Court File No. 157/21

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and
CALLIDUS CAPITAL CORPORATION

Plaintiffs
(Moving Parties)

and

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

Defendants
(Responding Parties)

FACTUM OF THE DEFENDANTS / RESPONDING PARTIES, CLARITYSPRING INC. AND NATHAN ANDERSON

(Motion for Leave to Appeal Order of Justice McEwen, dated February 12, 2021)

March 2, 2021

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PART I - INTRODUCTION AND BACKGROUND FACTS

A. Introduction

1. In this motion, the plaintiffs, The Catalyst Capital Group Inc. ("Catalyst") and Callidus Capital Corporation ("Callidus"), seek leave to appeal an order of Justice McEwen, dated February 12, 2021, arising from questions that were refused during a cross-examination of James Riley ("Riley"), who swore two affidavits in support of the moving parties' position with respect to a number of anti-SLAPP motions that are scheduled to be heard by Justice McEwen during the week of May 15, 2021. There were two refusals motions before the court: a motion brought by the defendants, Nathan Anderson ("Anderson") and ClaritySpring Inc. ("ClaritySpring", and together with Anderson, the "Anderson Defendants"); and another motion brought by the defendants, West Face Capital Inc. and Gregory Boland (collectively, "West Face").

2. With respect to the Anderson Defendants, this motion concerns three categories of information and documents: (i) a report prepared by the interim CEO of Callidus for the company's Board of Directors regarding its business prospects; (ii) communications between Callidus and the Ontario Securities Commission ("OSC") in the context of a routine disclosure review; and (iii) communications between Catalyst and the U.S. Securities and Exchange Commission ("SEC"). The first category of information and documents was also sought in West Face's motion.

3. In his February 12, 2021 ruling, Justice McEwen rejected the moving parties' assertions that the information and documents sought are privileged. Justice McEwen ordered that the requested documents be produced and that Riley re-attend to answer questions arising out of the production of those documents. In coming to this decision, Justice

McEwen comprehensively reviewed the evidentiary record before him, considered all material facts and circumstances, and properly applied established legal principles.

4. There is no basis for granting leave to appeal. The ruling at issue is interlocutory in nature, arising from routine refusals motions. 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 and Callidus' own evidentiary record. This simply is not a case requiring appellate review.

B. Background Facts

i. The Whistleblower Submissions

5. In late 2016, Anderson and ClaritySpring began investigating Catalyst and Callidus, and in particular, whether they had engaged in conduct in violation of securities laws.

6. Ultimately, Anderson and ClaritySpring formed the view that Catalyst and Callidus were engaging in a scheme to artificially inflate the value of their assets. Based on this conclusion, Anderson prepared two whistleblower submissions, which ClaritySpring submitted to the OSC in May 2017 (the "Whistleblower Submissions").[1] Similar whistleblower submissions were delivered to the SEC.

[1] OSC Whistleblower Submission, Motion Record (Motion for Leave to Appeal), Vol. 7, tab 4(III)(2)(F).

7. In addition, Anderson provided copies of the Whistleblower Submissions to Rob Copeland ("Copeland"), a reporter at the Wall Street Journal (and another defendant in this proceeding). Copeland ultimately wrote an article on Catalyst and Callidus, which was published in the Wall Street Journal on or about August 9, 2017.

8. The Whistleblower Submissions contained a number of allegations relating to the propriety and transparency of Catalyst and Callidus' accounting practices. Of particular note, one of the allegations in the Whistleblower Submissions related to Callidus' use of "yield enhancements", which practice was alleged to be misleading and a tactic to "hide bad loans".[2]

ii. The Action and the Anti-SLAPP Motions

9. In November 2017, the moving parties commenced this action. The moving parties make claims in conspiracy and defamation arising out of, *inter alia*, the Anderson Defendants' preparation and submission of the Whistleblower Submissions to the OSC and SEC. In particular, the moving parties allege that Anderson and ClaritySpring knowingly filed "false whistleblower Complaints".[3] In making such claims, the moving parties directly put in issue the accuracy of the allegations made in the Whistleblower Submissions.

10. In November 2019, the Anderson Defendants, among other defendants, brought a motion seeking to dismiss this action based on s. 137.1 of the *Courts of Justice Act* (the "Anti-

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[2] OSC Whistleblower Submission, pp. 24-25, Motion Record (Motion for Leave to Appeal), Vol. 7, tab 4(III)(2)(F).

[3] Fresh as Amended Statement of Claim at para 98, Motion Record (Motion for Leave to Appeal), Vol. 7, tab 4(III)(2)(A).

SLAPP Motion"; collectively, with the motions brought by other defendants, the "Anti-SLAPP Motions").[4]

iii. Riley's Cross-Examination

11. Beginning in October 2020, the parties conducted cross-examinations on the affidavits filed in support or defence of the Anti-SLAPP Motions. Riley, the Managing Director of Catalyst and former officer and director of Callidus, was cross-examined on two affidavits on October 26, 27 and November 17 and 18, 2020. Counsel for the Anderson Defendants cross-examined Riley on October 27, 2020.[5]

12. During Riley's cross-examination by counsel for the Anderson Defendants, the moving parties refused, or took under advisement but ultimately refused, a number of questions on the basis of privilege. Those questions related to three main issues / categories of documents:

(a) The mandate of Patrick Dalton ("Dalton"), former Interim CEO of Callidus, and a Strategic Review and Remediation Plan that was prepared by Dalton (the "Dalton Report");

(b) Communications between the moving parties and the OSC, in the context of a compliance review by the OSC relating to Callidus' reporting of unrecognized yield enhancements (the "OSC Documents"); and

(c) Communications between the moving parties and the SEC (the "SEC Documents").

13. Catalyst and Callidus took the position that the Dalton Report was subject to solicitor-client privilege. With respect to the OSC Documents and SEC Documents, they asserted that

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[4] A copy of the Anti-SLAPP Notice of Motion delivered by Anderson and ClaritySpring is at Motion Record (Motion for Leave to Appeal), Vol. 7, tab 4(III)(2)(C).

[5] Transcript of Cross-examination of J Riley by L Lung, held October 27, 2020, Motion Record (Motion for Leave to Appeal), Vol. 7, tab 4(III)(2)(G).

those documents were protected by a case-by-case privilege, within the context of the established *Wigmore* criteria for the recognition of case-by-case privilege.

14. Anderson and ClaritySpring brought a motion to compel the moving parties to answer the questions and to produce the documents that were refused during Riley's cross-examination. Simultaneously, West Face also moved for production of the Dalton Report, as well as other documents that the moving parties had refused on the basis of privilege (referred to in Catalyst and Callidus' factum as the "Guy Documents"). These motions were heard by Justice McEwen on January 18 and 22, 2021.

iv. Justice McEwen's Ruling

15. In a ruling dated February 12, 2021, Justice McEwen granted the motions brought by the Anderson Defendants and West Face.[6]

16. With respect to the Dalton Report, Justice McEwen accepted the arguments of the Anderson Defendants and West Face that solicitor-client privilege did not apply because:

(a) The Dalton Report was not prepared for the specific purpose of obtaining legal advice. Rather, it was created as a briefing document for review by the Callidus Board of Directors;

(b) The Dalton Report was an analysis of Callidus' business; and

(c) Dalton was employed by Callidus, but it was Catalyst's lawyer, and not Callidus' lawyer, who had some involvement in the preparation of the Dalton Report.[7]

17. The involvement of Catalyst's counsel in the preparation and presentation of the Dalton Report, the fact that the document was marked with "Confidential Attorney-Client

[6] Endorsement of McEwen J. dated February 12, 2021, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[7] McEwen J. Decision at paras 21-22, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

Privilege", and counsel's reliance on the Dalton Report in formulating legal advice were held to be insufficient to create solicitor-client privilege in the face of the above considerations.[8]

18. Justice McEwen also held that the OSC Documents and SEC Documents were not protected by a case-by-case privilege. With respect to the OSC Documents, Justice McEwen found that Catalyst and Callidus had failed to meet three of the four "*Wigmore*" criteria applicable to the consideration of case-by-case privilege:[9]

(a) There was **no evidence** that the OSC Documents originated in confidence vis-à-vis the world at large. The evidence presented by Catalyst and Callidus established only that the OSC itself would not publicly disclose the OSC Documents, except as permitted by the Ontario *Securities Act*. Catalyst and Callidus could not reasonably expect that confidentiality would extend to circumstances where they had commenced significant litigation in respect of which the content of the OSC Documents was relevant.[10]

(b) Catalyst and Callidus failed to establish that confidence was essential to the full and satisfactory maintenance of the relation between Callidus and the OSC, as they had presented **no evidence** that confidentiality was essential in the context of a routine compliance review (which formed the context of the communications between Callidus and the OSC).[11]

(c) The balance of interests favoured disclosure. Catalyst and Callidus produced **no evidence** that they would suffer harm if the OSC Documents were disclosed. Indeed, the OSC's investigation with respect to Callidus' use of unrecognized yield enhancements was long resolved, and Callidus had no further disclosure obligations to the OSC because it was no longer a public company. The OSC Documents were relevant to the claims made in Anderson and ClaritySpring's Whistleblower Submissions, which Catalyst and Callidus allege to be false in this litigation.[12]

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[8] McEwen J. Decision at paras 21-22, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[9] *Slavutych v Baker et al.*, 1975 CanLII 5 (SCC).
[10] McEwen J. Decision at paras 51-54, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[11] McEwen J. Decision at paras 55-56, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[12] McEwen J. Decision at paras 58-60, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

19. Justice McEwen held that the above *Wigmore* analysis also applied in respect of the SEC Documents.[13] Although Catalyst and Callidus had provided some additional evidence and literature related to U.S. law and the disclosure of SEC-related documents, they had failed to do so through expert evidence.[14] In any event, that evidence was held to be insufficient authority to support Catalyst and Callidus' claim for privilege, particularly in the face of legal authorities provided by Anderson and ClaritySpring wherein U.S. courts had specifically rejected the existence of a privilege attaching to SEC communications.[15]

PART II - ISSUES, LAW AND ARGUMENT

20. The sole issue on this motion is whether Catalyst and Callidus have met the test for leave to appeal an interlocutory ruling by Justice McEwen on a refusals motion brought by the Anderson Defendants. The Anderson Defendants submit that Catalyst and Callidus have not met that test, and that leave to appeal should not be granted.

21. In this factum, Anderson and ClaritySpring make submissions in respect of the following three issues identified by Catalyst and Callidus for this court's consideration:

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

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

(c) Issue #5 – The SEC Documents: Should a court considering *Wigmore* privilege over documents consider the privileged treatment of those documents in foreign jurisdictions?

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[13] McEwen J. Decision at para 62, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[14] McEwen J. Decision at para 65, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[15] McEwen J. Decision at paras 65-66, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

22. For the reasons set out below, the Anderson Defendants submit that none of these issues are genuine matters for appellate consideration, and that the very premises of these issues as articulated lack foundation in the record and/or circumstances. With respect to issues relating to the Dalton documents, Anderson and ClaritySpring support the submissions of West Face, in addition to making their own submissions below.

A. The Test for Leave to Appeal

23. The applicable test for obtaining leave to appeal is set out in Rule 62.02(4) of the *Rules of Civil Procedure*:

> **62.02** (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.[16]

24. 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. Rules 62.02(4)(a) and (b) each involve a two-part, conjunctive test, with both parts required to be met in order for leave to appeal to be granted.[17]

25. In their factum, Catalyst and Callidus do not identify which prong of the leave test they purportedly meet. Anderson and ClaritySpring submit that neither prong has been satisfied.

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[16] *Rules of Civil Procedure*, RRO 1990, Reg 194, r 62.02(4).
[17] *Farmers Oil & Gas Inc. v Ministry of Natural Resources*, 2013 ONSC 1608 at para 4 (Div Ct).

As Catalyst and Callidus appear to focus their submissions on the requirements of Rule 62.02(4)(b), Anderson and ClaritySpring will largely do the same.

26. To obtain leave under Rule 62.02(4)(b), a proposed appellant must establish both (i) "good reason to doubt the correctness" of the order in respect of which leave to appeal is sought, in the sense that the soundness of the order is open to very serious debate; and (ii) that the proposed appeal concerns matters of general importance to the public, the development of the law, or the administration of justice, and that the importance of the order transcends the interests of the parties.[18]

B. No Conflicting Decisions Have Been Identified

27. Catalyst and Callidus have identified no "conflicting decisions" with respect to any of the issues for which they seek leave to appeal. Therefore, there is no basis on which to grant leave to appeal under Rule 62.02(4)(a).

C. There is No Reason to Doubt the Correctness of Justice McEwen's Decision

28. There is no reason to doubt the correctness of Justice McEwen's ruling on the sweeping privilege claims asserted by Catalyst and Callidus over the Dalton Report, OSC Documents, and SEC Documents. Justice McEwen's ruling is consistent with, and gives effect to, well-settled authorities governing the law of privilege. Justice McEwen properly applied the applicable principles to the facts, circumstances, and evidence before him on the motion, and concluded that the privilege claims asserted by Catalyst and Callidus are unsustainable. There is no tenable basis to suggest that he erred in doing so.

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[18] *Mask v Silvercorp Metals, Inc.*, 2014 ONSC 4647 at paras 10-12 (Div Ct).

i. The Dalton Report

29. Justice McEwen properly considered all the facts and circumstances surrounding the preparation, content, and purpose of the Dalton Report. Having done so, he properly reached the conclusion that the Dalton Report is not subject to solicitor-client privilege and should be produced.[19] This finding was supported by substantial evidence.

30. Catalyst and Callidus' asserted errors with respect to Justice McEwen's conclusion on the Dalton Report amount to nothing more than dissatisfaction with how Justice McEwen applied established legal principles to the particular facts and circumstances of this case. This is no basis for doubting the correctness of Justice McEwen's decision.

31. Contrary to paragraph 30 of Catalyst and Callidus' factum, Justice McEwen's conclusion that solicitor-client privilege does not apply to the Dalton Report was not based solely on the fact that the document did not contain legal advice, and did not disregard the evidence of Catalyst and Callidus that the Dalton Report was used for the purpose of the provision of legal advice to Catalyst. Indeed, Justice McEwen specifically acknowledged, and accepted, that the Dalton Report was used by Catalyst's legal counsel to provide legal advice to Catalyst.[20]

32. Justice McEwen's decision was based on a comprehensive and contextual consideration of all the relevant facts and evidence, as Catalyst and Callidus acknowledge is "essential" to the consideration of privilege issues.[21] Justice McEwen considered the specific contextual matters that Catalyst and Callidus contend are relevant to the analysis, including the use of the Dalton Report for the provision of legal advice, the intention of Catalyst and

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[19] McEwen J. Decision at para 25, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[20] McEwen J. Decision at para 18, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[21] Moving Parties' Factum at para 38.

Callidus that the Dalton Report be treated as confidential, the importance of Catalyst's assessment and support of the recommendations in the Dalton Report, and the involvement of Catalyst's counsel in the preparation of the Dalton Report.[22] However, Justice McEwen also considered important contextual factors which did not support the position of Catalyst and Callidus, including the actual purpose and substance of the Dalton Report.[23] A consideration of those factors was not only appropriate, but required.

33. Justice McEwen correctly rejected the evidence provided by Catalyst and Callidus as to the purpose for which the Dalton Report was prepared in the face of contradicting documentary evidence. Contrary to paragraph 30 of Catalyst and Callidus' factum, the evidence that the purpose of the Dalton Report was to provide legal advice was not "uncontradicted": the Dalton Report itself stated that the information therein was "intended for the Board of Directors of Callidus Capital and their respective Counsel",[24] not specifically for counsel's use, and the business analysis contained in the Dalton Report indeed was presented to Callidus' Board of Directors with no accompanying provision of legal advice.[25] There is ample support for Justice McEwen's conclusion that the Dalton Report was not prepared for the specific purpose of obtaining legal advice.[26]

34. In considering the complete context before him, Justice McEwen applied established legal principles of solicitor-client privilege, including that solicitor-client privilege is not intended to protect all materials deemed useful by a lawyer to properly advise their client or

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[22] Moving Parties' Factum at paras 39-40; McEwen J. Decision at paras 12-22, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[23] McEwen J. Decision at paras 21-22, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[24] McEwen J. Decision at para 16, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[25] Minutes of a Meeting of the Board of Directors of Callidus Capital Corporation held February 28, 2019, Motion Record (Motion for Leave to Appeal), Vol. 8, tab 4(IV)(3).
[26] McEwen J. Decision at para 21, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

materials prepared for the purpose of review by a board of directors.[27] Conversely, Catalyst and Callidus propose that Justice McEwen should have adopted an approach that directly *contradicts* established legal authority. The suggestion that documents will attract solicitor-client privilege if they are to be used by a lawyer in providing legal advice to a client and are intended to be confidential,[28] disregards long-established legal authorities setting out the elements required to establish solicitor-client privilege (which do not include consideration of the supposed intentions of the client or counsel),[29] as well as case law in which courts have held that solicitor-client privilege does not protect materials simply deemed useful by a lawyer in properly advising the client where those materials do not themselves entail the seeking or offering of legal advice.[30]

35. Justice McEwen's conclusions all flowed from his comprehensive contextual analysis, and an appropriate application of relevant and established legal principles. Catalyst and Callidus concede that the Dalton Report contains no legal advice,[31] and provided no evidence that Dalton personally or his business analysis were required or necessary for counsel to be able to receive or understand relevant factual information. Justice McEwen's conclusions as to the purpose and substance of the Dalton Report are supported by the

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[27] McEwen J. Decision at para 21, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3, citing, for example, *Nova Chemicals (Canada Ltd.) v Ceda-Reactor Ltd.*, 2014 ONSC 3995 at paras 34 and 37, *General Accident Assurance Co. v. Chrusz*, 1999 CarswellOnt 2898 (ON CA) at paras 127-128 (CA), and *XCG Consultants Inc. v ABB Inc.*, 2014 ONSC 1111 at para 38.

[28] Moving Parties' Factum at para 35.

[29] Solicitor-client privilege has long been held to protect communications that (1) are between a client and his or her lawyer, (2) are made in the context of a solicitor-client relationship, and (3) entail the "seeking or giving of legal advice": *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 15.

[30] See, for example, *General Accident Assurance Co. v. Chrusz*, 1999 CarswellOnt 2898 (Ont CA); *Fresco v. CIBC*, 2019 ONSC 3309, 2019 CarswellOnt 9215 at para 26.

[31] Moving Parties' Factum at para 47.

evidence available to him. His ultimate finding that the Dalton Report does not attract solicitor-client privilege is amply supported, and correct. That Catalyst and Callidus would have preferred a different outcome from Justice McEwen's analysis does not cast doubt on the correctness of the outcome arrived at, and does not justify the granting of leave to appeal.

ii. The OSC Documents

36. None of the purported errors made by Justice McEwen in applying the *Wigmore* factors for case-by-case privilege, as described in Catalyst and Callidus' factum, were errors at all. Catalyst and Callidus have simply misstated what Justice McEwen actually did, in an attempt to generate errors where none exist.

37. With respect to the first *Wigmore* factor, Justice McEwen correctly found that the OSC Documents did not originate in confidence vis-à-vis the world at large. Contrary to paragraphs 74-75 of Catalyst and Callidus' factum, this finding was not premised on the application of any general legal proposition stated to arise from the recent decision *In the Matter of B*.[32] Rather, Justice McEwen recognized that Callidus' expectations were rooted in specific assurances given by the OSC (as noted at paragraph 76 of Catalyst and Callidus' factum) and properly engaged in an analysis of the language and substance of those assurances to determine whether the assurances given applied to the circumstances in which disclosure was being sought.[33]

38. In particular, Justice McEwen considered that the OSC did no more than state that OSC staff would not place the information and documents provided by Callidus into the public file. This was an assurance of confidentiality, but only in the limited sense that the OSC

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[32] *In the Matter of B*, 2020 ONSC 7563.
[33] McEwen J. Decision at paras 51-54, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

itself would not publicly disclose Callidus' responses. It was not an assurance of confidentiality in the circumstances in which disclosure is sought here. Catalyst and Callidus provided no evidence that Callidus' communications with the OSC originated in confidence vis-à-vis the outside world generally. Justice McEwen found no basis for any reasonable expectation that Callidus' communications with the OSC would remain confidential in the sense that they would not or should not be produced to any third party, and particularly in circumstances where Catalyst and Callidus have commenced significant litigation putting in issue the content of those communications, with corresponding discovery obligations. Indeed, the OSC's limited assurance of confidentiality itself contained an exception permitting disclosure as permitted by the Ontario *Securities Act* or as otherwise required by law.[34] Justice McEwen did not find that this exception "destroyed the expectation of confidentiality";[35] rather, he found that no such expectation ever reasonably existed.

39. Catalyst and Callidus further misstate Justice McEwen's approach in suggesting that "there is nothing unreasonable for a registrant under the *Securities Act* to expect where the production of *prima facie* confidential communications with its regulator was in issue, the Court would at least consider (along with the other elements of the case-by-case privilege) whether such production should occur."[36] There is no evidence before the Court indicating that the OSC Documents are "*prima facie* confidential", and such is contradicted by the actual wording of the OSC's statements about confidentiality, as well as the OSC's general policies

[34] McEwen J. Decision at paras 51-53, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[35] Moving Parties' Factum at para 77.
[36] Moving Parties' Factum at para 80.

on confidentiality.[37] Further, the question of whether production *should* occur does not properly play a role in the context of the first *Wigmore* criterion, which deals only with whether the documents at issue originated in context. Whether production should occur was properly addressed by Justice McEwen in the context of the fourth *Wigmore* criterion.[38]

40. Additionally, contrary to paragraph 81 of Catalyst and Callidus' factum, Justice McEwen's conclusion on this *Wigmore* factor does not lead to a result that no reporting issuer answering inquiries from the OSC Corporate Finance Branch could ever assert case-by-case privilege over such communications. In different circumstances – for example, had Callidus sought clarification from the OSC as to the confidential treatment of its communications, or sought additional confidentiality protections prior to communicating with the OSC – there very well could be different or more expansive assurances of confidentiality provided, which could alter the outcome of a case-by-case privilege analysis. No such circumstances exist in this case, and Justice McEwen's conclusion with respect to this *Wigmore* factor is correct. That Callidus may have misunderstood or made unjustified assumptions in respect of the OSC's statements as to confidentiality does not justify granting leave to appeal.

41. With respect to the second *Wigmore* factor, Justice McEwen correctly found that confidence was not essential to the relationship between Callidus and the OSC in the context in which the OSC Documents were generated.[39] Justice McEwen recognized that the OSC

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[37] See, for example, OSC Staff Notice 15-703, which provides that the OSC's general rule of not publicly disclosing the existence or details regarding investigations applies only to investigations conducted by the Enforcement Branch, and not to reviews conducted from a compliance or continuance disclosure perspective: OSC Staff Notice 15-703, *Guidelines for Staff Disclosure of Investigations*, (2004) 27 OSCB 8520-8522, Motion Record (Motion for Leave to Appeal), Vol. 8, tab 4(IV)(2).

[38] McEwen J. Decision at paras 59-60, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

[39] McEwen J. Decision at para 55, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

Documents were not generated in the context of an enforcement investigation which could have led to prosecution for alleged breaches of securities law; rather, the OSC Documents arise from a routine compliance review by the OSC's Corporate Finance Branch. It was entirely reasonable for Justice McEwen to find that confidence was not essential to such a relationship in the absence of any evidence to that effect from Catalyst and Callidus.

42. Contrary to paragraph 84 of Catalyst and Callidus' factum, it would not have been appropriate for Justice McEwen to consider the importance of confidentiality in this context as "a matter of common sense".[40] Though Catalyst and Callidus suggest that such has been recognized by "several courts in differing contexts, both in Canada and in the United States", they identify no such cases. In any event, the importance of confidentiality in this context certainly is not a matter of common sense, in light of authorities presented by Anderson and ClaritySpring indicating that the OSC itself does not view confidentiality as essential outside the enforcement context. OSC Staff Notice 15-703, which sets out the general rule that the OSC does not publicly disclose the existence of an investigation or details regarding an investigation (as well as the exceptions and discretion relevant to its application), specifically provides that it applies only to investigations conducted by the Enforcement Branch, and not to reviews conducted from a compliance or continuance disclosure perspective.[41] In the face of the OSC's own policies to the contrary, Catalyst and Callidus' submissions on this point simply are not legitimate. They are no more than a weak attempt to excuse their own failure

[40] Moving Parties' Factum at para 84.
[41] OSC Staff Notice 15-703, *Guidelines for Staff Disclosure of Investigations*, (2004) 27 OSCB 8520-8522, Motion Record (Motion for Leave to Appeal), Vol. 8, tab 4(IV)(2).

to produce any evidence suggesting that they considered confidentiality to be essential to their relationship with the OSC.[42]

43. 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,[43] Catalyst and Callidus seek to advance an unduly restrictive approach to the breadth of disclosure in a significant lawsuit such as this one.

44. The OSC Documents are patently relevant. Among the allegations made by Anderson and ClaritySpring in the Whistleblower Submissions, alleged by Catalyst and Callidus to be false, is an allegation related to Catalyst and Callidus' use of "yield enhancements", which practice was alleged to be misleading and a tactic to "hide bad loans".[44] Catalyst and Callidus' evidence is that the OSC Documents relate to a continuous disclosure review specifically focused on "references in Callidus' publicly disclosed Management Discussion & Analysis to forward looking unrecognized yield enhancements, and whether the inclusion of such non IFRS references were appropriate".[45] The OSC Documents therefore are directly relevant to the accuracy of an allegation in the Whistleblower Submissions which are the subject of this litigation.

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[42] McEwen J. Decision at para 56, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[43] McEwen J. Decision at para 59, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[44] OSC Whistleblower Submission, pp. 24-25, Motion Record (Motion for Leave to Appeal), Vol. 7, tab 4(III)(2)(F).
[45] Affidavit of James Riley sworn December 28, 2020 at para 49, Motion Record (Motion for Leave to Appeal), Vol. 9, tab 4(V)(2).

45. Contrary to paragraph 91 of Catalyst and Callidus' factum, it is not only formal allegations of misconduct or adverse rulings by the OSC that would meet the standard of relevance here. It is no challenge to identify circumstances in which communications with the OSC could establish the accuracy (or inaccuracy) of the allegations in the Whistleblower Submissions, absent a formal enforcement proceeding or OSC ruling. If the Corporate Finance Branch identified problems with Callidus' use of "yield enhancements", such could verify the allegations made in the Whistleblower Submissions, even if Callidus was able to rectify the identified problems and avoid enforcement action by the OSC. Anderson and ClaritySpring would be significantly prejudiced in their ability to defend against the claims made by Catalyst and Callidus absent disclosure of such documents. There is no reason to doubt the accuracy of Justice McEwen's decision with respect to the relevance of the OSC Documents.

46. The overarching difficulty with Catalyst and Callidus' positions on this motion is that, as the parties seeking to exclude evidence, they bear the burden of establishing a basis for the privileges being asserted.[46] Even if Justice McEwen had applied some legal principle incorrectly (which, Anderson and ClaritySpring submit, he did not), that would not change the significant evidentiary deficiencies in Catalyst and Callidus' case. Justice McEwen held that there was no evidence supporting Catalyst and Callidus' position in respect of three of the four *Wigmore* factors applicable to the establishment of case-by-case privilege. While Catalyst and Callidus take issue with Justice McEwen's findings of no evidence with respect to two of those factors (the communications originating in confidence, and the essentiality of confidence to the relationship), the fact remains that they presented no evidence of any harm

[46] David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 348.

or injury they would suffer in the event of disclosure.[47] The proposed appeal therefore could have no impact on Justice McEwen's decision with respect to the disclosure of the OSC Documents (and, on the same basis, the SEC Documents), as the fourth *Wigmore* factor (whether the injury that would inure to the relation by the disclosure of the communication is *greater than* the benefit thereby gained for the correct disposal of litigation) would remain unsatisfied and case-by-case privilege could not be established.

iii. The SEC Documents

47. The above points related to the OSC Documents similarly apply to Justice McEwen's conclusions with respect to the SEC Documents, and will not be repeated here. This section will address additional points unique to consideration of the SEC Documents.

48. There is no reason to doubt the correctness of Justice McEwen's decision with respect to the SEC Documents. Like in relation to the OSC Documents, Catalyst and Callidus simply misstate what Justice McEwen actually did, in an attempt to generate errors where none exist.

49. Catalyst and Callidus suggest that Justice McEwen somehow misapprehended Callidus' position, and erroneously thought that Catalyst and Callidus sought acceptance and adoption of a new claim of privilege based upon a U.S. "limited waiver" doctrine.[48] There was no such misapprehension. Justice McEwen understood that the U.S. authorities presented by Catalyst and Callidus were proffered as relevant to the *Wigmore* analysis. He simply rejected that position. For example, as stated at paragraph 67 of Justice McEwen's ruling:

> *Further, and in any event, the thrust of the submissions with respect to the U.S. authorities speaks to the obligations of the SEC to make disclosure*

[47] McEwen J. Decision at para 59, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[48] Moving Parties' Factum at para 93.

> ***and is not relevant to the parties in this lawsuit or the Wigmore factors***.[49] [emphasis added]

50. Catalyst and Callidus suggest that their U.S. authorities are relevant because "they describe the factual circumstances referable to the SEC Documents and explain U.S. practices, policies and concerns about the production of such documents."[50] In order for foreign legal authorities to be relied on for such purposes, they must be presented through expert evidence, as acknowledged by Justice McEwen in his ruling.[51] Foreign law is an issue of fact which must be specifically proved by expert evidence.[52] Catalyst and Callidus delivered no expert evidence with respect to the U.S. law that they seek to have the Court consider in its analysis; rather, they relied on the evidence of Roel Campos, a former Commissioner of the SEC, who expressly stated that he was not providing expert evidence.[53] It would have been improper for Justice McEwen to consider U.S. legal principles in his *Wigmore* analysis in the absence of any admissible evidence of U.S. law.

51. In any event, the evidence and authorities presented by Catalyst and Callidus simply do not disclose any genuine issue with respect to privilege and SEC communications, and particularly do not support their suggestion that U.S. jurisprudence is divided on such issues.[54] The evidence of Mr. Campos is directed at issues regarding disclosure by the SEC itself, which, as Justice McEwen acknowledged, is irrelevant to the issue of whether Callidus

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[49] McEwen J. Decision at para 67, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[50] Moving Parties' Factum at para 95.
[51] McEwen J. Decision at para 65, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[52] *Kinectrics Inc. v FCL Fisker Customs & Logistics Inc.*, 2020 ONSC 6748 at para 41.
[53] Declaration of Roel C. Campos executed December 28, 2020 at para 16, Motion Record (Motion for Leave to Appeal), Vol. 9, tab 4(V)(1): "This Declaration is not a legal opinion, nor is it being proffered as an expert report."
[54] Moving Parties' Factum at para 93.

is required to make disclosure.[55] With respect to legal authorities, U.S. courts have specifically rejected the existence of a privilege attaching to SEC communications.[56] At paragraph 96 of their factum, Catalyst and Callidus reproduce an excerpt of their factum before Justice McEwen with respect to U.S. authorities which speak to policy reasons for why a privilege perhaps *should* apply to SEC documents in certain circumstances, but there is no basis to believe that such commentary would or should override clear judicial authority finding to the contrary. Such weighing of U.S. authorities certainly should not be done in the absence of expert evidence as to the current state of the law in the U.S. on these matters.

52. Similar concerns arise with respect to Catalyst and Callidus' attempt to rely on U.S. authorities regarding the relevance of SEC materials.[57] In addition to the procedural concerns with relying on such authorities in the absence of expert evidence on the current state of the law, a conclusion on relevance in one case simply cannot blindly be applied to a relevance determination in a different case, with no consideration of the applicable circumstances and claims.

53. In the circumstances, there is no genuine issue for appellate consideration with respect to whether the SEC Documents are privileged, in light of U.S. authorities proffered by Catalyst and Callidus. Justice McEwen was correct to disregard those authorities, both on the basis of their substance and in the absence of expert evidence. There is no reason to doubt the correctness of his decision.

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[55] McEwen J. Decision at para 67, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.
[56] *Kirkland v Superior Court*, 95 Cal.App.4th 92 (2002); *D'Addario v Geller*, 129 Fed.Appx. 1 (2005); Philip M. Aidikoff, Robert A. Uhl, Ryan K. Bakhtiari, Jeff Aidikoff, "Discovery of Regulatory Documents: Debunking the Myth of an 'SEC Privilege' in Securities Arbitration" (2011) 18:2 PIABA Bar Journal 187.
[57] Moving Parties' Factum at para 97.

D. The Proposed Appeal Raises No Issues of General Importance

54. The second requirement for leave to appeal under Rule 62.02(4)(b) is that the proposed appeal concern a matter of "such importance" as to merit granting leave to appeal in respect of an interlocutory matter. In order to meet this prong of the test, the moving party must establish that the matter is of general importance to the public or to the development of the law, and that the importance of the matter transcends the interests of the particular parties.[58]

55. This was a refusals motion. It was a "common procedural motion based on well-recognized legal principles".[59] Anderson and ClaritySpring submit that the proposed appeal involves no matters of general importance. Leave to appeal ought not be granted.

56. With respect to the Dalton Report, Catalyst and Callidus suggest that there is an issue of "general application and importance" in relation to how solicitor-client privilege applies to related corporate entities who have the precise corporate structure that they do, and who prepare a document in the precise context and for the same purpose as the Dalton Report.[60] Their own framing of this issue betrays its asserted generality.

57. Catalyst and Callidus rely on an unreported 1999 Divisional Court decision, *Bank Leu AG v Gaming Lottery Corporation*, to effectively argue that any decision concerning legal professional privilege should be considered to engage an issue of general importance sufficient to justify the granting of leave to appeal.[61] Courts have recognized frequently that

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[58] *Mask v Silvercorp Metals, Inc.*, 2014 ONSC 4647 at paras 10-12 (Div Ct).
[59] See *Pytka v Pytka Estate*, 2010 ONSC 2549 at paras 12-17, where the Divisional Court refused to grant leave to appeal from a ruling that the applicant had waived privileged advice received from her former law firm, holding that the ruling involved no issues of general importance.
[60] Moving Parties' Factum at paras 50-51.
[61] Moving Parties' Factum at para 28.

highly fact-specific decisions cannot satisfy the requirement of general importance simply because the decision at issue concerns issues of privilege.[62] Rather, the "general importance" criterion generally will only be satisfied where the motions judge was required or asked to establish or expand a new proposition of law or practice, or modify or overturn an established one.[63]

58. Justice McEwen's analysis and determination on privilege with respect to the Dalton Report was entirely fact-driven, applying existing propositions of law to the specific circumstances of this case.[64] Even if Justice McEwen had applied incorrectly principles of solicitor-client privilege in his analysis of the Dalton Report (which, Anderson and ClaritySpring submit, he did not), that would at most satisfy the first criterion of Rule 62.02(4)(b).

59. The application of principles of solicitor-client privilege to a particular document or category of documents is inherently fact- and context-specific. A determination of the issue proposed by Catalyst and Callidus will have no general applicability to other parties in other cases; the result of a privilege analysis will always depend on the factual circumstances and evidence in a particular case, and the particulars of a given corporate structure. There can be no tenable argument that Justice McEwen's ruling regarding a single document such as the Dalton Report, in the unique circumstances at issue here, transcends the interests of the parties so as to meet the second requirement of Rule 62.02(4)(b).

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[62] See, for example, *Economical v Fairview*, 2011 ONSC 7535 at para 14 (Div Ct).
[63] *Economical v Fairview*, 2011 ONSC 7535 at para 14 (Div Ct).
[64] McEwen J. Decision at paras 19-25, Motion Record (Motion for Leave to Appeal), Vol. 1, tab 3.

60. The same applies in respect of Justice McEwen's decisions on the OSC Documents and SEC Documents. Justice McEwen's determinations on privilege with respect to these documents were made by application of recognized legal principles to the particular facts and context of this case. This is particularly so in respect of his decision on the OSC Documents, which was largely based in an analysis of the specific wording of the OSC's language in correspondence to Callidus, and the nature of the claims being made in this action. The matters raised are not of general importance to the public or the development of the law, and their importance does not transcend the interests of the parties.

PART III - NO ADDITIONAL ISSUES AND ORDER REQUESTED

61. Anderson and ClaritySpring have no additional issues to raise on this motion.

62. Anderson and ClaritySpring respectfully request an Order denying Catalyst and Callidus' motion for leave to appeal from the Ruling of Justice McEwen dated February 12, 2021, and granting Anderson and ClaritySpring its partial indemnity costs of this motion as set out in the costs outline provided. In the event this motion for leave to appeal is granted, Anderson and ClaritySpring submit that the costs of this motion should be in the cause of appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 2nd day of March, 2021.

Lucas E. Lung / Rebecca Shoom
Lerners LLP

Lawyer for the Defendants/Responding Parties,
Nathan Anderson and ClaritySpring Inc.

SCHEDULE "A" - LIST OF AUTHORITIES

1. *D'Addario v Geller*, 129 Fed.Appx. 1 (2005)
2. *Farmers Oil & Gas Inc. v Ministry of Natural Resources*, 2013 ONSC 1608 (Div Ct)
3. *General Accident Assurance Co. v. Chrusz*, 1999 CarswellOnt 2898 (Ont CA)
4. *Economical v Fairview*, 2011 ONSC 7535
5. *Fresco v. CIBC*, 2019 ONSC 3309, 2019 CarswellOnt 9215
6. *In the Matter of B*, 2020 ONSC 7563
7. *Kinectrics Inc. v FCL Fisker Customs & Logistics Inc.*, 2020 ONSC 6748
8. *Kirkland v Superior Court*, 95 Cal.App.4th 92 (2002)
9. *Mask v Silvercorp Metals, Inc.*, 2014 ONSC 4647 (Div Ct)
10. *Nova Chemicals (Canada Ltd.) v Ceda-Reactor Ltd.*, 2014 ONSC 3995
11. *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31
12. *Pytka v Pytka Estate*, 2010 ONSC 2549
13. *Slavutych v Baker et al.*, 1975 CanLII 5 (SCC)
14. *XCG Consultants Inc. v ABB Inc.*, 2014 ONSC 1111

OTHER AUTHORITIES:

15. David M Paciocco, Palma Paciocco & Lee Stuesser, *The Law of Evidence*, 8th ed (Toronto: Irwin Law, 2020) at 348
16. Philip M. Aidikoff, Robert A. Uhl, Ryan K. Bakhtiari, Jeff Aidikoff, "Discovery of Regulatory Documents: Debunking the Myth of an 'SEC Privilege' in Securities Arbitration" (2011) 18:2 PIABA Bar Journal 187

SCHEDULE “B” - RELEVANT STATUTES

Rules of Civil Procedure, RRO 1990, Reg 194, r 62.02(4)

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).

THE CATALYST CAPITAL GROUP INC., et al. Plaintiffs (Moving Parties)	and	WEST FACE CAPITAL INC., et al. Defendants (Responding Parties)	Court File No.: 157/21

ONTARIO
SUPERIOR COURT OF JUSTICE – DIVISIONAL COURT
Proceeding commenced at Toronto.

FACTUM OF THE DEFENDANTS/RESPONDING PARTIES, NATHAN ANDERSON AND CLARITYSPRING INC.

(MOTION FOR LEAVE TO APPEAL ORDER OF JUSTICE MCEWEN, DATED FEBRUARY 12, 2021)

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