Divisional Court File No. 182/21

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs
(Responding 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, GERALD DUHAMEL, GEORGE WESLEY VOORHEIS, BRUCE LIVESEY and JOHN DOES #4-10

Defendants
(Moving Parties)

FACTUM OF THE RESPONDING PARTIES/PLAINTIFFS
(Anderson Defendants' Motion for Leave to Appeal)

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

Tel: (613) 786-0135
Fax: (613) 788-3430

Richard G. Dearden (LSO#19087H)
Marco Romeo (LSO#70111G)
Lawyers for the Responding Parties/Plaintiffs

TO:

LERNERS LLP
225 King Street West, Suite 1500,
Toronto ON M5V 3M2

Lucas E. Lung (#52595C)
llung@lerners.ca

Rebecca Shoom (#68578G)
rshoom@lerners.ca

Lawyers for the Moving Parties

TABLE OF CONTENTS

PAGE NO.

PART I – OVERVIEW AND FACTS

A. OVERVIEW

1. The Anderson Defendants are professional short-sellers who have been ordered by Justice McEwen to disclose the identities of their confidential sources.

2. Justice McEwen found that the Anderson Defendants failed to meet the onus on them to fulfill two of the four elements of the *Wigmore* test, an exceptional privilege against disclosure: element #3 (the relationship with the source is one which should be sedulously fostered in the public good) and element #4 (the public interest served by protecting the identity of the source outweighs the public interest in getting at the truth).

3. Rather than letting Ontario Securities Commission regulators investigate the validity of his Whistleblowers Submissions, Anderson shopped them to journalists so that his fraud accusations would be published to cause the share price of Callidus Capital to plummet, and thereby profit from his short positions in Callidus Capital's shares.

4. *The Wall Street Journal* did publish Anderson's fraud accusations. Within 28 minutes of the publication of the *Wall Street Journal's* online fraud article, the Callidus share price plummeted 21.4%. During the morning of the date of publication, Anderson shorted 6,100 shares of Callidus Capital and closed his short positions in these shares six hours later.[1]

5. Justice McEwen rejected Anderson's argument that he was akin to an investigative journalist. Anderson was correctly found to be a professional short-seller not looking to

[1] Motion Record of the Responding Parties ("**MRP**"), Tab F-17.

publish articles in the public good but rather for financial benefit as part of an orchestrated short-selling investment strategy.

6. There is no basis for granting the Anderson Defendants' leave to appeal pursuant to Rule 62.02(4)(b) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 ("***Rules***"). This motion does not involve an interlocutory order that warrants the rare granting of leave to appeal.

B. FACTS

7. Nathan Anderson is a professional short seller and whistleblower and the principal of the Defendant Clarity Spring Inc. (the "**Anderson Defendants**").[2]

8. In May 2017, the Anderson Defendants filed Whistleblower Submissions with the Ontario Securities Commission that accused the Plaintiffs of fraud.[3] The Anderson Defendants then proceeded to shop their Whistleblower Submissions to Reuters News.[4]

9. After Reuters News "wussed out" on publishing Anderson's fraud accusations, Anderson texted *Wall Street Journal* reporter Rob Copeland to tell him: "I'm not playing! They appear to be wussing out so it's yours".[5]

10. Anderson also provided Copeland with a Broken Bridge Research Report he wrote about the Plaintiff Callidus Capital that disclosed that he held short positions in the shares

---

[2] Motion Record of the Moving Parties ("**MMP**"), Tab 7A, at page 171.
[3] OSC Submission: Catalyst Capital Group, Inc. and Callidus Capital Corporation dated May 22, 2017, MMP, Tab 6A.
[4] Affidavit of Nathan Anderson, sworn November 8, 2018, at para 32, MMP, at page 57.
[5] MMP, Tab 7A, at page 203.

of Callidus Capital and stood to realize gains in the event that the price of the stock decreased.[6]

11. In August 2017, *The Wall Street Journal* published front page articles that accused the Plaintiffs of fraud in online and print articles (the "**WSJ Fraud Articles**") to a global audience of over a million readers. The *Wall Street Journal*'s online article was headlined "Canadian Private Equity Giant Catalyst Accused of Fraud by Whistleblowers".[7] The lead paragraph stated: "At least four individuals have filed whistleblower complaints with Canadian securities regulators alleging fraud" against the Plaintiffs."

12. The Anderson Defendants were one of the whistleblowers referenced the WSJ Fraud Articles. Nathan Anderson was a primary source for the WSJ Fraud Articles. Anderson was aware of the damage that publication of his fraud accusations would cause:

(i) in an email sent to several of his co-defendants Anderson stated: "frankly most due-diligence pros in the industry stop caring when they get even a whiff of fraud and just move on."[8] (email sent on December 7, 2016 at 10:38 AM).

(ii) in another *Wall Street Journal* article reporting on how Anderson torched the stock of Nikola Corp. and caused its share price to decrease 33%, Anderson

[6] MRP, Tab D-5.
[7] MRP, Tab C.
[8] MRP, Tab D-6.

said: “I know people can lose their jobs, their careers”; “people will lose money, I’ll be threatened with lawsuits”; [9] “It’s been a big win”.[10]

(iii) and in text messages exchanged with *Wall Street Journal* reporter Copeland about publicly traded company Eros, Anderson wrote: “sent out a couple tweets about their accounting fraud and the thing ripped down 20% and has been nutty all day”;[11] “Good for brand Nate ultimately. Helps keep the lights on in the interim”;[12] “I crushed that stupid Eros company”.[13]

13. The online article was published at 3:32 PM on August 9, 2017 causing Callidus Capital’s share price to plummet 21.4% in the 28 minutes before trading closed that day.[14] Shortly after *The Wall Street Journal* published the fraud accusations, Copeland texted Anderson to say “shares tankinggggg”.[15] Anderson replied “lol, that’ll happen when you are called out for fraud”.[16]

PART II – ISSUES, LAW, AND ARGUMENT

14. The sole issue in this motion is whether the Anderson Defendants have fulfilled the Rule 62.02(4)(b) test for leave to appeal an interlocutory ruling by Justice McEwen on a refusals motion brought by the Plaintiffs. They have not.

---

[9] Gregory Zuckerman, “How Nicola Stock Got Torched by a Short Seller” (September 23, 2020), *The Wall Street Journal*, MMP, Tab 7A, at page 227.
[10] Gregory Zuckerman, “How Nicola Stock Got Torched by a Short Seller” (September 23, 2020), *The Wall Street Journal*, MMP, Tab 7A, at page 228.
[11] MRP, Tab D-8.
[12] MRP, Tab D-8.
[13] MMP, Tab 7A, at page 213.
[14] Plaintiffs’ Factum (Confidential Source Redactions Motion), para 4, MMP, Tab 8, at page 259.
[15] MMP, Tab 7A, at page 216.
[16] MMP, Tab 7A, at page 216.

A. TEST FOR LEAVE TO APPEAL

15. The Anderson Defendants seek leave to appeal Justice McEwen's March 2, 2021 Endorsement pursuant to Rule 62.02(4)(b) of the Rules:

> **62.02** …
>
> (4) Leave to appeal shall not be granted unless,
>
> …
>
> (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.[17]

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

(a) the phrase "good reason to doubt the correctness of a decision in question", does not require a conclusion that the decision in question was wrong or even probably wrong, or that the reviewing judge would have decided it differently. The test is whether the decision is open to serious debate;[18]

(b) an appeal is from the result of the order, and not the reasons. The leave Judge must ask whether there is good reason to doubt the correctness of the result. If the result appears to be correct, even if there is an error in the reasons or the reasons are inadequate, then leave to appeal should be denied.[19]

(c) 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.[20]

(d) 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.[21]

---

[17] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 62.02(4) Schedule B below.
[18] *Judson v Mitchele*, 2011 ONSC 6004 at paras 13-16.
[19] *White v 123627 Canada Inc. (Algonquin Petro Canada)*, 2014 ONSC 6234 at para 10.
[20] *Judson v Mitchele*, 2011 ONSC 6004 at paras 13-16.
[21] *Greslik v. Ontario Legal Aid Plan*, [1988] OJ No 525, 1988 CanLII 4842 (Div Ct).

17. The test for leave to appeal an interlocutory decision has been characterized as a "very strict one", as leave to appeal such orders should rarely be granted. Rule 62.02(4)(b) involves a two-part, conjunctive test, with both parts required to be met in order for leave to appeal to be granted.[22] The Anderson Defendants do not meet either branch of Rule 62.02(4)(b).

B. THERE IS NO GOOD REASON TO DOUBT THE CORRECTNESS OF THE ORDER

Issue #1: The Permissible Scope of Disclosure/and or Production in the Context of a Refusals Motion in a Pending Motion under s. 137.1 of the Courts of Justice Act

18. The Anderson Defendants allege that Justice McEwen erred:

(i) by applying "an overly broad definition of relevance in considering whether the identities of the Anderson Defendants' sources were relevant, in a manner that undermined the purpose and goals of the anti-SLAPP regime."[23]
(ii) that "the Catalyst Parties' refusals motion ought to have been dismissed outright as improper within the context of the anti-SLAPP regime."[24]

a. The Identities of the Sources are relevant to the Plaintiffs' ability to defend the Anti-SLAPP Motion

19. The identities of the Anderson Defendants' sources are relevant to the Plaintiffs ability to defend the Anderson Defendants' anti-SLAPP motion. Indeed, paragraph 58 of the Anderson Defendants' Factum concedes that the identities of their sources are "tangentially relevant".[25]

20. The Anderson Defendants argue that "the identities of the sources have no impact in respect of any of the elements of the anti-SLAPP test" and that the Plaintiffs "have

---

[22] *Farmers Oil & Gas Inc. v Ministry of Natural Resources*, 2013 ONSC 1608 at para 4 (Div Ct).
[23] Factum of the Moving Defendants ("**MPF**") at para 27.
[24] MPF at para 27.
[25] MPF at para 33.

ample evidence available to make their case".[26]

21. The Plaintiffs Fresh as Amended Statement of Claim pleads a number of causes of action against the Anderson Defendants – conspiracy, defamation, interference with economic relations, and breach of the *Securities Act*. Section 137.1(4)(a)(ii) of the *Courts of Justice Act* requires the Plaintiffs to satisfy the anti-SLAPP motion Judge that there are grounds to believe the Anderson Defendants have no valid defence.

22. One reason that the identities of the sources are relevant to the defamation cause of action is that malice will invalidate the following libel defences pleaded by Anderson in his Statement of Defence: fair comment,[27] qualified privilege,[28] and public interest responsible communication.[29]

23. Reliance on information from a biased source is evidence of malice. A biased source includes a disgruntled employee or persons with axes to grind against the Plaintiff.[30] One of the factors considered in determining the responsible communication defence is whether a source had an axe to grind. Without knowing the identities of Anderson's sources, the Plaintiffs do not know who nor how many sources had an axe to grind against them.

24. Another indicia of malice is the reporting of only one side of the story and the deliberate refrain by a defendant from making important further inquiries.[31] The sources

---

[26] MPF at para 32.
[27] MRP, Tab B para 33.
[28] MRP, Tab B para 38.
[29] MRP, Tab B para 34.
[30] *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CanLII 22380 at para 178 (Sup Ct).
[31] *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CanLII 22380 at para 162 (Sup Ct).

with whom Anderson did communicate with or failed to communicate with are relevant to the issue of malice – who, if anyone, did Anderson contact that supported the Plaintiffs side of the story?

25. Paragraph 200 of the Fresh as Amended Statement of Claim pleads that John Doe Defendants 4-10 are persons or entities whose names are not known to the Plaintiffs but who: (1) participated in the conspiracy (2) knew the *Wall Street Journal* article would cause the market price of Callidus shares to decline; and (3) took short positions in Callidus shares and stood to gain by covering their short positions after the article was published. The identity of other conspirators is a relevant question.[32]

26. As regards the conspiracy cause of action, Justice McEwen correctly held:

> [46] Given the Catalyst Parties' allegations of conspiracy, and the activities that were undertaken by the Anderson Defendants which will be described in greater detail below, I believe the Catalyst Parties are entitled to test Anderson's assertions concerning his conversations with the unidentified sources, even though they do not figure prominently in the Whistleblower Submissions. These inquiries were obviously important to his investigation and, therefore, the identities of the confidential sources should be produced.[33]

27. As another example of the relevance of the identities of the sources, the Plaintiffs claim for intentional interference with economic relations pleads:

> In so doing, the Defendants interfered with Callidus's and Catalyst's economic relations with its investors, directors and auditors and caused harm to Callidus and Catalyst in the form of a lower price for the Callidus Shares …[34]

Section 137.1(4)(a)(i) of the *Courts of Justice Act* requires the Plaintiffs to satisfy the Judge that there are grounds to believe that their action has substantial merit. The

---

[32] *A & B Sound Ltd v Future Shop Ltd*, [1996] BCJ No 1344, 1996 CanLII 1671 at paras 10-17 (Sup Ct).
[33] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 46, MMP, Tab 3.
[34] MRP, Tab A at para 194.

identities of the investors and others who Anderson interfered with are relevant to the issue of whether there is substantial merit to this cause of action.

28. Another cause of action against the Anderson Defendants is that they breached sections 126.1 and 126.2 of the *Securities Act*. Paragraph 186 of the Fresh as Amended Statement of Claim pleads that the Defendants unlawful short attack was intended to and did drive down the price of Callidus shares to artificially low levels.[35] The Defendants conduct in this regard includes: (1) providing tip-offs and previews to selected investors of the Defendants' intention to disseminate false negative information into the market concerning Callidus, and of the planned timing of such dissemination (2) accumulating open short positions in advance of the publication of the *Wall Street Journal* article and encouraging selected investors to do the same. The identities of the investor sources are relevant to this cause of action.

29. The Anderson Defendants also inexplicably assert that Justice McEwen reached his decision despite "the fact that the Catalyst Parties delivered no evidence and no factum on this refusals motion, and made no submissions at the hearing of the motion with respect to why the source identities sought were necessary to their ability to fairly respond to the Anti-SLAPP Motion …".[36] The Plaintiffs served the Anderson Defendants with their Motion Record for the Refusals Motion and their Factum (Confidential Source Redactions Motion), which are specifically referenced in Justice McEwen's Order.

---

[35] MRP, Tab A at para 186.
[36] MPF at para 34. Emphasis in the original.

b. The Plaintiffs Refusals Motion Was Not Improper within the Context of the Anti-SLAPP Regime

30. Refusals motions within anti-SLAPP motions are not improper. Indeed, the Anderson Defendants successfully brought a refusals motion against the Plaintiffs within their anti-SLAPP motion and obtained an Order from Justice McEwen compelling the Plaintiffs to produce a massive volume of Ontario Securities Commission and Securities and Exchange Commission documents of tens of thousands pages.[37] The Plaintiffs' motion for leave to appeal that Order was dismissed.[38]

31. *United Soils Management Ltd v Mohammed* confirms that a party may bring a motion to compel production within a SLAPP motion. In *United Soils*, Justice Penny explicitly rejected the responding party's argument that all proceedings, including motions within the anti-SLAPP motion, are stayed.[39]

32. In *Galloway v AB*, production was ordered within an anti-SLAPP motion.[40] British Columbia's anti-SLAPP legislation is modelled on Ontario's anti-SLAPP legislation.[41] In *Galloway*, Justice Murray was in agreement with the *United Soils* decision and ordered production:

> [38] While I appreciate that the aim of the Act is to provide defendants in SLAPP actions a timely and expedient process to have unmeritorious actions dismissed, the flip side cannot be to deprive a plaintiff with a valid cause of action the ability to proceed. Section 4 places a burden on the plaintiff. An unusually onerous burden of proving not only that they have a case but that the defendants do not. To have to do that in a vacuum would be unjust and contrary to R. 22-1(4)(c).

---

[37] *Catalyst Capital Group Inc v West Face Capital Inc*, 2021 ONSC 1140.
[38] *Catalyst Capital Group Inc v West Face Capital Inc*, 2021 ONSC 2072.
[39] *United Soils Management Ltd v Mohammed*, 2017 ONSC 904 at para 20, aff'd, 2019 ONCA 128, leave to appeal dismissed at the SCC, 2019 CarswellOnt 16393.
[40] *Galloway v AB*, 2019 BCSC 1417.
[41] *Cheema v Young*, 2021 BCSC 461 at para 6.

> [39] Clearly I have the discretion to order disclosure. That seems to be agreed upon by the defendants and it accords with the finding in *United Soils*.[42]

The British Columbia Court of Appeal dismissed the appeal.[43]

c. The Scope of Cross-Examinations on Affidavits

33. The Anderson Defendants' argue that Justice McEwen's approach permitted cross-examination on an affidavit sworn for the purposes of the anti-SLAPP motion to become a substitute for an examination for discovery.[44] This argument has no merit.

34. On November 18, 2019, Anderson swore an affidavit in support of his anti-SLAPP motion that states:

> I proceeded to conduct independent research to investigate the true state of affairs at Catalyst and Callidus. Among other things my research included: …
>
> (c) discussions with numerous individuals, including former employees of Catalyst and Callidus, Catalyst investors, Catalyst counter parties, and members of Canada's financial services sector with knowledge of Catalyst, Glassman and other principals of Glassman – controlled entities.[45]

Anderson's affidavit states at paragraph 21:

> In researching Catalyst and Callidus, I reviewed thousands of documents and communicated with over 30 sources …[46]

35. Justice Perrell held in *Ontario v Rothmans*:

> If a matter is raised in, or put in issue by the deponent in his or her affidavit, the opposite party is entitled to cross-examine on the matter even if it is irrelevant and immaterial to the motion before the court.[47]

36. The cross-examination relating to these 30 sources was proper and in no way a substitute for an examination for discovery as alleged. Anderson's affidavit put his

---

[42] *Galloway v AB*, 2019 BCSC 1417 at paras 38-39.
[43] *Galloway v AB*, 2020 BCCA 106.
[44] MPF at para 31.
[45] Affidavit of Nathan Anderson, sworn November 8, 2018, at para 32, MMP, at page 53.
[46] Affidavit of Nathan Anderson, sworn November 8, 2018, at para 32, MMP, at page 54.
[47] *Ontario v Rothmans*, 2011 ONSC 2504 at para 143.

sources in issue in his anti-SLAPP motion, which Justice McEwen correctly ordered disclosed.

Issue #2: Is the Relationship Between a Source and a Professional Short-seller one that should be sedulously fostered – the Third Element of the Wigmore test?

37. The third element of the *Wigmore* test requires that the relationship with the source be one that ought to be sedulously fostered in the public good. Justice McEwen correctly found that the Anderson Defendants failed to fulfill this element of the *Wigmore* test.

a. The Anderson Defendants are Professional Short-sellers and not akin to Investigative Journalists

38. The Anderson Defendants allege that Justice McEwen erred by taking into account the motivations of the Anderson Defendants and "this *Wigmore* criterion is concerned with the nature of the relationship in a "general sense", and not the individual conduct or motivations of the specific parties."[48]

39. Justice McEwen clearly recognized that for the third element of the *Wigmore* test the focus of the analysis is on the general relationship which he found to be one between a source and a professional short-seller:

> [32] …The Court of Appeal for Ontario underscores the need to focus on the general and not the specific relationship for the third criterion; the general relationship here is not between a source and a journalist but rather a source and a professional short seller (*Stewart*, 2013 ONCA 184).
>
> [59] However, the Anderson Defendants did not stop there and consequently, the "general relationship" in question at this stage is different than that of a journalist or simple whistleblower…
>
> [68] "Unlike with the third criterion where the focus of the analysis is on the general relationship, for the final criterion the Court can review the specific

[48] MPF at para 35.

> relationship and the content of the communication: *Stewart* at para 85 and 94".[49] (emphasis added)

40. A confidential relationship between a whistleblower and the Ontario Securities Commission was not the relationship in issue before Justice McEwen. Justice McEwen was correct in finding that Nathan Anderson's professional short-seller relationship with his sources was not one that ought to be sedulously fostered in the public good.

41. Anderson shopped his OSC Whistleblower Submissions to journalists hoping they would publish his fraud accusations which he knew would cause the Callidus share price to decrease. Anderson needed the media to publish the fraud accusations so he could profit from the short positions he held in Callidus Capital's shares. Anderson shorted 6,100 shares of Callidus Capital the morning of August 9, 2017 (the date of publication of *The Wall Street Journal*'s online article.) Anderson closed his short positions in these shares six-hours later.[50]

42. Justice McEwen correctly rejected the Anderson Defendants' claim that they were "akin to investigative journalists". In this regard, Justice McEwen made ample findings as to why the general relationship between the Anderson Defendants and their sources was not that of a journalist and a source but rather a professional short seller and a source:

> [29] Unlike a journalist who purports to be an impartial provider and source of information, the Anderson Defendants are professional short sellers and whistleblowers who are primarily, if not solely, motivated by profit.
>
> [30] It is in this context that the Anderson Defendants sought out the confidential sources to obtain information and ultimately, prepared the Whistleblower Submissions, leaked them to the press, shorted the Callidus stock, and presumably made a profit.

---

[49] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at paras 32, 59, 68, MMP, Tab 3.
[50] MRP, Tab F-17.

…

[56] …The Anderson Defendants describe their role as akin to an investigative journalist. As noted, I disagree. Anderson began his investigation of the Catalyst Parties with the aim to determine whether there were questionable activities which would financially benefit him by engaging in a short selling strategy.

…

[58] Had the Anderson Defendants stopped at merely providing the Whistleblower Submissions to the OSC, and perhaps received a financial reward from the OSC as sometimes happens, I may have accepted their argument that I should protect their relationship with confidential sources as being those that should be sedulously fostered in the public good.

[59] However, the Anderson Defendants did not stop there and consequently, the "general relationship" in question at this stage is different than that of a journalist or simple whistleblower. Anderson took the Whistleblower Submissions to different media outlets, including Reuters and the Wall Street Journal, in an attempt to have them published. The Wall Street Journal, through Copeland and McNish, did in fact publish those reports and as noted, in the morning that the first article was published, the Anderson Defendants shorted Callidus's stock.

…

[61] On this interlocutory motion, however, based on the specific facts of this case, I cannot conclude that the Anderson Defendants acted akin to an investigative journalist. They were not looking to publish articles in the public good or of a general interest to the public. Rather, the Anderson Defendants acted in advance of an investment strategy that depended on the dissemination of the information obtained.

[62] I am also of the view that, unlike any form of journalist, the Anderson Defendants were not subjected to any professional oversight…

…

[64] …the within case deals with confidential sources providing information to a professional short seller who then, as part of an orchestrated investment strategy, also shares the information to regulators, amongst others.[51]

43. A professional short-seller who plants fraud stories with the media to damage the market value of a public company such as Callidus Capital cannot benefit from the

[51] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at paras 39-30, 56, 58-59, 61-62, 64, MMP, Tab 3.

Wigmore privilege. Justice McEwen's findings regarding the third element of the *Wigmore* test are not open to serious debate.

b. "The Journalists Get Paid by Their Employers" Argument

44. The Anderson Defendants argue that Justice McEwen made an unsustainable distinction between investigative journalists associated with mainstream media outlets on the basis that the Anderson Defendants sought the publication of their allegations in pursuit of financial self-interest rather than in furtherance of the public good. The distinction is allegedly unsustainable because journalists publish articles not solely in furtherance of the public good but because their employers pay them to do so.

45. It is on this basis that the Anderson Defendants make the following nonsensical submission to this Court:

> On the Motion Judge's reasoning, no for-profit enterprise – including nearly every media organization in existence – could be said to be acting in the public good, and the relationships between their journalists and sources would cease to qualify for protection under journalist-source privilege. This would be a substantial departure from existing law.[52]

46. There is nothing in Justice McEwen's reasons that will cause journalists' relationships with their sources to cease to qualify for protection under the *Wigmore* case-by-case privilege.

Issue #3: The scope and definition of "public interest" and/or "public good" for the purposes of the Wigmore case-by-case privilege analysis.

47. The Anderson Defendants argue that "public interest may be engaged even where a party is also acting in self-interest."[53] They rely on public interest litigation cases, a

[52] MPF at para 47.
[53] MPF at para 40.

Securities Act case, and cases declaring the meaning of expression that relates to a matter of public interest in section 137.1(3) of the *Courts of Justice Act*. None of these cases assist the Anderson Defendants' argument that Justice McEwen's findings were wrong in law or that his Honour had a flawed understanding of the public interest or the public good.

48. The Supreme Court of Canada reviewed the general principles underlying the recognition of privilege from disclosure in *M (A) v Ryan*:

> [19] … [E]veryone owes a general duty to give evidence relevant to the matter before the court, so that the truth may be ascertained. To this fundamental duty, the law permits certain exceptions, known as privileges, where it can be shown that they are required by a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth"…[54]

49. In *Ryan*, McLachlin J., (as she then was) determined that the relationship between a psychiatrist and their client provides a public good, noting:

> [27] The third requirement — that the relation must be one which in the opinion of the community ought to be sedulously fostered — is equally satisfied. Victims of sexual abuse often suffer serious trauma, which, left untreated, may mar their entire lives. It is widely accepted that it is in the interests of the victim and society that such help be obtained. The mental health of the citizenry, no less than its physical health, is a public good of great importance. Just as it is in the interest of the sexual abuse victim to be restored to full and healthy functioning, so is it in the interest of the public that she take her place as a healthy and productive member of society.[55]

50. The relationship between professional short sellers and sources cannot be equated to the relationships that Canadian courts have recognized as deserving of case-by-case privilege: (1) academic researchers and secret sources;[56] (2) psychiatrists and

---

[54] *M (A) v Ryan*, [1997] 1 SCR 157, 1997 CanLII 403 at para 19.
[55] *M (A) v Ryan*, [1997] 1 SCR 157, 1997 CanLII 403 at para 27.
[56] *R v Parent* (2014), 308 CCC (3d) 493, 111 WCB (2d) 717 (C Sup) at para 130.

clients;[57] (3) journalists and sources;[58] (4) internal corporate whistleblowers and victims of fraud.[59]

51. In *Camporese v Bay Area Investigations*, A.J. Goodman J. held that the relationship between private investigators and clients did not rise to the level of providing a public good:

> [50] … I do not think [the private investigator-client relationship] rises to the level of providing a public good in the same way as the relationships recognized in the case law. Without this, it cannot be said that the community has an interest in maintaining the confidentiality of the relationship.[60]

52. Justice McEwen was cognizant of the damage caused by short and distort campaigns:

> [37] On the downside, short sellers who engage in unethical and illegal market manipulation, often known as "short and distort" campaigns, can damage legitimate companies, harm their employees and investors and jeopardize the markets.
>
> [38] Perell J. further recognized the legitimacy of short selling in his decision in *Harrington Global Opportunities Fund S.A.R.L. v Investment Industry Regulatory Organization of Canada*, 2018 ONSC 7739, at paras. 12 and 14, where he noted that while short selling is a legitimate activity in the capital markets, the strategy of "short and distort" is illegal and an attempt to manipulate the market.[61]

53. Justice McEwen also distinguished the Anderson Defendants from the internal corporate whistleblowers at issue in *Cadillac Fairview Corporation Ltd. v Standard Parking of Canada*, 2003 CanLii 23598 (Ont. S.C.) identifying the Anderson Defendants'

---

[57] *M (A) v Ryan*, [1997] 1 SCR 157, 1997 CanLII 403 at para 27.
[58] *R v National Post*, 2010 SCC 16 at para 64.
[59] *Cadillac Fairview Corp v Standard Parking of Canada Ltd*, [2004] OJ No 37, 003 CanLII 23598 at para 28 (Sup Ct J).
[60] *Camporese v Bay Area Investigations*, 2019 ONSC 962 at para 50.
[61] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 37-38, MMP, Tab 3.

primary concern as forwarding "an orchestrated investment strategy" "that depended on the dissemination of the information obtained."[62]

54. Justice McEwen engaged in proper analysis of the relationship between the Anderson Defendants and their sources. Their plan all along was to leak their OSC Whistleblower Submissions to the media for publication to cause the Callidus share price to decrease and thereby profit as part of their short-selling strategy.

55. Justice McEwen considered the evidentiary record and correctly held:

> [61] … [The Anderson Defendants] were not looking to publish articles in the public good or of a general interest to the public. Rather the Anderson Defendants acted in advance of an investment strategy that depended on the dissemination of the information obtained.[63]

56. Justice McEwen correctly determined that the relationship between the short-selling Anderson Defendants and their confidential sources is not one that should be sedulously fostered in the public good.[64] The result of Justice McEwen's Order is not subject to serious debate.

Issue #4: The Weighing Of Interests –The Fourth Element Of The Wigmore Test

a. Introduction

57. The onus was on the Anderson Defendants to prove that the public interest that is served by protecting the identity of a confidential source outweighs the public interest in getting at the truth. They failed to do so.

---

[62] MMP, Tab 2, paras 61, 64.
[63] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 61, MMP, Tab 3.
[64] MMP, Tab 2, paras 55, 60.

58. The Anderson Defendants submit that Justice McEwen failed to give requisite consideration to the privacy interests of the sources and focused solely on Anderson's own motivations including whether he was impartial. According to the Anderson Defendants, this was a fundamental misunderstanding.

59. Justice McEwen had no fundamental misunderstanding about the fourth element of the *Wigmore* test and correctly held that for the fourth criterion:

> [68] the Court can review the specific relationship and the content of the communication (Stewart, paras 85 and 94). At this stage, the Court can also consider the timing of the privilege claim, the centrality of the issue to the dispute, the stage of the proceedings, whether the journalist is a party to the proceedings and whether the information is available through other means: *Globe and Mail* at para 66. This is not an exhaustive list.[65]

b. Assessment of the Relationship in the Context of the Actual Facts of a Specific Case

60. In determining whether the Anderson Defendants met the onus of proving the fourth element of the *Wigmore* test, Justice McEwen had to assess the relationship in the context of the actual facts before him, which he did.

61. The balancing of the competing interests must be conducted in a context specific manner[66]. Chief Justice Wagner held in *Denis v Côté*, that "the Court is not barred, in the course of the balancing exercise, from assessing the importance of this relationship in the context of the actual facts of a specific case, especially where a clear attempt has been made to divert journalism from its legitimate purposes."[67] Anderson used the media as part of his short selling activities to make a profit.

---

[65] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 68, MMP, Tab 3.
[66] *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 65.
[67] *Denis v Côté*, 2019 SCC 44 at para 37.

62. The "context" as found by Justice McEwen included the paragraphs in the Endorsement set out above (paragraphs 29-30, 56-59, 62-21, 64) finding that Anderson was a professional short seller, and:

> [71] … the circumstances here go beyond whistleblowing. Anderson's plan was not to lead an investigation that would result solely in prosecution by regulatory authorities, instead he acted in self-interest. The factual matrix of this case does not suggest impartiality, but rather the partial activities of a professional short-seller and whistleblower who seeks to earn a profit.
>
> [72] The public interest in discovering the truth would have been served by only submitting the Whistleblower Submissions to the OSC. The additional steps taken in self-interest and to advance an investment strategy undermine the public interest in protecting the identities of the sources …[68]

Within this context, Justice McEwen found that the protection of the identities of the Anderson Defendants' sources did not outweigh the public interest in getting at the truth.

c. Privacy Interests of Sources

63. The Anderson Defendants argue that Justice McEwen failed to "assess the interest in getting at the truth and disposing correctly of the litigation, as weighed against the privacy interests of the sources, *in the specific context of the pending Anti-SLAPP motion*."[69] Justice McEwen was not required to weigh the interest in getting at the truth against the privacy interests. Rather, it is the public interest in protecting the identity of the sources that must outweigh the interest in getting at the truth.

64. Further, Justice McEwen considered the interests of the sources at paragraphs 75-77 of the Endorsement and rejected Anderson's submissions that they needed to be protected from being sued. Justice McEwen found that Anderson knew his published

---

[68] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at paras 71-72, MMP, Tab 3.
[69] MPF at para 51. Emphasis in original. Internal quotation omitted.

reports could lead to lawsuits and made no error in questioning how Anderson could have credibly advised his sources that their identities would remain confidential. In addition, the Anderson Defendants could not give their sources an absolute promise of confidentiality.[70]

d. The Relevant Considerations

65. In undertaking his analysis of the fourth element of the *Wigmore* test, Justice McEwen correctly set out and considered the relevant considerations set down by the Supreme Court of Canada in the *Globe and Mail v Canada (Attorney General)*.[71] The relevant considerations for the fourth element of the analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and perhaps most importantly, whether the information is available through other means.

66. The identity of the source is "more likely to be central to the dispute between the parties where the journalist is a party to the litigation".[72] The Anderson Defendants are parties to this litigation.

67. Section 137.1(4)(a)(ii) of the *Courts of Justice Act* requires the Plaintiffs to satisfy the anti-SLAPP Motions Judge that there are grounds to believe that the Anderson Defendants have no valid defence. This is a central issue in dispute. It is imperative that

---

[70] *R v National Post*, 2010 SCC 16 at para 69; *1654776 Ontario Limited v Stewart*, 2013 ONCA 184 at para 124.
[71] *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 61.
[72] *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 61.

the Plaintiffs are not deprived of any evidence to defend the Anderson Defendants' anti-SLAPP motion that seeks to dismiss this action.

68. The correct disposal of litigation is deserving of weight under the *Wigmore* test.[73] Justice McEwen held that "the identities sought are relevant given the Catalyst Parties obligations to adduce evidence concerning the strength of their claim against the Anderson Defendants and the validity of the Anderson Defendants' defences".[74] Examples of the relevance of the identities of the Anderson Defendants' sources are set out above regarding Issue #1.

69. Justice McEwen correctly held at para 74 of the Endorsement:

> Moreover, based on the additional factors discussed in *Globe and Mail*, the Anderson Defendants are parties to the litigation and the issues in dispute are important to the Catalyst Parties' ability to satisfy their onus in the anti-SLAPP motions. These factors favor disclosing the identities of the sources …[75]

70. The outcome of the weighing of the competing interests depends on the case and is fact specific. This is why the *Wigmore* privilege is a case-by-case privilege. As Justice Binnie held in *R v* National *Post*, "the relationship between the source and a blogger might be weighed differently than in the case of a professional journalist…who is subject to much greater institutional accountability within his or her own news organizations".[76] Justice McEwen recognized this difference in finding that Anderson was not subject to any professional oversight.

---

[73] *1654776 Ontario limited v Stewart*, 2013 ONCA 184 at para 136.
[74] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 41, MMP, Tab 3.
[75] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 74, MMP, Tab 3.
[76] *R v National Post*, 2010 SCC 16 at para 57.

71. In the Anderson Defendants case, Justice McEwen weighed the competing interests and decided that the *Wigmore* case by case privilege was not proven. In the Dow Jones Defendants case Justice McEwen weighed the competing interests and protected the identities of most of the sources but noted that "the Catalyst Parties are obtaining the vast majority of the evidence they seek, which establishes a necessary balance".[77] Each case depends on its own actual facts.

72. Justice McEwen correctly found "that the Anderson Defendants have failed to show that the public interest in protecting the confidential sources outweighs the public interest in discovering the truth.[78] The result is not open to serious debate.

C. THE PROPOSED APPEAL RAISES NO MATTERS OF GENERAL IMPORTANCE

a. Introduction

73. Rule 62.02(4)(b) requires that the proposed appeal must extend beyond the interest of the litigants and relate to matters of public importance and matters relevant to the development of the law and the administration of justice.

74. The Anderson Defendants allege that Justice McEwen's decision raises two matters of general importance:

(1) it undermines the anti-SLAPP regime; and,

(2) it threatens to undermine the OSC Whistleblower Program.

---

[77] *Catalyst et al v West Face Capital et al*, 2021 ONSC 1191 at para 30.
[78] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 67, MMP, Tab 3.

Justice McEwen's decision neither undermines the anti-SLAPP regime nor threatens the OSC Whistleblower Program.

b. The Decision Does Not Undermine the Anti-SLAPP Regime

i) Early Access to the Discovery Process

75. The Anderson Defendants' Factum argues that Justice McEwen's broad approach to disclosure undermined the purpose and goals of the anti-SLAPP regime and allowed the Catalyst parties early access to the discovery process.[79] They also argue that cross-examination on affidavits must be limited to what is necessary for the purposes of the determination of an anti-SLAPP motion whereas "the Motion Judge decided the Catalyst Parties refusal motion on a broad theory of "full disclosure".[80] These submissions are without merit.

76. Firstly, the Anderson Defendants did not object to Justice Hainey's Order in December 2019 that the parties serve their Affidavits of Documents and productions on December 30, 2019 for the purposes of the anti-SLAPP motions.

77. Secondly, as discussed above, the Anderson Defendants' themselves obtained an Order from Justice McEwen on February 12, 2021 compelling the Catalyst Parties to produce a massive volume of Ontario Securities Commission and Securities and Exchange Commission Documents in which Justice McEwen held:

> [68] … I agree with the sentiments of Boswell J. at para 339 of his decision, that "the trend in civil litigation is towards full disclosure, as a function of trial fairness and in the service of the truth-seeking goal of the adjudicative process." In my view, this statement rings true in this case which involves high-stakes litigation, allegations of conspiracy and defamation, amongst other significant allegations, and extensive litigation on a level seldom seen by our courts. In these circumstances, and considering the parties have already exchanged hundreds of

[79] MPF at para 3.
[80] MPF at para 58.

> thousands of documents, it is fair to lean towards full disclosure. As Boswell, J. noted, this is not a David and Goliath battle. This is Goliath v Goliath.[81]

The Plaintiffs' motion for leave to appeal Justice McEwen's Order was dismissed.

78. It is estimated that the communications exchanged between the Plaintiffs and the OSC and SEC exceed tens of thousands of pages. It therefore does not lie in the mouth of the Anderson Defendants to allege that Justice McEwen's March 2nd Endorsement ordering Anderson to disclose the identities of his sources undermined the goals of the anti-SLAPP regime and allowed early access to the discovery process.

79. It is also of note that in opposing the Plaintiffs' motion for leave to appeal Justice McEwen's February 12th Order requiring production of the OSC and SEC documents, the Anderson Defendants' Factum made the following submissions to this Court:

> (1) "There is no basis for granting leave to appeal. The ruling in issue is interlocutory in nature, arising from a routine refusals motion. Justice McEwen's analysis is reasoned and well-supported by both the evidentiary record before him and established legal principles; there is no reason to doubt the correctness of his conclusions. The analysis is grounded in the particular facts and circumstances of these parties and these claims. The purported issues raised by Catalyst and Callidus amount to no more than disagreement with the result of Justice McEwen's analysis, rather than any legitimate doubt as to how the analysis was conducted, or are an attempt to cover for the failings in Catalyst or Callidus' own evidentiary record. This is simply not a case requiring appellate review".[82]
>
> (2) "With respect to the final *Wigmore* factor, Justice McEwen held that the balancing of interests favoured disclosure of the OSC Documents. Catalyst and Callidus objections to this finding are in essence, disagreement with Justice McEwen's view that the OSC Documents are relevant. Like they did before Justice McEwen, Catalyst and Callidus seek to advance an unduly restrictive approach to the breadth of disclosure in a significant law suit such as this one."[83]

---

[81] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 68, MMP, Tab 3.
[82] MPF at para 4.
[83] MPF at para 43.

80. These submissions are equally applicable to the Anderson Defendants' motion for leave to appeal Justice McEwen's March 2nd Order.

ii) Productions within an Anti-SLAPP Motion

81. The Anderson Defendants' argument that "No Ontario court has previously ruled on the issue of the permissible extent of production or disclosure requests in the context of an ongoing anti-SLAPP motion" is without merit.

82. As discussed above: (i) the Anderson Defendants' obtained a production Order from Justice McEwen and leave to appeal was denied, (ii) Justice Penny ruled in *United Soils Management* that a party may bring a motion to compel production within a SLAPP motion as did the British Columbia Courts in *Galloway*.

83. Further, in another production motion brought by several of the Defendants in this action for the purposes of their anti-SLAPP motions, Justice Boswell held:

(1) the motions were "legitimate interlocutory steps within the anti-SLAPP motions (para 209);

(2) interlocutory steps within an anti-SLAPP motion may be permitted, but they must be proportionate and not undermine the goals of efficiency and economy (para 212);

(3) the present litigation is a $450 million lawsuit. This is not a David and Goliath battle. This is Goliath v Goliath. "Substantial materials" have been filed in connection with the anti-SLAPP motions (para 213);

(4) I am not satisfied, in the unique circumstances of this litigation, that the privilege motions undermine the goals of the anti-SLAPP process to such a degree that they should be prohibited. They are not disproportionate in the context of this litigation (para 215);

(5) the trend in civil litigation is towards full disclosure, as a function of trial fairness and in service of the truth-seeking goal of the adjudicative process (para 339).

The Plaintiffs' motion for leave to appeal Justice Boswell's decision was dismissed.[84]

84. Justice McEwen's Endorsement in issue in this motion for leave to appeal followed and agreed with Justice Boswell's decision:

> [41] …Both Boswell J. and I have ordered extensive production by the Catalyst Parties, including information sought by the Anderson Defendants...
>
> [42] In this regard, I wholeheartedly agree with the comments of Boswell J., at paras. 209-216 of his decision, with respect to his jurisdiction to order production. I also agree with the scope of the production he ordered, which was largely mirrored in my previous endorsement. Overall, the aforementioned production orders are proportional in light of the size and complexity of the lawsuits where the parties are seeking multimillion-dollar damages.
>
> [43] As Boswell J. noted at para 339, which I have agreed with in my previous decision, at para 68, the trend in civil litigation is toward full disclosure and, in particular, a case of this nature benefits from full rather than limited disclosure. It can hardly be described as disproportionate give the scope of documentary production provided to date.[85]

85. Justice McEwen's decision in issue in this motion for leave to appeal does not threaten to undermine the anti-SLAPP regime. If it did, then Justice McEwen's February 12th decision and Justice Boswell's January 11th decision ordering the Plaintiffs to produce a massive volume of productions in anti-SLAPP motions would likewise threaten the anti-SLAPP regime. This Court dismissed both of the Plaintiffs' motions for leave to appeal those Orders and there was no threat to the anti-SLAPP regime in doing so.

iii) Retribution

86. The Anderson Defendants argue that the disclosure of the identities "provides the Catalyst parties ammunition to potentially continue their efforts to seek retribution against those who spoke out about them…where the source identities are only tangentially

---

[84] *Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 2061.
[85] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at paras 41-43, MMP, Tab 3.

relevant at best".[86] Firstly, it is noteworthy that the Anderson Defendants admit that the identities have some relevance.

87. Secondly, as set out above, the identities are relevant to the Plaintiffs ability to satisfy the anti-SLAPP Motions Judge that there are grounds to believe that the Anderson Defendants have no valid defences and that the Plaintiffs' claims have substantial merit.

88. Thirdly, Justice McEwen did consider the Anderson Defendants' submissions that "the identities of the confidential sources should be privileged to protect them from untoward litigation that may be commenced by the Catalyst Parties" and rejected the argument at paragraphs 75-77 of his Endorsement.[87] Justice McEwen held that: "Anderson also knew that his published reports could lead to lawsuits. In these circumstances, I question how Anderson could have credibly advised his sources that their identities would remain confidential".[88] This finding is in accord with the law that nobody can give a source an absolute promise of confidentiality.

c. Justice McEwen's Decision Does Not Threaten to Undermine the OSC's Whistleblower Program

89. Justice McEwen's decision does not threaten to undermine the OSC's Whistleblower program as alleged in paragraphs 60-64 of the Anderson Defendants' Factum.

---

[86] MPF at para 58.
[87] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at paras 75-77, MMP, Tab 3.
[88] *The Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 1454 at para 76, MMP, Tab 3.

90. There is no evidentiary foundation whatsoever for the submission at paragraph 63 of the Factum that "The Motion Judge's decision, in failing to recognize a case-by-case privilege in respect of communications between whistleblowers and their sources, will discourage (and potentially prevent) the submission of well-researched, well-supported whistleblower submissions to the OSC.

91. Further, Justice McEwen's decision does not affect the OSC's confidential treatment of Whistleblower Submissions. The OSC Policy – 15-601 (Whistleblower Program) allows a whistleblower to submit a complaint anonymously.[89] The whistleblower protection found in Part 3 of the OSC's Whistleblower Policy requires Commission staff to keep the identity of the whistleblower confidential.[90] Justice McEwen's Order has no effect whatsoever on these provisions of OSC Policy -15-601 (Whistleblower Program).

92. The OSC whistleblower program has not been undermined at all by Justice McEwen's March 2nd Endorsement. Rather, it is Anderson's shopping of his Whistleblower Submissions to the media so they would publish his fraud accusations to cause the Callidus share price to crater and allow him to profit from his short-selling that undermines the OSC's Whistleblower Program.

D. CONCLUSION

93. The decision subject to this motion for leave to appeal is not open to serious debate. Justice McEwen correctly found that the Anderson Defendants did not meet their onus to prove two of the elements of the *Wigmore* test, either one of which would deny

[89] OSC Policy – 15-601 – Whistleblower Program, s 3, MRP, Tab D-4.
[90] OSC Policy – 15-601 – Whistleblower Program, s 11, MRP, Tab D-4.

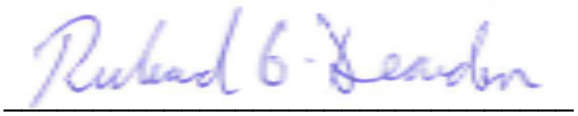
the granting of the *Wigmore* case-by-case privilege. The result of the Order is correct. Nor does the proposed appeal involve any matters of general importance. The Anderson Defendants have failed to demonstrate that the proposed appeal affects the development of the law or the administration of justice.

94. It is respectfully submitted that this motion for leave to appeal be dismissed.

PART III – ORDER REQUESTED

95. The Responding Parties/Plaintiffs respectfully request that the Anderson Defendants' motion for leave to appeal Justice McEwen's Order dated March 2, 2021 be dismissed with costs.

Date: March 29, 2021



Gowling WLG (Canada) LLP

Richard G. Dearden
richard.dearden@gowlingwlg.com

Marco Romeo
marco.romeo@gowlingwlg.com

Lawyers for the Responding Parties/Plaintiffs

Schedule A
List of Authorities

1. *Judson v Mitchele*, 2011 ONSC 6004
2. *White v 123627 Canada Inc. (Algonquin Petro Canada)*, 2014 ONSC 6234
3. *Greslik v Ontario Legal Aid Plan*, [1988] OJ No 525, 1988 CanLII 4842 (Div Ct)
4. *Farmers Oil & Gas Inc. v Ministry of Natural Resources*, 2013 ONSC 1608
5. *Leenen v Canadian Broadcasting Corp,* [2000] OJ No 1359, 2000 CanLII 22380 (Sup Ct)
6. *A & B Sound Ltd v Future Shop Ltd*, [1996] BCJ No 1344, 1996 CanLII 1671 (Sup Ct)
7. *Catalyst Capital Group Inc v West Face Capital Inc*, 2021 ONSC 1140
8. *Catalyst Capital Group Inc v West Face Capital Inc*, 2021 ONSC 2072
9. *United Soils Management Ltd v Mohammed*, 2017 ONSC 904
10. *Galloway v AB*, 2019 BCSC 1417
11. *Cheema v Young*, 2021 BCSC 461
12. *Galloway v AB*, 2020 BCCA 106
13. *Ontario v Rothmans*, 2011 ONSC 2504
14. *M (A) v Ryan,* [1997] 1 SCR 157, 1997 CanLII 403
15. *R v Parent* (2014), 308 CCC (3d) 493, 111 WCB (2d) 717 (C Sup)
16. *R v National Post*, 2010 SCC 16
17. *Cadillac Fairview Corp v Standard Parking of Canada Ltd*, [2004] OJ No 37, 003 CanLII 23598 (Sup Ct J)
18. *Camporese v Bay Area Investigations*, 2019 ONSC 962
19. *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41
20. *Denis v Côté*, 2019 SCC 44

21. *1654776 Ontario Limited v Stewart,* 2013 ONCA 184

22. *Catalyst Capital Group Inc et al v West Face Capital Inc et al*, 2021 ONSC 2061

Schedule B
Text of Statutes, Regulations & By-Laws

Rule 62.02(4) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, under the *Courts of Justice Act*, R.S.O. 1990, c. C.43

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. R.R.O. 1990, Reg. 194, r. 62.02 (4); O. Reg. 82/17, s. 14 (2, 3); O. Reg. 536/18, s. 4 (2).

Divisional Court File No. 182/21
Commercial Court File No. CV-17- CV-17-587463-00CL

THE CATALYST CAPITAL GROUP INC. et al

Plaintiffs

-and-

WEST FACE CAPITAL INC. et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT
PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDING PARTIES/PLAINTIFFS

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

Richard G. Dearden
richard.dearden@gowlingwlg.com

Marco S. Romeo
marco.romeo@gowlingwlg.com

Lawyers for the Responding Parties/Plaintiffs