank privilege only extends to materials that reflect the regulator's opinions, deliberations, or recommendations, and not to fact documents. Catalyst accepts this principle; notwithstanding the expectation of confidentiality and the FOIA jurisprudence referred to above, Catalyst does not assert privilege over otherwise producible, relevant corporate documents provided to the SEC.

84. As stated above, these observations are not binding on this Court. But it is respectfully submitted that they are relevant to this Court's consideration of the Wigmore case by case criteria, both as to the benefits of maintaining confidentiality in respect of the SEC materials, and the balancing provided for in the fourth leg of the Wigmore test.

[Underlining and bolding added.]

97. In addition, Callidus' factum cited U.S. principles which are highly relevant to the fourth element of the case-by-case privilege criteria – the importance (relevance and probative value) of the communications to and from the SEC examiners:[84]

> 68. The purposes of the SEC process and the thrust of the Anderson whistleblower complaint were all exceedingly broad. Some form of overlap was inevitable. That does not mean that one was or is "relevant" to the other, especially when none of the Anderson pleadings raises any such issue. A fortiori, any such overlap has no impact upon the validity of the privileges asserted with respect to the SEC communications or on the expectations of confidentiality associated therewith.
>
> 69. In the result, Catalyst's position is that the only arguable relevance to the SEC materials is that the SEC undertook a broad-ranging examination process under the Advisers Act, and that no proceedings were ever initiated by the SEC.

[84] Catalyst Factum (motion before McEwen J.), Catalyst Motion Record Vol 11 Tab 2 at MR-2120 to 2122.

70. Put differently, in the case at bar, where no proceedings were ever brought against Callidus, the wording and content of any letters, requests, or observations of the SEC examiners are irrelevant and have no probative value.

71. This position is supported by the following commentary and references:[85]

> Even if assertion of a privilege from disclosure does not succeed in a particular case, the SEC's arguments in *Putnam* also provide a basis for opposing the admission at trial of deficiency letters and related communications. The SEC emphasized in *Putnam* that such communications "are of limited value to entities other than the parties to the communications because the communications are with Commission staff and *are not reviewed by the Commission*." Thus, the SEC explained, "[t]o determine the Commission's position" one should *not* look to such communications but instead "should consider documents released by the Commission." Reinforcing this point, OCIE's deficiency letters are required to state: "The above findings are based on the staff's examination and are not findings or conclusions of the Commission."
>
> The party opposing admission of such materials thus can argue under Rule 401 of the Federal Rules of Evidence that the materials have no probative weight and so should be excluded as irrelevant. Or the party can argue under Rule 403 that any relevance is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. The concern is that a jury would regard a deficiency letter as having the *imprimatur* of the SEC, but in reality - as the SEC itself emphasized in *Putnam* - such letters are not "findings or conclusions of the Commission." Moreover, because the examination process does not afford the regulated entity any formal hearing and because deficiency letters do not represent an adjudication by a neutral factfinder, to present the jury with these so-called "findings" of the SEC staff would be unfairly prejudicial.

[Italics in original; underlining added.]

98. It is respectfully submitted that the conclusion of the Motions Judge, holding that the principles explained and described in the above citations are irrelevant to the case-by-case analysis, is flawed.

99. For these reasons, it is submitted that the Motions Judge's ruling with respect to the production of all of the OSC and SEC Documents is open to serious legal debate. This decision raises issues of general importance, both in the area of case-by-case privilege, and because of its

[85] David H. Herrington & Kathleya Chotiros, "The Developing Privilege for Regulatory Communications with the SEC" (2007) 124 *Banking L.J.* 704, p. 710 (footnotes omitted).

impact upon the relationship between securities regulators and regulated entities such as Callidus, and upon the practices followed in regulatory investigations and communications.

100. It is further submitted that the U.S. case law is instructive on whether leave to appeal should be granted in respect of the production of the OSC and SEC Documents.

101. The Ontario principles applicable to granting such leave are summarized in paragraphs 24 - 28 of this Factum.

102. In the United States, *some* of the Federal Court circuits apply a stricter standard. The Second Circuit Court of Appeals is one such court. Considering whether to grant a writ of mandamus with respect to a decision of the United States District Court for the Southern District of New York, the Court stated:[86]

> As a threshold matter, the court must determine whether it will use mandamus to review the district court's order compelling production of the memorandum. We have consistently expressed reluctance to use mandamus as a means to circumvent the general rule that pretrial discovery orders are not appealable. *In re W.R. Grace & Co., 984 F.2d 587, 589 (2d Cir. 1993)*. "Unlike other circuits, we have rarely used the extraordinary writ of mandamus to overturn a discovery order involving a claim of privilege." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC, 964 F.2d 159, 163 (2d Cir. 1992)*. ***HN2***[] The circuit will use mandamus to review discovery orders involving a claim of privilege **[**6]** only when:
>
> (i) an issue of importance and of first impression is raised; (ii) the privilege will be lost in the particular case if review must await a final judgment; and (iii) immediate resolution will avoid the development of discovery practices or doctrine undermining the privilege.
>
> *W.R. Grace, 984 F.2d at 589, quoting Turner & Newall, 964 F.2d at 163*. [Underlining added.]

103. Because the privilege issue in question had not been previously decided on appeal, the Court considered the petition for mandamus on the merits. In deciding to do so, the Court of

[86] *In Re Steinhardt Partners, L.P., Steinhardt Management Co*., United States Court of Appeals, Second Circuit, 9 F.3d 230 (2d Cir. 1993).

Appeals referred to the very division in the case law alluded to in the authorities cited by Callidus in this case:[87]

> This dispute presents one of the very rare circumstances permitting the use of mandamus to review a district court order. The circuit has not previously resolved the important question of whether disclosure of attorney work product in connection with a government investigation waives the privilege in later civil discovery. The district courts of the circuit have addressed similar questions, arriving at different results. *See Enron Corp. v. Borget, 1990 U.S. Dist. LEXIS 12471, 1990 WL 144879 (S.D.N.Y. Sept. 22, 1990)* (no waiver of work product protection); *Teachers Ins. & Annuity Ass'n v. Shamrock Broadcasting Co., 521 F. Supp. 638 (S.D.N.Y. 1981)* (disclosure to SEC waived attorney-client privilege); *Byrnes v. IDS Realty Trust, 85 F.R.D. 679 (S.D.N.Y. 1980)* **[**7]** (applying Eighth Circuit law and holding attorney-client privilege not waived); *GAF Corp. v. Eastman Kodak Co., 85 F.R.D. 46 (S.D.N.Y. 1979)* (no waiver of work product protection). The circuits have also split on this issue. *Compare Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414 (3rd Cir. 1991)* (waiver of work product and attorney-client privilege upon voluntary disclosure of information to SEC and Department of Justice) *and In re Subpoenas Duces Tecum, 738 F.2d 1367, 238 U.S. App. D.C. 221, (D.C. Cir. 1984)* (waiver of work product and attorney-client privilege upon voluntary disclosure of information to SEC) *with Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 606 (8th Cir. 1977)* (en banc) (no waiver of attorney-client privilege).
>
> In addition, the alleged privilege will be lost if review must await final judgment. Disclosure of the memorandum will destroy the alleged privilege and moot the question. As to the final part of the *Turner & Newall* test, Steinhardt's argument that the district court's order will lead to discovery practices undermining the privilege **[**8]** is not a mere conclusory allegation, but is supported by the decisions of at least one circuit. *See Diversified, 572 F.2d at 611*. Given the fact that this court is yet to resolve this important issue, a decision from at least one circuit supporting petitioner's argument that the district court's order undermines the privilege, and the need for immediate resolution before the alleged privilege is lost, this petition satisfies the conditions of the *Turner & Newall* test. [Underlining added.]

104. No Ontario appellate court has decided (a) that case-by-case privilege cannot reply to OSC regulatory inquiries because the assurances of confidentiality given by the OSC are qualified, (b) that the only context in which the second case-by-case privilege test could be met is in OSC enforcement investigations, or (c) the relevance and application of the U.S. practices to the production of SEC investigation documents.

105. These are important issues of first impression. Even under the very strict standard that would be applied by the United States Second Circuit Court of Appeals, consideration of these

[87] Ibid.

issues by an appellate court is warranted. *A fortiori*, leave to appeal in respect of these issues should be granted under the Ontario principles for leave to appeal.

Part IV – Conclusion

106. For the above reasons, it is respectfully submitted that leave to appeal should be granted in respect of the issues identified herein.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of February, 2021.

David C. Moore

Matthew Karabus

Kenneth G. Jones

MOORE BARRISTERS
Professional Corporation
393 University Avenue, Suite 1600,
Toronto ON M5G 1E6
Tel: 416.581.1818 x.222
Fax: 416.581.1279

David C. Moore (#16996U)
david@moorebarristers.ca

Kenneth G. Jones (#29918I)
kenjones@moorbarristers.ca

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5
Tel: 416-862-7525
Fax: 416-862-7661

Matthew Karabus (LSO#61892D)
matthew.karabus@gowlingwlg.com

Lawyers for the Plaintiffs/Moving Parties, The Catalyst Capital Group Inc. and Callidus Capital Corporation

SCHEDULE A - LIST OF AUTHORITIES

Caselaw

1. *Comtrade Petroleum Inc. v. 490300 Ontario Ltd*. (1992), 7 O.R. (3d) 542 (Div. Ct.)
2. *Judson v Mitchele*, 2011 ONSC 6004
3. *Greslik v. Ontario Legal Aid Plan*, 1988 CarswellOnt 436 (Div Ct)
4. *Re Sault Dock Co. Ltd. and City of Sault Ste. Marie*, [1973] 2 O.R. 479 (Ont. C.A.)
5. *Bank Leu AG v. Gaming Lottery Corporation et al.*, unreported decision of Justice Hartt, Divisional Court, November 26, 1999 (General Division Court File No. 96-CU-101891B, Commercial List File No. 97-CL-556)
6. *College of Physicians of British Columbia (College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665
7. *Currie v. Symcor Inc.*, 2008 CarswellOnt 4525
8. *Cusson v. Quan* (2004), 10 C.P.C. (6th) 308 (Ont. Master)
9. *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA)
10. *Trillium Motor World Ltd. v. General Motors of Canada Ltd*., 2014 ONSC 1338, aff'd 2014 ONSC 4894
11. *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, 2011 BCSC 88
12. *Royal Bank v Société Générale (Canada))*, 2005 CanLII 36727 (ONSC)
13. *Blank v Canada (Minister of Justice)*, 2006 SCC 39
14. *CIT Financial Ltd v JDS Uniphase Corp*, [2003] OJ No 2991
15. *Pritchard v Ontario (Human Rights Commission)*, [2004] 1 SCR 809
16. *Keefer Laundry Ltd. v. Pellerin Milnor Corp*., 2006 BCSC 1180
17. *New Brunswick v. Enbridge Gas New Brunswick Limited Partnership*, 2016 NBCA 17
18. *Huang v. Silvercorp Metals Inc*., 2017 BCSC 795
19. *Genier v CCI Capital Canada Ltd.*, 2008 CanLII 1175 (ONSC)
20. *CC&L Dedicated Enterprise Fund (Trustee of) v. Fisherman*, 2001 CarswellOnt 514 (SCJ)

Other Authorities

SCHEDULE B - RELEVANT STATUTES, REGULATIONS AND BY-LAWS

RULES OF CIVIL PROCEDURE, R.R.O. 1990, REG. 194

62.02 (1) Leave to appeal to the Divisional Court from any of the following orders shall be obtained from a panel of that court in accordance with this rule:

> **1. An interlocutory order of a judge of the Superior Court of Justice, under clause 19 (1) (b) of the Courts of Justice Act.**
>
> **2. A final order of a judge of the Superior Court of Justice for costs, under clauses 19 (1) (a) and 133 (b) of the Courts of Justice Act.**

…

Grounds on Which Leave May Be Granted

(4) Leave to appeal from an interlocutory order shall not be granted unless,

> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the panel hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there appears to the panel hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in the panel's opinion, leave to appeal should be granted.

***SECURITIES ACT*, R.S.O. 1990, C. S.5**

Section 11

Investigation order

11 (1) The Commission may, by order, appoint one or more persons to make such investigation with respect to a matter as it considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (1).

Contents of order

(2) An order under this section shall describe the matter to be investigated. 1994, c. 11, s. 358.

Scope of investigation

(3) For the purposes of an investigation under this section, a person appointed to make the investigation may investigate and inquire into,

(a) the affairs of the person or company in respect of which the investigation is being made, including any trades, communications, negotiations, transactions, investigations, loans, borrowings or payments to, by, on behalf of, or in relation to or connected with the person or company and any property, assets or things owned, acquired or alienated in whole or in part by the person or company or by any other person or company acting on behalf of or as agent for the person or company; and

(b) the assets at any time held, the liabilities, debts, undertakings and obligations at any time existing, the financial or other conditions at any time prevailing in or in relation to or in connection with the person or company, and any relationship that may at any time exist or have existed between the person or company and any other person or company by reason of investments, commissions promised, secured or paid, interests held or acquired, the loaning or borrowing of money, stock or other property, the transfer, negotiation or holding of stock, interlocking directorates, common control, undue influence or control or any other relationship. 1994, c. 11, s. 358.

Right to examine

(4) For the purposes of an investigation under this section, a person appointed to make the investigation may examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company. 1994, c. 11, s. 358.

Minister may order investigation

(5) Despite subsection (1), the Minister may, by order, appoint one or more persons to make such investigation as the Minister considers expedient,

(a) for the due administration of Ontario securities law or the regulation of the capital markets in Ontario; or

(b) to assist in the due administration of the securities or derivatives laws or the regulation of the capital markets in another jurisdiction. 1994, c. 11, s. 358; 2010, c. 26, Sched. 18, s. 4 (2).

Same

(6) A person appointed under subsection (5) has, for the purpose of the investigation, the same authority, powers, rights and privileges as a person appointed under subsection (1). 1994, c. 11, s. 358.

Section 13

Power of investigator or examiner

13 (1) A person making an investigation or examination under section 11 or 12 has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions, and the refusal of a person to attend or to answer questions or of a person or company to produce such documents or other things as are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (1).

Rights of witness

(2) A person or company giving evidence under subsection (1) may be represented by counsel and may claim any privilege to which the person or company is entitled. 1994, c. 11, s. 358.

Inspection

(3) A person making an investigation or examination under section 11 or 12 may, on production of the order appointing him or her, enter the business premises of any person or company named in the order during business hours and inspect any documents or other things that are used in the business of that person or company and that relate to the matters specified in the order, except those maintained by a lawyer in respect of his or her client's affairs. 1994, c. 11, s. 358.

Authorization to search

(4) A person making an investigation or examination under section 11 or 12 may apply to a judge of the Ontario Court of Justice in the absence of the public and without notice for an order authorizing the person or persons named in the order to enter and search any building, receptacle or place specified and to seize anything described in the authorization that is found in the building, receptacle or place and to bring it before the judge granting the authorization or another judge to be dealt with by him or her according to law. 1994, c. 11, s. 358; 2006, c. 19, Sched. C, s. 1 (2).

Grounds

(5) No authorization shall be granted under subsection (4) unless the judge to whom the application is made is satisfied on information under oath that there are reasonable and probable grounds to believe that there may be in the building, receptacle or place to be searched anything that may reasonably relate to the order made under section 11 or 12. 1994, c. 11, s. 358.

Power to enter, search and seize

(6) A person named in an order under subsection (4) may, on production of the order, enter any building, receptacle or place specified in the order between 6 a.m. and 9 p.m., search for and seize anything specified in the order, and use as much force as is reasonably necessary for that purpose. 1994, c. 11, s. 358.

Expiration

(7) Every order under subsection (4) shall name the date that it expires, and the date shall be not later than fifteen days after the order is granted. 1994, c. 11, s. 358.

Application

(8) Sections 159 and 160 of the Provincial Offences Act apply to searches and seizures under this section with such modifications as the circumstances require. 1994, c. 11, s. 358.

Private residences

(9) For the purpose of subsections (4), (5) and (6),

"building, receptacle or place" does not include a private residence. 1994, c. 11, s. 358.

Section 20.1

Continuous disclosure reviews

20.1 (1) The Commission or any member, employee or agent of the Commission may conduct a review of the disclosures that have been made or that ought to have been made by a reporting issuer or mutual fund in Ontario, on a basis to be determined at the discretion of the Commission or the Director. 2002, c. 22, s. 179.

Same, issuer other than reporting issuer or mutual fund in Ontario

(1.1) The Commission or any member, employee or agent of the Commission may conduct a review of an issuer other than a reporting issuer or mutual fund in Ontario for the purpose of determining whether disclosure requirements under Ontario securities law applicable to the issuer are being complied with, on a basis to be determined at the discretion of the Commission or the Director. 2014, c. 7, Sched. 28, s. 3 (1).

Information and documents

(2) An issuer that is subject to a review under this section shall, at such time or times as the Commission or Director may require, deliver to the Commission or Director any information and documents relevant to the review. 2014, c. 7, Sched. 28, s. 3 (2).

Freedom of Information and Protection of Privacy Act

(3) Despite the *Freedom of Information and Protection of Privacy Act*, information and documents obtained pursuant to a review under this section are exempt from disclosure under that Act if the Commission determines that the information and documents should be maintained in confidence. 2002, c. 22, s. 179.

Prohibition on certain representations

(4) An issuer, or any person or company acting on behalf of an issuer, shall not make any representation, written or oral, that the Commission has in any way passed upon the merits of the disclosure record of the issuer. 2014, c. 7, Sched. 28, s. 3 (3).

Divisional Court File No.
Superior Court File No. CV-17-587463-00CL

THE CATALYST CAPITAL GROUP et al. - and - WEST FACE CAPITAL INC. et al.

Plaintiffs Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MOVING PARTIES

MOORE BARRISTERS
Professional Corporation
393 University Avenue, Suite 1600,
Toronto ON M5G 1E6

David C. Moore (#16996U)
david@moorebarristers.com

Ken Jones (#29918I)
kenjones@moorebarristers.ca

Tel: 416.581.1818 x.222
Fax: 416.581.1279

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
1 First Canadian Place
100 King Street West, Suite 1600
Toronto ON M5X 1G5

Matthew Karabus (#61892D)
matthew.karabus@gowlingwlg.com

Tel: 416-862-7525
Fax: 416-862-7661

Lawyers for the Plaintiffs/Moving Parties, The Catalyst Capital Group Inc. and Callidus Capital Corporation