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 and CALLIDUS CAPITAL CORPORATION

Plaintiffs

- and -

WEST FACE CAPITAL INC., GREGORY BOLAND, M5V ADVISORS INC. C.O.B. ANSON GROUP CANADA, ADMIRALTY ADVISORS LLC, FRIGATE VENTURES LP, ANSON INVESTMENTS LP, ANSON CAPITAL LP, ANSON INVESTMENTS MASTER FUND LP, AIMF GP, ANSON CATALYST MASTER FUND LP, ACF GP, MOEZ KASSAM, ADAM SPEARS, SUNNY PURI, CLARITYSPRING INC., NATHAN ANDERSON, BRUCE LANGSTAFF, ROB COPELAND, KEVIN BAUMANN, JEFFREY MCFARLANE, DARRYL LEVITT, RICHARD MOLYNEUX, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10

Defendants

A N D B E T W E E N:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim

- and –

THE CATALYST CAPITAL GROUP INC., CALLIDUS CAPITAL CORPORATION NEWTON GLASSMAN, GABRIEL DE ALBA, JAMES RILEY, VIRGINIA JAMIESON, EMMANUEL ROSEN, B.C. STRATEGY LTD. d/b/a BLACK CUBE, B.C. STRATEGY UK LTD. d/b/a BLACK CUBE, and PSY GROUP INC.

Defendants by Counterclaim

RESPONDING FACTUM OF THE CATALYST PARTIES

(Motion Returnable January 18, 2021)

January 13, 2021

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TO: SERVICE LIST

PART I
OVERVIEW

1. The Catalyst Capital Group Inc. ("**Catalyst**"), Callidus Capital Corporation ("**Callidus**"), Newton Glassman, Gabriel De Alba, and James Riley, (the "**Respondents**" or "**Catalyst Parties**") oppose motions by West Face Capital Inc. and Gregory Boland ("**West Face**"), and Clarityspring Inc. and Nathan Anderson ("**Anderson Parties**") (collectively, the "**Moving Parties**"), challenging privileges the Respondents assert over certain categories of documents, described below.

2. Since the delivery of the Catalyst Parties' responding affidavits on December 28, 2020, the number of privilege issues challenged by the Moving Parties has reduced significantly. The Moving Parties' challenges now relate to the following classes of documents:

(a) West Face and the Anderson Parties seek production of numerous documents arising out of an email dated August 11, 2017, purporting to be authored by Vincent Hanna (the "**Vincent Hanna email**") specified in the Respondents' detailed Schedule B (the "**Guy Documents**");

(b) West Face and the Anderson Parties seek production of a report prepared by Patrick Dalton (a consultant and Interim CEO of Callidus) in February 2019 (the "**Dalton Report**"), and,

(c) the Anderson Parties seek production of documents and communications among the Respondents' or their counsel, and the Ontario Securities

Commission (the "**OSC**") and the U.S. Securities and Exchange Commission (the "**SEC**").

3. The Respondents' position with respect to these documents is as follows:

(a) The Guy Documents came into being after the Catalyst Parties had sought legal advice regarding the Vincent Hanna Email. These documents include communications to and from an individual known as Danny Guy, his counsel, and an investigator hired by Danny Guy (cumulatively the "**Guy Parties**"). The contents of the Guy Documents are either privileged on their face or refer to privileged advice and communications of the Respondents (or the Guy Parties). The Guy Documents were the subject of a common interest agreement between the Catalyst Parties and the Guy Parties, and therefore retain their privileged status.

(b) The Dalton Report proposed a confidential restructuring plan and was intended to be privileged and confidential. It was prepared with the express intent that it be provided to counsel so that legal advice could be obtained regarding the proposed restructuring, and was in fact used by counsel for this purpose. The Dalton Report was and remains subject to solicitor-client privilege.

(c) The OSC and SEC materials were intended to be confidential from the outset, and are privileged under the four-fold case by case test articulated in *Slavutych v. Baker*. In the case of the SEC materials, the U.S. case law and practices are relevant and support the recognition of case by case privilege under Ontario law.

4. The Respondents accept that if any of the types of documents referred to above contain or include historical non-privileged documents, such documents are not shielded from production. This is most applicable to the OSC and SEC materials: if these materials

attach or contain any corporate documents which are relevant to the issues in this action, they are not subject to privilege.

PART II
STATEMENT OF FACTS AND CONCISE ARGUMENT

(A) Category One: The Guy Documents

5. Catalyst has been party to a number of pieces of litigation involving West Face, as well as other parties. From and after August 2017, active steps were underway with legal counsel regarding the within action (the "**Conspiracy Action**") and a second action against Dow Jones et al. (the "**Dow Jones Action**"), which were commenced on November 7, 2017.[1]

6. The Conspiracy and Dow Jones Action arise out of a wrongful conspiracy the elements of which involve coordinated actions to harm the Catalyst Parties, including 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 Article**").[2]

7. Following the publication of the WSJ Article, Glassman received an email from a person purporting to be "Vincent Hanna," referring to a "cabal" of conspirators who had (among other things) caused the publication of the WSJ Article and the short selling proximate to it.[3]

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[1] Described in the Affidavit of James Riley, sworn December 28, 2020 ("**Riley Affidavit**), para 12, Catalyst Motion Record Vol 1 at p.9.
[2] Riley Affidavit, para 13, Catalyst Motion Record Vol 1 at p.9-10.
[3] Email from Vincent Hanna to Newton Glassman, August 11, 2017, Riley Affidavit Exhibit B, Catalyst Motion Record Vol 1 Tab 2B.

8. In the immediate aftermath of the WSJ article, the contents of the Vincent Hanna Email were of obvious concern and relevance to the Catalyst Parties:[4]

> **To:** nglassman[nglassman@catcapital.com]
> **From:** Vincent Hanna[vincent_h@runbox.com]
> **Sent:** Fri 8/11/2017 4:55:15 PM (UTC-04:00)
> **Subject:** Attacks on Callidus
>
> Dear Mr. Glassman.
>
> 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:
>
> 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.
>
> I am disgusted that this acting in concert is going on and happening to you and other participants in the Canadian Capital Markets and I write this letter to inform you of such.
>
> If I were you I would sue the above groups and from that you will garner access to all their trading records and communications between them. From this you will then be fed additional information. This will lead the perpetrators down a rabbit hole they will not escape from. But in the end that is up to you. You now have this information. There will be more to come. Stay tuned.

9. The Catalyst Parties immediately sought legal advice about this email. They then exchanged emails and made inquiries with "Vincent Hanna,"[5] and the Catalyst Parties eventually concluded that "Vincent Hanna" was an alias of Daniel Guy, who is the founder

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[4] Email from Vincent Hanna to Newton Glassman, August 11, 2017, Riley Affidavit Exhibit B, Catalyst Motion Record Vol 1 Tab 2B.
[5] Riley Affidavit, para 20, Catalyst Motion Record Vol 1 at p. 12.

of Harrington Global Limited, a private equity firm based in Toronto.[6] Guy introduced the Catalyst Parties to the other Guy Parties, i.e., his lawyer John Kingman Phillips, and his private investigator Derrick Snowdy.[7]

10. In and as a result of the above interactions, the Catalyst Parties and the Guy Parties agreed that their communications relating to the issues referred to in the Vincent Hanna Email were subject to common interest privilege.[8]

Common interest privilege

11. Common interest privilege is an exception to the general rule of waiver that allows the sharing of privileged information between parties with a "joint interest" without loss of privilege. A party asserting common interest must illustrate 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 the disclosure; and (iii) the privilege has not been abrogated through waiver, disclosure, or otherwise at law.[9]

12. Common interest privilege ensures that a document or communication that is already protected by solicitor-client or litigation privilege does not lose that protection when it is shared between two parties sharing a "common interest" in either litigation or a transaction. As such, there must be an underlying privilege established in order for a claim for common interest privilege to be made out.[10]

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[6] Riley Affidavit, para 21, Catalyst Motion Record Vol 1 at p. 12.
[7] Riley Affidavit, para 21, Catalyst Motion Record Vol 1 at p. 12.
[8] Riley Affidavit, para 24, Catalyst Motion Record Vol 1 at p. 13.
[9] *Milicevic v T Smith Engineering Inc.,* 2016 ONSC 2166, at paras 136-137, RBOA Tab 9.
[10] *The Law of Privilege in Canada* – Chapter 12.240 Common Interest Privilege, RBOA Tab 23.

(ii) The Catalyst Parties and the Guy Parties shared a "common interest" at the time of the disclosure

13. After the Vincent Hanna Email, the Catalyst Parties and the Guy Parties shared information and legal advice regarding prospective options about litigation against wrongdoers who had harmed them, including short sellers. The information shared was subject to solicitor-client privilege and litigation privilege.

14. The subject of the privileged communications between the Catalyst Parties and the Guy Parties was their common interest in defending themselves against, and litigating, short sellers that were targeting, respectively, Callidus and Harrington.[11] Guy was currently involved in litigation against short sellers (which may have included members of the "Wolfpack" referred to in the Vincent Hanna Email), and the Catalyst Parties were contemplating litigation against short sellers (including members of the "Wolfpack").[12]

15. 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".[13] 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".[14]

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[11] Riley Affidavit, para 25, Catalyst Motion Record Vol 1 at p. 13.
[12] Riley Affidavit, para 23, Catalyst Motion Record Vol 1 at p. 13.
[13] *Genier v CCI Capital Canada Ltd.*, 2008 CanLII 1175 (ONSC), at para 18, Book of Authorities of the Catalyst Parties ("**RBOA**") Tab 5.
[14] *Pritchard v Ontario*, 2004 SCC 31, at para 24, RBOA Tab 11.

(iii) The privilege has not been abrogated through waiver, disclosure or otherwise at law

16. The Catalyst Parties and the Guy Parties have not disclosed any of the privileged information which was exchanged after the Vincent Hanna Email, and so the privilege has not been waived.[15]

17. It is respectfully submitted that all of the documents sought to be produced under this category are documents to which solicitor-client privilege or litigation privilege applies, and were the subject of a common interest agreement.

18. As a result, it is submitted that none of the Guy Documents should be produced.

(B) Category Two: The Dalton Report

19. Patrick Dalton ("**Dalton**") was engaged by Callidus (and its controlling shareholder, Catalyst) as the Interim CEO of Callidus and consultant in late October 2018.[16]

20. At the time, Callidus was a reporting issuer under the *Securities Act*. Its financial difficulties were well publicized. Callidus had been attempting without success to complete a privatization process for a transaction which would enable the sale of its minority shareholdings interests to be sold to a private buyer. In order to implement any privatization, a shareholders' agreement between any buyer and Catalyst was necessary.

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[15] Riley Affidavit, para 26, Catalyst Motion Record Vol 1 at p. 14.
[16] Transcript from the Cross-examination of Patrick Dalton on January 5, 2021 ("**Dalton CXM**"), p. 16 q. 48, Catalyst Motion Record Vol 2 at p. 137; 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 2 Tab 4 at p. 183.

Callidus was also highly dependant upon Catalyst for various financings described in Callidus' continuous disclosure.[17]

21. Dalton was directed to prepare a report regarding potential restructuring options for Callidus. Given the above context, any such restructuring would have to be acceptable to Catalyst.[18]

22. In these circumstances, the Callidus Board knew and intended and directed that Dalton provide Jim Riley and Newton Glassman, as well as Rocco DiPucchio ("DiPucchio"), with copies of the draft and final versions of the Dalton Report for their review and consideration.[19] DiPucchio was not a member of the Callidus Board. Rather, he was a managing director of Catalyst and acted as Catalyst's *de facto* General Counsel and gave advice to Catalyst regarding the proposed restructuring.[20]

23. In these circumstances, the Callidus Board knew, intended, and directed that the Dalton Report be confidential and be subject to solicitor client privilege. This intention was reflected by a label on the front page of the Dalton Report. In addition, the Dalton report contained a disclaimer which indicated that:

(a) the Dalton Report did not itself include legal advice;

(b) accordingly, the Dalton Report was to be used by Callidus' directors to consult with legal counsel (DiPucchio), and

(c) the Dalton Report was strictly confidential but could be disclosed to Catalyst, as Callidus' affiliate, including any Catalyst representatives.[21]

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[17] Item #34 of the Riley Answers to Under Advisements, Catalyst Motion Record Vol 2 Tab 4 at p. 186-187.
[18] Affidavit of Patrick Dalton sworn January 4, 2021 ("**Dalton Affidavit**) at paras 3-4, Catalyst Motion Record Vol 1 at p. 74-75.
[19] Dalton Affidavit para 4, Catalyst Motion Record Vol 1 at p. 75.
[20] Dalton Affidavit para 5, Catalyst Motion Record Vol 1 at p. 75; Riley Affidavit para 46, Catalyst Motion Record Vol 1 at p. 20-21.
[21] Item #34 to the Riley Answers to Undertakings Catalyst Motion Record Vol 2 Tab 3 at p. 186-187.

24. Mr. Dalton's unchallenged evidence about the purpose and scope of the Dalton Report was that it was prepared for the purpose of enabling counsel to provide legal and strategic advice to Catalyst:[22]

> 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.

25. The record also demonstrates that:

(a) DiPucchio received and reviewed a draft version of the Dalton Report he received from Dalton;[23]

(b) DiPucchio requested that certain additional information be added to the Dalton Report so that it could be reviewed with Catalyst;[24]

(c) Dalton prepared and included a supplement in the Dalton Report, which was finalized on or about February 27, 2019;[25]

(d) DiPucchio attended the February 28, 2019 Callidus Board meeting as an invitee;[26] and

(e) In fact, DiPucchio received the Dalton Report and used it to give legal advice to Catalyst and its principals regarding the proposed restructuring.[27]

26. In summary, the purpose of the Dalton Report, its disclosure to DiPucchio, and DiPucchio's attendance at the February 28, 2019 Board meeting was to enable DiPucchio to provide legal advice to Catalyst, which was being asked to consider and support possible restructuring proposals.

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[22] Dalton Affidavit para 4, Catalyst Motion Record at p. 75; Dalton CXM p. 26 q.. 80, Catalyst Motion Record at p. 147.
[23] Dalton CXM p. 27 q. 83, Catalyst Motion Record at p. 148.
[24] Dalton CXM p. 27 q. 83, Catalyst Motion Record at p. 148.
[25] Dalton CXM p. 27 q. 83, Catalyst Motion Record at p. 148.
[26] Exhibit 1 to the Cross-examination of James Riley on January 5, 2021 ("**Riley CXM**"), Catalyst Motion Record Vol 2 Tab 1A.
[27] Riley Affidavit para 46, Catalyst Motion Record Vol 1 at p. 20.

27. Communications between a consultant and a solicitor will be recognised as subject to solicitor-client privilege where the consultant acts as an agent or channel of communication between the client and the solicitor or where the consultant's retainer "extends to a function which is essential to the existence or operation of the client-solicitor relationship."[28]

28. 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.[29]

29. In *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, General Motors retained an outside consultant (Ernst & Young) to explore ways to restructure the company and also to investigate how they might avoid taking this drastic step. Privilege was claimed over certain documents prepared by Ernst & Young. In upholding the privilege over such documents, the Court held that where restructuring experts (like Mr. Dalton in this case) and lawyers (like Mr. DiPucchio) work together in formulating a restructuring plan, there is an expectation that the information they share will remain protected from disclosure:[30]

> 155 The evidence is clear that E &Y worked as part of a team of professional advisors, along with legal counsel, towards both possible outcomes (restructuring and CCAA filing) simultaneously. The professional advisors worked seamlessly and collaboratively, the goal being to maximize the success of the restructuring option. All communications were understood and expected to be privileged and

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[28] *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA) para 120, , RBOA Tab 4.
[29] *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA) para 111, RBOA Tab 4.
[30] *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* 2014 ONSC 1338 at para 155, RBOA Tab 18.

> to remain confidential and a confidentiality agreement was entered into to highlight GMCL's expectation in that regard.

30. In *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority*, the plaintiff was seeking documents over which privilege had been claimed, and asserted that the solicitor to the defendant had provided advice or been asked for advice in the presence of a third party, a consultant retained to assist the defendant with property acquisitions. In acknowledging that the lawyer and the consultant worked closely together in the context of the project, the court stated that they worked hand-in-hand, within their respective areas of expertise, on an ongoing basis to advance the interests of their client [underlining added]:[31]

> 63 This is not a case where Mr. Pavlakovic merely gathered information from outside sources and provided that information to Mr. Hanman so that Mr. Hanman could advise the Authority, or where Mr. Pavlakovic was retained to act on the legal instructions of Mr. Hanman: *Chrusz* at para.122. Instead, this is a case where Mr. Hanman and Mr. Pavlakovic worked hand-in- hand, within their respective areas of expertise, on an ongoing basis to advance the interests of the Authority. They simply did so under an economic model that caused the Authority to outsource part of the project to Mr. Pavlakovic. All of their activity was undertaken with the knowledge of and at the instance of the Authority.
>
> 64 The nature of the interrelationship and of the dealings between the Authority, Mr. Pavlakovic and Mr. Hanman are a practical reality in major commercial projects where teams of individuals with focused expertise are assembled. All functions are not performed under a single roof, and the solicitor, though retained by a single client, may be required to give advice to different members of the team who work for the client. In Chrusz, Doherty J.A. began his analysis with a consideration of the underlying objects of solicitor-client privilege and developed a "functional" approach to address the circumstances within which a solicitor may interact with a third party. Chrusz recognized that the instances in which and purposes for which solicitors, third parties and clients interact are many and varied. The question of whether communications between a solicitor and a third party are privileged turns not on a focused consideration of the third party's legal status but rather on a more measured assessment of the function and role of that third party.

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[31] *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88, RBOA Tab 1.

31. In *Royal Bank v Société Générale (Canada)*,[32] the defendants sought production of documents over which RBC claimed privilege. The document in question was a report prepared for a breakout committee of the RBC board that had been formed to investigate forged bank drafts. The Committee drafted a report to be provided to RBC's counsel for the purpose of seeking legal advice. The Court held that the document was clearly privileged, since the purpose of the report was to give legal advice.[33]

32. Another example of this extension of solicitor client privilege was also discussed by the Court of Appeal in *Chrusz*, in its review of the decision in *Susan Hosiery Ltd. v. Minister of National Revenue.* In that case, the client's financial advisers who communicated with the lawyer were intimately familiar with the client's business. At the client's instruction, they met with the solicitor to convey information concerning the business affairs of the client. They were also instructed to discuss possible arrangements of those affairs to minimize tax consequences. The accountants thus served as translators, assembling the necessary information from the client and putting the client's affairs in terms which could be understood by the lawyer. In addition, they served as a conduit of advice from the lawyer to the client and as a conduit of instructions from the client to the lawyer. As a result, their communications were protected from disclosure by solicitor client privilege.[34]

33. As with the restructuring consultants in *General Motors of Canada Ltd.*, the property acquisitions consultant in *Camp Development*, and the accountants in *Susan Hosiery Ltd.,* Mr. Dalton was performing a function – the preparation of his report – that

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[32] *Royal Bank v. Société Générale (Canada)*, 2005 CanLII 36727 (ONSC), RBOA Tab 13
[33] *Royal Bank v. Société Générale (Canada)*, 2005 CanLII 36727 (ONSC) at paras 10-11, RBOA Tab 13.
[34] *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (CA) para 111, RBOA Tab 4

was essential to the provision of legal advice. He was tasked with assembling and translating information provided to him so that Catalyst's lawyer (DiPucchio) could understand its nature and legal significance to provide legal advice thereon. This was particularly important in this case where Catalyst's internal counsel Mr. Riley had transitioned out of his role during the early part of Mr. Dalton's retainer to be replaced by Mr. DiPucchio, formerly external litigation counsel to Catalyst.[35]

34. It is respectfully submitted that a proper application of the above principles leads to the conclusion that the Dalton Report was and remains subject to solicitor client privilege.

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

35. The Catalyst Parties have listed numerous emails to or from OSC Staff in their detailed Schedule B and claim case-by-case privilege over these communications.

36. From time to time since 2014, the Corporate Finance Branch of the OSC has made inquiries with Callidus, primarily with respect to its continuous disclosure filings. Catalyst has answered these inquiries. They included, in 2016, an issue-oriented Continuous Disclosure Review pursuant to section 20.1 of the Ontario *Securities Act*.[36] Based upon the initiating letter received by the Catalyst Parties with respect to this, the Catalyst Parties understood that the information provided to the OSC would be kept confidential.[37] Similar

[35] Dalton CXM p. 139 q. 57, Catalyst Motion Record at p. 139; Riley CXM p. 50 q. 119-121, Catalyst Motion Record at p. 51.
[36] Riley Affidavit, para 49, Catalyst Motion Record Vol 1 at p. 21.
[37] Riley Affidavit, para 53, Catalyst Motion Record Vol 1 at p. 22.

statements were made in other communications from and to the OSC Corporate Finance Branch during the above period.

37. Section 20.1 of the Ontario *Securities Act* provides that the Securities Commission may review the disclosures that have been, or ought to have been, made by a reporting issuer.[38] It further provides that an issuer that is subject to a review under section 20.1 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.[39] Subsection (3) states that 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.[40]

38. Catalyst's communications with the OSC with respect to the above inquiries are protected by case-by-case privilege, the tenets of which were defined by *Wigmore* and adopted in the unanimous decision of the Supreme Court of Canada in *Slavutych v Baker*:

> (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.

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[38] Securities Act, R.S.O. 1990, c. S.5, s. 20.1 (the "*Securities Act*"), Schedule "B" below.
[39] Securities Act, s. 20.1(2), Schedule "B" below.
[40] Securities Act, s. 20.1(3), Schedule "B" below.

> (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.[41]

39. Application of the *Wigmore/Slavutych* criteria to Catalyst's communications with the OSC indicates that the OSC communications are protected by case-by-case privilege.

(i) The communications originated in a confidence that they would not be disclosed

40. The relevant question for the first Wigmore criterion "originate in confidence" is whether, at the time the communication was made, there was an expectation that what was shared would be confidential and not disclosed to anyone beyond the individuals in the relevant relationship.[42]

41. The OSC communications originated in a confidence that they would not be disclosed. It is clear from the affidavit of James Riley that the documents and communications obtained from Callidus originated in a confidence that they would not be placed on the public file, and Callidus responded with that expectation.[43] This assurance of non-disclosure was expressed in correspondence exchanged between the Corporate Finance Branch and Callidus,[44] and Callidus' expectations were reflected in its responses from time to time.

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[41] *Slavutych v. Baker et al.*, [1976] 1 SCR 254, 1975 CanLII 5 (*Slavutych*), RBOA Tab 14.
[42] *Camporese v Bay Area Investigations*, 2019 ONSC 962 at para 26, RBOA Tab 2.
[43] Riley Affidavit, para 49 and 53, Catalyst Motion Record Vol 1 at p. 21-22; (additional communication in Catalyst's confidential brief will be provided to the Court).
[44] Riley Affidavit, para 53, Catalyst Motion Record Vol 1 at p. 22.

(ii) The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties

42. The relationship in this case is that of a reporting issuer and its regulator. The assurance of confidentiality is essential to an investigative regime which requires the full cooperation of its reporting issuers in order to operate effectively.

43. Inquiries and reviews conducted by the Corporate Finance Branch of the OSC are not enforcement proceedings. Rather, the purpose of such communications is to educate issuers and ensure that issuers comply with securities law.[45] As a result, from time to time, the OSC Corporate Finance Branch promised Callidus, subject to exceptions required by law, that the documents and communications in issue would not be placed on the public file. This promise has been honoured: Callidus' responses do not form part of the OSC's public file.

44. It would be understandable for an issuer, in the absence of such promises of confidentiality, to be guarded in their communications with the OSC. Such guardedness would undermine the purposes of the Continuous Disclosure Review Program. The OSC would be unable to ensure compliance with continuous disclosure obligations if issuers were guarded or resisted document requests. In other words, confidence is essential to the free flow of information between an issuer and the OSC during a Confidential Disclosure Review.[46] In *Steep (Litigation Guardian of) v Scott*, the Ontario Superior Court held that the free exchange of information, promoted by confidentiality, is a key factor in establishing the second *Wigmore* step.[47] In the context of a section 20.1 review, if no

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[45] CSA Staff Notice 51-312 (Revised) – Harmonized Continuous Disclosure Review Program.
[46] S*teep (Litigation Guardian of) v Scott*, 2002 CanLII 53248 (ONSC), at para 26 [*Steep*], , RBOA Tab 16.
[47] *Steep*, at paras 25-26, RBOA Tab 16.

confidentiality attached to communications, an issuer might be "self-protective, guarded and concerned about the consequences of their admissions"[48] despite their obligation to disclose under section 20.1(2).

45. The foregoing types of inquiries depend on the cooperation of issuers. Unlike section 11 of the *Securities Act*, section 20.1 does not provide the OSC with any investigative powers. While section 20.1(2) states that an issuer *shall* provide the OSC with any document that it requests, the only apparent mechanisms to enforce this are the section 122 quasi-criminal power and the section 127 public interest enforcement power.

46. It is respectfully submitted that the assurances that information provided to the OSC will be kept confidential enhances the relationship between reporting issuers and the OSC. This relationship is essential to the OSC's role in protecting the public through the investigation of potential securities violations. Reporting issuers must be able to rely on undertakings given by their regulator and to expect that if the continuous disclosure review does not result in a discipline charge, they will not be prejudiced or embarrassed by the communications and documents exchanged being publicly available. It would undermine the relationship between the reporting issuer and the OSC's relationship if the continuous disclosure review was understood to serve not only the public interest mandate but also the private interests of potential plaintiffs.

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[48] *Steep*, at para 25, RBOA Tab 16.

47. The case of *Visic v. Elia Associates*, 2011 HRTO 1230, affirmed 2015 ONSC 7163, supports this analysis.[49]

48. This was a proceeding before the Ontario Human Rights Commission in which the complainant alleged that she had been wrongfully treated by her former law firm. One of the issues was whether or not communications between the law firm and the Law Society which contained information and/or statements made by the lawyer relevant to the human rights complaint, should be produced.

49. In dismissing the complaint on the merits, the Human Rights Tribunal rejected the complainant's request for production of the communication between the Law Society and the lawyers:[50]

> 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

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[49] *Visic v. Elia Associates*, 2011 HRTO 1230, RBOA Tab 19, affirmed 2015 ONSC 7163 (Div Ct), RBOA Tab 20

[50] *Visic v. Elia Associates*, 2011 HRTO 1230 at paras 140-141, RBOA Tab 19.

> to 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.

50. The importance of the assurance of confidentiality to the parties may also be illustrated by reference to the adoption of the implied undertaking rule in civil litigation. This common law, codified in Rule 30.1 of the *Rules of Civil Procedure*, provides that a party who obtains a document from another party through the discovery process (which compels disclosure) is subject to an implied undertaking not to use the document for a purpose other than that of the proceeding in which the document was obtained. As Justice Morden of the Ontario Court of Appeal held in *Goodman v Rossi*, "...this intrusion should not be allowed for any purpose other than that of securing justice *in the proceeding in which the discovery takes place*."[51]

51. The Catalyst Parties submit that the same principle applies to communications with the OSC Corporate Finance Branch, because the element of confidentiality is essential to the full and satisfactory maintenance of the relation issuers and the OSC.

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

52. The OSC regulates and charges reporting issuers, and maintains public confidence in that important business. The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the OSC and reporting issuers,

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[51] *Goodman v Rossi*, 1995 CanLII 1888 (CA), RBOA Tab 6.

and given the obvious importance of effective regulation and supervision of our capital markets, the relationship is one which ought to be sedulously fostered.[52]

53. The third tenet of Wigmore was considered in a decision of the Quebec Superior Court in *Parent v R.*[53] In *Parent*, the relationship was academic researcher and participant. The academic researchers were professors of Criminology at the University of Ottawa engaged in a Research Project that addressed sex work from the perspective of the sociology of work. The Research Project interviewed 15 male escorts, including one Luka Magnotta who had agreed to be interviewed on a confidential basis. Magnotta was subsequently charged with first degree murder. The police seized by search warrant a recording and transcript of one of the interviews involving the accused. The Court analyzed each of the four tenets in the circumstances of the case and ordered that the search warrant be quashed and the seized documents be returned to the researchers.

54. In the *Parent* case, the public interest issues involved the suppression of crime process on one side and academic research on the other. Even though the party seeking access to the disputed documents represented a significant public interest (the effective prosecution of a serious criminal offence), the relationship between academic researcher and participant was found to meet the third tenet that in the opinion of the community it should be sedulously fostered. The *Parent* facts can be contrasted with the instant case, which involves the interest of West Face and Boland in its private lawsuit, versus the

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[52] *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co*, 1995 CanLII 7258 (ONSC), at para 34, RBOA Tab 17. *Smerchanski v Lewis*, 1981 CanLII 1695 (ONCA), at para 52, RBOA Tab 15. The Ontario Court of Appeal held that the relationship between the OSC and brokers should be sedulously fostered.

[53] *Parent v R*, 2014 QCCS 132, [*Parent*], RBOA Tab 10.

public interest served by confidentiality of continuous disclosure reviews under s. 20.1 of the *Securities Act.*

55. The Catalyst Parties reasonably understood that the information provided to the OSC would be kept in confidence. If reporting issuers did not have comfort in the confidential nature of their communications with the OSC, the frankness and openness of these communications would suffer. These communications and the associated relationship between issuers and the OSC ought to be sedulously fostered.

(iv) 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

56. In the case at bar, Catalyst does not oppose production of relevant corporate documents provided to the OSC. However documents sought must be required in order to "get at the truth and prevent an unjust verdict".[54] It is not sufficient that the documents merely meet threshold relevance in order for production to be required under the Wigmore test, rather '"the correct disposal of the litigation" must be at stake.[55]

57. Underlying this tenet is the need to achieve proportionality in striking a balance among the competing interests.[56] A court is more likely to order the production of highly relevant documents than documents of questionable relevance.[57]

58. This test is not met in the present case. West Face can attempt to prove the truth of its allegations on the basis of independently existing documents pertaining to Callidus'

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[54] *MacRae v. BDO Dunwoody LLP*, 2010 ONSC 3404 (Master), at para. 60, RBOA Tab 8.
[55] *MacRae v. BDO Dunwoody LLP*, 2010 ONSC 3404 (Master), at para. 60 and 68, RBOA Tab 8.
[56] *R v National Post*, 2010 SCC 16, at para 59, RBOA Tab 12.
[57] *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC), at para 37. See also *Deloitte and Touche LLP v Ontario (Securities Commission)*, 2002 CanLII 44980 (ONCA), at para 44, RBOA Tab 3.

business. However, any communications exchanged between Callidus and the OSC explaining or describing those documents are not facts or evidence but opinions which hold no weight.

59. Moreover, the commentary provided by Callidus to the OSC was legal work product. Callidus was assisted by counsel at the Faskin law firm, led by Jon Levin, in relation to its communications with the OSC.[58] This privileged work product was confidential and would not have been disclosed were it not for the mandatory nature of the OSC's Continuous Disclosure regime.

60. The benefit of disclosure of the documents in issue to the correct disposal of this action is outweighed by the damage to the relationship of the OSC to reporting issuers and to the investigative process.

61. Finally, the Anderson Parties' factum contends that Riley waived privilege in relation to the OSC documents by answering certain questions about the issues raised by OSC Staff. The Anderson Parties' factum also argues that the question asked of Riley about the potential existence of an OSC investigation was proper and should have been answered.

62. There is no merit to either argument. Riley's limited evidence related to a publicly known fact, namely that following discussions with the OSC, Callidus had discontinued reference to yield enhancements in its shareholder disclosure. His answers did not indicate any intent to waive privilege and did not constitute any waiver. As to the inquiry

[58] Riley Affidavit, para 52, Catalyst Motion Record Vol 1 at p. 22.

regarding an OSC investigation, the question was squarely directed at the potential existence of an order under section 11 of the Act, and should not have been asked.

63. For all of these reasons, the motion by the Anderson Parties relating to the OSC Documents should be dismissed.

(D) Category Four: Communications with the SEC

64. The SEC documents are not listed in Catalyst's detailed Schedule B. It is evident that by doing so, notwithstanding the provisions of Rule 30.05, the Anderson Parties would argue that Catalyst has admitted relevance.

65. At the outset of the SEC process, the SEC advised Catalyst that the purpose of the SEC examination process was to assess compliance with the *Investment Advisers Act* of 1940 (the "*Advisers Act*") and the rules thereunder. The publicly available SEC explanatory materials provided to Catalyst also indicated:[59]

> "[T]he purpose of SEC examinations is to protect investors. Thus, during examinations, the SEC staff will seek to determine whether the firm is: conducting its activities in accordance with the federal securities laws and rules adopted under these laws (including, where applicable, the rules of self-regulatory organizations subject to the SEC's oversight); adhering to the disclosures it has made to investors; and implementing supervisory systems and/or compliance policies and procedures that are reasonably designed to ensure that the firm's operations are in compliance with the law."

66. None of the SEC communications ever referred to the Anderson complaint (or any other whistleblower complaints). As is obvious from the public record, no enforcement proceedings were ever commenced by the SEC.

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[59] Item #29 to the Answers to Riley Under Advisements, Catalyst Motion Record Vol 2 at p. 183-185.

67. The gist of the Anderson whistleblower complaint was expansive, namely that:[60]

> "Whistleblowers submit that regulators must closely examine the business activities of Glassman, Catalyst, Callidus and all other Glassman-controlled entities to limit losses from what appears to be a massive and ongoing fraud."

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.

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:[61]

> 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

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[60] Item #29 to the Answers to Riley Under Advisements, Catalyst Motion Record Vol 2 at p. 183-185.
[61] David H. Herrington & Kathleya Chotiros, "The Developing Privilege for Regulatory Communications with the SEC" (2007) 124 *Banking L.J.* 704, p. 710 (footnotes omitted), RBOA Tab 24

> 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.
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> [Italics in original]

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, 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,[62] 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

[62] Declaration of Roel Campos signed December 28, 2020 ("**Campos Declaration**"), Catalyst Motion Record Vol 1 Tab 1.

assessing the issues regarding the production of the SEC documents, and warrant consideration by this Court in its application of Ontario law.

74. Firstly, the provisions of the *Advisers Act* confirms the SEC materials involve inquiries by a major U.S. regulator whose role and function is the same as the OSC. Second, the statute affords the SEC with broad jurisdiction to make inquires, and registrants under its supervision (like Catalyst/Callidus) are, in practical terms, require to cooperate and comply with requests for information. This context is emphasized by the provisions of the *Advisers Act* that require registrants to maintain certain types of documents[63] and that empower prosecutions by the SEC with penal consequences if a registrant refuses to answer inquiries.[64]

75. This regime is analogous to the OSC's supervisory role in relation to Callidus, and has led to commentaries in the U.S. suggesting that in practical terms a registrant's cooperation with and answers to SEC questions requiring the production of documents is not truly voluntary.[65]

76. Secondly, the United States regime provides, like Ontario, an opportunity for a registrant answering questions and providing documents to request and obtain confidential treatment, subject to third party adjudication with respect to privacy issues. This was evident from one of the public notices provided to Catalyst at the commencement of the SEC process:[66]

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[63] *Investment Advisers Act*, 1940, Section 204(3)-(4), Schedule "B" below.
[64] *Investment Advisers Act*, 1940, Section 204(3)-(4), Schedule "B" below.
[65] *Investment Advisers Act*, 1940, Section 217, Schedule "B" below. See also Campos Declaration, para 7, Catalyst Motion Record Vol 1 at p. 2.
[66] SEC Form 1661, Exhibit G to the Riley Affidavit, Catalyst Motion Record Vol 1 Tab 2G.

> The Freedom of Information Act, 5 U.S.C. 552 (the "FOIA"), generally provides for disclosure of information to the public. Rule 83 of the Commission's Rules on Information and Requests, 17 CFR 200.83, provides a procedure by which a person can make a written request that information submitted to the Commission not be disclosed under the FOIA. That rule states that no determination as to the validity of such a request will be made until a request for disclosure of the information under the FOIA is received. Accordingly, no response to a request that information not be disclosed under the FOIA is necessary or will be given until a request for disclosure under the FOIA is received. If you desire an acknowledgement of receipt of your written request that information not be disclosed under the FOIA, please provide a duplicate request, together with a stamped, self addressed envelope.

77. Through U.S. counsel, Catalyst availed itself of the above invitation through the communications it sent to the SEC at the outset of the examination process, and which were repeated thereafter.[67]

78. The applicable U.S. case law indicates that answers to SEC requests for information and documents from an investment advisor (Catalyst) are exempt from disclosure under the above referenced provisions:[68]

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".[69] 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.[70]

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[67] Riley Affidavit para 59, Catalyst Motion Record Vol 1 at p. 24.
[68] *Berliner Zisser, Walter & Gallegos, PC. v. SEC*, 962 F. Supp. 1348, 1352 (D.Colo. 1997) (investment advisers), RBOA Tab 21.
[69] Diversified Industries v. Meredith, 572 F.2d 596 (US Court of Appeals, 8th Circuit) at 607-608, 611, and footnote 1, RBOA Tab 21A. See also Beth S. Dorris, "The Limited Waiver Rule: Creation of an SEC-Corporation Privilege" (1984) 36 *Stanford LR* 789, RBOA Tab 26; Andrew McNally, "Comment: Revitalizing Selective Waiver" (2005) 35 *Seton Hall LR* 823, RBOA Tab 27; and Latieke Lyles, "Comment: Cooperation or Coercion" (2008) 52 *St. Louis U LJ* 1291, RBOA Tab 28.
[70] See Keyawna Griffith, "From Compulsion to Compensation: How Selective Waiver Compensates Corporations for Involuntary Disclosures", (2019) 13 *Va. L. and Bus. Rev.* 41, RBOA Tab 25

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.[71]

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:[72]

> 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:[73]

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[71] *In re Subpoena*, 967 F.2d 630 (United States Court of Appeal, District of Columbia) , RBOA Tab 22.
[72] David H. Herrington & Kathleya Chotiros, "The Developing Privilege for Regulatory Communications with the SEC" (2007) 124 *Banking L.J.* 704 at p. 706, RBOA Tab 24
[73] David H. Herrington & Kathleya Chotiros, "The Developing Privilege for Regulatory Communications with the SEC" (2007) 124 *Banking L.J.* 704 at 706-707 (footnotes omitted), RBOA Tab 24.

> 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 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.[74]

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.

85. Applying the foregoing circumstances and considerations to the Ontario principles applicable to case by case Wigmore privilege, as articulated in *Slavutych v. Baker,* it is respectfully submitted that:

(a) the SEC materials originated in confidence and Catalyst had an expectation throughout that they would remain confidential;

(b) the maintenance of the confidentiality in relation to the SEC materials is beneficial to and essential to the maintenance of a candid, thorough and effective relationship, i.e., between Catalyst and its regulators;

(c) the relationship is one that should be sedulously encouraged, and,

(d) the balancing exercise favours recognition of case by case privilege, given the importance and benefits of the relationship and the irrelevance (or at most marginal relevance) of the SEC materials.

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[74] David H. Herrington & Kathleya Chotiros, "The Developing Privilege for Regulatory Communications with the SEC" (2007) 124 *Banking L.J.* 704 at 707-709, RBOA Tab 24.

86. For these reasons, the Anderson Parties' motion with respect to the SEC documents should be dismissed.

PART IV - ORDER REQUESTED

87. The Catalyst Parties respectfully request an order dismissing these motions with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13th day of January, 2021.

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SCHEDULE "A"
LIST OF AUTHORITIES

Table of Domestic Cases

1. *Camp Development Corp. v. South Coast Greater Vancouver Transportation Authority* 2011 BCSC 88
2. *Camporese v Bay Area Investigations*, 2019 ONSC 962
3. *Deloitte and Touche LLP v Ontario (Securities Commission)*, 2002 CanLII 44980 (ONCA)
4. *General Accident Assurance Co. v. Chrusz*, 1999 CanLII 7320 (ON CA)
5. *Genier v CCI Capital Canada Ltd.*, 2008 CanLII 1175 (ONSC)
6. *Goodman v Rossi*, 1995 CanLII 1888 (CA)
7. *M. (A.) v. Ryan*, 1997 CanLII 403 (SCC)
8. *MacRae v. BDO Dunwoody LLP*, 2010 ONSC 3404
9. *Milicevic v T Smith Engineering Inc.*, 2016 ONSC 2166
10. *Parent v R*, 2014 QCCS 132
11. *Pritchard v Ontario*, 2004 SCC 31
12. *R v National Post*, 2010 SCC 16
13. *Royal Bank v. Société Générale (Canada)*, 2005 CanLII 36727 (ONSC)
14. *Slavutych v. Baker et al.*, [1976] 1 SCR 254
15. *Smerchanski v Lewis*, 1981 CanLII 1695 (ONCA)
16. *Steep (Litigation Guardian of) v Scott*, 2002 CanLII 53248 (ONSC)
17. *Transamerica Life Insurance Co of Canada v Canada Life Assurance Co*, 1995 CanLII 7258 (ONSC)
18. *Trillium Motor World Ltd. v. General Motors of Canada Ltd.* 2014 ONSC 1338
19. *Visic v HRTO and Elia Associates Professional Corporation*, 2015 ONSC 7163 (Div Ct)
20. *Visic v. Elia Associates*, 2011 HRTO 1230

Table of US Cases

Table of Secondary Sources

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

RULES OF CIVIL PROCEDURE, RRO 1990 Reg 194

30.1.01 (1) This Rule applies to,

(a) evidence obtained under,

(i) Rule 30 (documentary discovery),

(ii) Rule 31 (examination for discovery),

(iii) Rule 32 (inspection of property),

(iv) Rule 33 (medical examination),

(v) Rule 35 (examination for discovery by written questions); and

(b) information obtained from evidence referred to in clause (a).

(2) This Rule does not apply to evidence or information obtained otherwise than under the rules referred to in subrule (1).

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

Exceptions

(4) Subrule (3) does not prohibit a use to which the person who disclosed the evidence consents.

(5) Subrule (3) does not prohibit the use, for any purpose, of,

(a) evidence that is filed with the court;

(b) evidence that is given or referred to during a hearing;

(c) information obtained from evidence referred to in clause (a) or (b).

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

(7) Subrule (3) does not prohibit the use of evidence or information in accordance with subrule 31.11 (8) (subsequent action).

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

SECURITIES ACT, RSO 1990, c S.5

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.

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.

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.

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.

INVESTMENT ADVISERS ACT 1940, 15 U.S.C.A. § 80b-1 *et. seq.*

Section 204 / § 80b-4. Reports by investment advisers

(a) In general

Every investment adviser who makes use of the mails or of any means or instrumentality of interstate commerce in connection with his or its business as an investment adviser (other than one specifically exempted from registration pursuant to section 80b-3(b) of this title), shall make and keep for prescribed periods such records (as defined in section 78c(a)(37) of this title), furnish such copies thereof, and make and disseminate such reports as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors. All

records (as so defined) of such investment advisers are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations by representatives of the Commission as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(b) Records and reports of private funds

(1) In general

The Commission may require any investment adviser registered under this subchapter--

(A) to maintain such records of, and file with the Commission such reports regarding, private funds advised by the investment adviser, as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk by the Financial Stability Oversight Council (in this subsection referred to as the "Council"); and

(B) to provide or make available to the Council those reports or records or the information contained therein.

(2) Treatment of records

The records and reports of any private fund to which an investment adviser registered under this subchapter provides investment advice shall be deemed to be the records and reports of the investment adviser.

(3) Required information

The records and reports required to be maintained by an investment adviser and subject to inspection by the Commission under this subsection shall include, for each private fund advised by the investment adviser, a description of--

(A) the amount of assets under management and use of leverage, including off-balance-sheet leverage;

(B) counterparty credit risk exposure;

(C) trading and investment positions;

(D) valuation policies and practices of the fund;

(E) types of assets held;

(F) side arrangements or side letters, whereby certain investors in a fund obtain more favorable rights or entitlements than other investors;

(G) trading practices; and

(H) such other information as the Commission, in consultation with the Council, determines is necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk, which may include the establishment of different reporting requirements for different classes of fund advisers, based on the type or size of private fund being advised.

(4) Maintenance of records

An investment adviser registered under this subchapter shall maintain such records of private funds advised by the investment adviser for such period or periods as the Commission, by rule, may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.

(5) Filing of records

The Commission shall issue rules requiring each investment adviser to a private fund to file reports containing such information as the Commission deems necessary and appropriate in the public interest and for the protection of investors or for the assessment of systemic risk.

(6) Examination of records

(A) Periodic and special examinations

The Commission--

(i) shall conduct periodic inspections of the records of private funds maintained by an investment adviser registered under this subchapter in accordance with a schedule established by the Commission; and

(ii) may conduct at any time and from time to time such additional, special, and other examinations as the Commission may prescribe as necessary and appropriate in the public interest and for the protection of investors, or for the assessment of systemic risk.

(B) Availability of records

An investment adviser registered under this subchapter shall make available to the Commission any copies or extracts from such records as may be prepared without undue effort, expense, or delay, as the Commission or its representatives may reasonably request.

(7) Information sharing

(A In general

The Commission shall make available to the Council copies of all reports, documents, records, and information filed with or provided to the Commission by an investment adviser under this subsection as the Council may consider necessary for the purpose of assessing the systemic risk posed by a private fund.

(B) Confidentiality

The Council shall maintain the confidentiality of information received under this paragraph in all such reports, documents, records, and information, in a manner consistent with the level of confidentiality established for the Commission pursuant to paragraph (8). The Council shall be exempt from section 552 of Title 5 with respect to any information in any report, document, record, or information made available, to the Council under this subsection.".[1]

(8) Commission confidentiality of reports

Notwithstanding any other provision of law, the Commission may not be compelled to disclose any report or information contained therein required to be filed with the Commission under this subsection, except that nothing in this subsection authorizes the Commission--

(A) to withhold information from Congress, upon an agreement of confidentiality; or

(B) prevent[2] the Commission from complying with--

(i) a request for information from any other Federal department or agency or any self-regulatory organization requesting the report or information for purposes within the scope of its jurisdiction; or

(ii) an order of a court of the United States in an action brought by the United States or the Commission.

(9) Other recipients confidentiality

Any department, agency, or self-regulatory organization that receives reports or information

from the Commission under this subsection shall maintain the confidentiality of such reports, documents, records, and information in a manner consistent with the level of confidentiality established for the Commission under paragraph (8).

(10) Public information exception

(A) In general

The Commission, the Council, and any other department, agency, or self-regulatory organization that receives information, reports, documents, records, or information from the Commission under this subsection, shall be exempt from the provisions of section 552 of Title 5 with respect to any such report, document, record, or information. Any proprietary information of an investment adviser ascertained by the Commission from any report required to be filed with the Commission pursuant to this subsection shall be subject to the same limitations on public disclosure as any facts ascertained during an examination, as provided by section 80b-10(b) of this title.

(B) Proprietary information

For purposes of this paragraph, proprietary information includes sensitive, non-public information regarding--

(i) the investment or trading strategies of the investment adviser;

(ii) analytical or research methodologies;

(iii) trading data;

(iv) computer hardware or software containing intellectual property; and

(v) any additional information that the Commission determines to be proprietary.

(11) Annual report to Congress

The Commission shall report annually to Congress on how the Commission has used the data collected pursuant to this subsection to monitor the markets for the protection of investors and the integrity of the markets.

(c) Filing depositories

The Commission may, by rule, require an investment adviser--

(1) to file with the Commission any fee, application, report, or notice required to be filed by this subchapter or the rules issued under this subchapter through any entity designated by the Commission for that purpose; and

(2) to pay the reasonable costs associated with such filing and the establishment and maintenance of the systems required by subsection (c).

(d)[3]Access to disciplinary and other information

(1) Maintenance of system to respond to inquiries

(A) In general

The Commission shall require the entity designated by the Commission under subsection (b)(1) to establish and maintain a toll-free telephone listing, or a readily accessible electronic or other process, to receive and promptly respond to inquiries regarding registration information (including disciplinary actions, regulatory, judicial, and arbitration proceedings, and other information required by law or rule to be reported) involving investment advisers and persons associated with investment advisers.

(B) Applicability

This subsection shall apply to any investment adviser (and the persons associated with that adviser), whether the investment adviser is registered with the Commission under section 80b-3 of this title or regulated solely by a State, as described in section 80b-3a of this title.

(2) Recovery of costs

An entity designated by the Commission under subsection (b)(1) may charge persons making inquiries, other than individual investors, reasonable fees for responses to inquiries described in paragraph (1).

(3) Limitation on liability

An entity designated by the Commission under subsection (b)(1) shall not have any liability to any person for any actions taken or omitted in good faith under this subsection.

(d)[3]Records of persons with custody or use

(1) In general

Records of persons having custody or use of the securities, deposits, or credits of a client, that relate to such custody or use, are subject at any time, or from time to time, to such reasonable periodic, special, or other examinations and other information and document requests by representatives of the Commission, as the Commission deems necessary or appropriate in the public interest or for the protection of investors.

(2) Certain persons subject to other regulation

Any person that is subject to regulation and examination by a Federal financial institution regulatory agency (as such term is defined under section 212(c)(2) of Title 18) may satisfy any examination request, information request, or document request described under paragraph (1), by providing the Commission with a detailed listing, in writing, of the securities, deposits, or credits of the client within the custody or use of such person.

...

Section 217 / § 80b-17. Penalties

Any person who willfully violates any provision of this subchapter, or any rule, regulation, or order promulgated by the Commission under authority thereof, shall, upon conviction, be fined not more than $10,000, imprisoned for not more than five years, or both.

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

RESPONDING FACTUM OF THE CATALYST PARTIES

(Motion Returnable January 18, 2021)

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