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

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

and

CANACCORD GENUITY CORP.

Third Party

A N D B E T W E E N:

WEST FACE CAPITAL INC. and GREGORY BOLAND

Plaintiffs by Counterclaim / Responding Parties

and

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

Defendants to the Counterclaim / Moving Parties

A N D B E T W E E N:

BRUCE LANGSTAFF

Plaintiff by Counterclaim

and

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Defendants to the Counterclaim

FACTUM OF THE RESPONDING PARTIES,
WEST FACE CAPITAL INC. AND GREGORY BOLAND

(RE: CATALYST PARTIES' MOTION FOR LEAVE TO APPEAL
THE DECISION OF JUSTICE MCEWEN DATED FEBRUARY 12, 2021)

March 1, 2021

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PART I - INTRODUCTION AND BACKGROUND FACTS

A. Introduction

1. This is the second Motion for leave to appeal that the Moving Parties (collectively, the "**Catalyst Parties**")[1] have brought in respect of failed claims of privilege that they have asserted in the context of multiple pending "**Anti-SLAPP Motions**" in this action.[2] These Anti-SLAPP Motions are being case managed by Justice McEwen and will be heard together by him during the week of May 17, 2021. This particular Motion concerns four sets of documents: (i) a series of correspondence between the Catalyst Parties, a shadowy figure (and his alleged alter-ego), and others that accused various parties of wrongdoing; (ii) a report prepared by the interim CEO of Callidus for the company's Board regarding its business prospects; (iii) communications between the Catalyst Parties and the Ontario Securities Commission; and (iv) communications between the Catalyst Parties and the Securities and Exchange Commission. In respect of the latter two categories, West Face Capital Inc. and Greg Boland (together, "**West Face**") rely on the submissions of ClaritySpring Inc. and its principal Nathan Anderson (together, "**ClaritySpring**").

2. The interlocutory Decision of Justice McEwen rendered on February 12, 2021 (the "**Decision**") held that all of these documents were relevant to the pending Anti-SLAPP Motions, and that none of them were privileged. Justice McEwen carefully considered all of the material facts and circumstances, and properly applied well-settled principles of law. While the documents in question are clearly important to the parties, and to the issues to be determined by Justice McEwen at the return of the Anti-SLAPP Motions, there are no unsettled questions of law or

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[1] The Moving Parties are the Plaintiffs (Defendants by Counterclaim) The Catalyst Capital Group Inc. ("**Catalyst**") and Callidus Capital Corporation ("**Callidus**") and the Defendants by Counterclaim Newton Glassman, Gabriel De Alba, and James Riley.

[2] These Motions are scheduled to be heard the week of May 17, 2021. It is these Anti-SLAPP Motions that are the cause for the urgency of this Motion for leave to appeal and its expedition. West Face greatly appreciates the Divisional Court's assistance in this regard.

broader issues of public importance at stake. This was simply a refusals Motion.

3. Notably, Justice McEwen's Decision followed closely (both temporally and substantively) a recent "Ruling on Privilege Motions" made by Justice Boswell on January 11, 2021 within these same proceedings (the "**Boswell Ruling**").[3] In that Ruling, Justice Boswell held that the Catalyst Parties had made (other) unsustainable claims of privilege over thousands of documents relating to "**Project Maple Tree**", a "multi-pronged" operation by the Catalyst Parties and their agents that involved, among other things, "generating stories about the Wolfpack conspiracy" and otherwise "publishing any kind of negative information possible about West Face".[4] The Catalyst Parties are currently seeking leave to appeal the Boswell Ruling. Their Motions for leave to appeal both the Boswell Ruling and the Decision are being expedited and will be considered and determined by the same panel of the Divisional Court.

4. The Catalyst Parties would have this Court believe that these two, parallel leave to appeal Motions represent the unfortunate coincidence of two different, learned judges independently reaching parallel incorrect conclusions and rejecting otherwise valid claims of privilege. The reality, as becomes clear when the Boswell Ruling and McEwen Decision are read together, is that the Catalyst Parties have consistently made unfounded and unsustainable privilege claims in order to evade scrutiny of their conduct.

B. Background Facts

5. As noted by Justice McEwen in his Decision, the Boswell Ruling comprehensively sets out the relevant history of contentious litigation between the Catalyst Parties and West Face.[5] Justice

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[3] Boswell Ruling, Motion Record of the Catalyst Parties ("**Catalyst MR**"), Vol. 11, Tab 4(IV)-1.

[4] Boswell Ruling, at paras. 53 & 79, Catalyst MR, Vol. 11, Tab 4(IV)-1, MR-2048 & MR-2052.

[5] Decision, at paras. 5-10, Catalyst MR, Vol. 1, Tab 3, MR-29-MR-30.

McEwen effectively incorporated by reference the background facts set out therein.

6. Catalyst and Callidus commenced the main Action in these proceedings (the "**Wolfpack Action**") on November 7, 2017. The Wolfpack Action accuses an array of alleged "conspirators" – West Face, respected members of the media, borrowers of Callidus (a formerly-public company whose shares were at all material times majority-owned by funds managed by Catalyst) and members of the financial community – of conspiring to harm Callidus (the "**Alleged Wolfpack Conspiracy**"). According to the Catalyst Parties, the Alleged Wolfpack Conspiracy culminated in the publication of an allegedly defamatory article about Catalyst and Callidus in the *Wall Street Journal* on August 9, 2017 (the "**WSJ Article**").[6]

7. West Face and a number of its co-Defendants have brought Anti-SLAPP Motions asserting that the Catalyst Parties commenced the Wolfpack Action to punish, and to chill the speech of, those who have dared stand up to the Catalyst Parties. Consistent with this abusive behaviour, commencing in or around August 2017 and continuing through the launch of the Wolfpack Action in November 2017, agents of the Catalyst Parties were busily engaged in the systematic campaign of espionage "stings" and defamation known as Project Maple Tree.[7]

8. The primary targets of Project Maple Tree were West Face (including Mr. Boland) and retired Justice Frank Newbould, who had decided a prior proceeding in favour of West Face and against the Catalyst Parties in August 2016. As euphemistically noted by Justice Boswell, certain aspects of Justice Newbould's judgment had apparently "stuck in Catalyst's craw".[8] Following revelations that the Catalyst Parties had engaged in the above-noted campaign of stings and

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[6] See the Plaintiffs' Fresh as Amended Statement of Claim dated July 19, 2019, Catalyst MR, Vol. 2, Tab 4(I)-2-1.

[7] Boswell Ruling, at paras. 53-124, Catalyst MR, Vol. 11, Tab 4(IV)-1, MR-2048-MR-2059.

[8] Boswell Ruling, at para. 41, Catalyst MR, Vol. 11, Tab 4(IV)-1, MR-2047.

defamation against West Face and Justice Newbould, West Face commenced its Counterclaim against the Catalyst Parties and the other Counterclaim Defendants. The Catalyst Parties have also commenced their own Anti-SLAPP Motion to dismiss certain portions of West Face's Counterclaim.

9. James Riley has sworn numerous Affidavits in support of the Catalyst Parties' positions on the various Anti-SLAPP Motions. Mr. Riley was cross-examined on those Affidavits by counsel for West Face in October 2020. During Mr. Riley's cross-examination, the Catalyst Parties' counsel refused to permit him to answer any questions about the basis for their many assertions of privilege.[9] Those refusals resulted in the Boswell Ruling and the Decision at issue in this Motion.

C. The Documents at Issue

i. The Guy Documents

10. The "**Guy Documents**" consist of at least 26 communications between one or more of the Catalyst Parties, and one or more of the "**Guy Parties**" (collectively, an individual using the pseudonym "Vincent Hanna"; Danny Guy, the principal of Harrington Global Opportunities Fund SARL, who the Catalyst Parties say is behind "Vincent Hanna"; Mr. Guy's counsel, John Kingman Phillips; and Derrick Snowdy, a private investigator allegedly working for Mr. Guy).[10]

11. On August 11, 2017, Newton Glassman received an (ostensibly) unsolicited email from a person using the pseudonym "Vincent Hanna", which was the name of Al Pacino's character in the 1995 gangster movie "Heat" (the "**Vincent Hanna Email**").[11] The Vincent Hanna Email was sent two days after the publication of the WSJ Article that is at the heart of the Wolfpack Action.

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[9] See Transcript Excerpts from the Examination of James Riley, Catalyst MR, Vols. 4 & 6, Tabs 4(I)-2-18, 4(I)-2-19, & 4(II)-1-4.

[10] Decision, at paras. 3, Catalyst MR, Vol. 1, Tab 3, MR-29.

[11] Vincent Hanna Email, Catalyst MR, Vol. 9, Tab 4(B)-2-B, MR-1799; "IMDB" Webpage for the Film Heat, Catalyst MR, Vol. 4, Tab 4(I)-2-51.

As noted by Justice McEwen, the Vincent Hanna Email alleged that the Catalyst Parties were victims of a "'cabal' of conspirators who, amongst other things, had a goal to 'bring down' Callidus and Glassman. The cabal, according to Hanna, included West Face and Boland, amongst others."[12] The Vincent Hanna Email further opines that the "cabal" was responsible for the publication of the WSJ Article.[13]

12. To be clear, the allegations in the Vincent Hanna Email against West Face are entirely false, as West Face will demonstrate to Justice McEwen at the return of the Anti-SLAPP Motions.

13. Mr. Riley relied on the Vincent Hanna Email in three separate Affidavits that were delivered by the Catalyst Parties in the Anti-SLAPP Motions.[14] As noted by Justice McEwen,[15] the Catalyst Parties have relied upon this email: (i) to argue that the Wolfpack Action was brought in good faith and is not a SLAPP suit; and (ii) to justify one of the publications (namely, a letter sent by Catalyst to its investors on August 14, 2017) that West Face has characterized as defamatory in its Counterclaim.[16] Mr. Riley claimed in his Affidavits that Catalyst sent this letter to its investors because it "felt obligated" to "inform" them of the supposedly "material

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[12] Decision, at para. 26, Catalyst MR, Vol. 1, Tab 3, MR-33.

[13] Vincent Hanna Email, Catalyst MR, Vol. 9, Tab 4(B)-2-B, MR-1799

[14] Mr. Riley and the Catalyst Parties relied on and gave extensive concerning the Vincent Hanna Email in his Affidavits in the Anti-SLAPP Motions. See: (i) the Excerpted Affidavit of James Riley dated December 5, 2019, at paras. 108-109, Catalyst MR, Vol. 4, Tab 4(I)-2-48, MR-1080-1081; (ii) Excerpted Affidavit of James Riley dated May 29, 2020, at paras. 101-105, Catalyst MR, Vol. 4, Tab 4(I)-2-49, MR-1088-MR-1089; and (iii) the Excerpted Affidavit of James Riley dated August 20, 2020, at paras. 140-146, Catalyst MR, Vol. 4, Tab 4(I)-2-50, MR-1094-MR-1096. The complete bodies of these Affidavits are included in the Motion Record of the Catalyst Parties in their Motion for leave to appeal the Boswell Ruling ("**Boswell MR**"): (i) the Affidavit of James Riley dated December 5, 2019, Boswell MR, Vol. 4, Tab 4(IV)-2-A; (ii) the Affidavit of James Riley dated May 29, 2020, Boswell MR, Vol. 4, Tab 4(IV)-2-B; and (iii) the Affidavit of James Riley dated August 20, 2020, Boswell MR, Vol. 4, Tab 4(IV)-2-D.

[15] Decision, at para. 44, Catalyst MR, Vol. 1, Tab 3, MR-35-MR-36.

[16] The letter contained the following accusations:

"*As a brief update on the West Face and Wind litigation, new facts helpful to the case have been discovered. These relate not only to their standalone behavior but also to possible interference and market manipulation involving West Face and others in Callidus.*"

West Face Defence and Counterclaim, at para. 139, Catalyst MR, Vol. 4, Tab 4(I)-2-2, MR-139. See also the Excerpted Affidavit of James Riley dated December 5, 2019, at paras. 108-109, Catalyst MR, Vol. 4, Tab 4(I)-2-48, MR-1080-1081.

information" contained in the Vincent Hanna Email.[17]

14. Despite having put the Vincent Hanna Email squarely at issue in the Anti-SLAPP Motions, the Catalyst Parties have refused to produce any of their subsequent email correspondence with the mysterious "Vincent Hanna", including their communications with the person who the Catalyst Parties allege was the true author of the Vincent Hanna Email, Danny Guy.

15. Of the 26 Guy Documents, eleven are emails originating from Mr. Guy, and four more purport to be from "Vincent Hanna". All of these were sent to either Mr. Glassman or Mr. Riley. Mr. Glassman sent one email to "Vincent Hanna", and Mr. Riley sent one email to Mr. Guy.[18] Other recipients of certain of the Guy Documents include Mr. Snowdy as well as Marc Cohodes[19] and Adam Spears.[20] The latter two individuals are clearly adverse in interest to the Catalyst Parties: Mr. Spears is a co-Defendant of West Face in the Wolfpack Action, and Mr. Cohodes (while not named as a Defendant) is an alleged member of the "cabal" referred to in the Vincent Hanna Email, and someone against whom the Catalyst Parties make express allegations in their Statement of Claim.[21] None of these emails were authored by counsel.[22] All of them were reviewed in confidence by Justice McEwen.[23]

ii. The "Murky" Nature of the Vincent Hanna Email

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[17] Excerpted Affidavit of James Riley dated December 5, 2019, at paras. 108-109, Catalyst MR, Vol. 4, Tab 4(I)-2-48, MR-1080-1081.

[18] Supplemental Schedule B of the Catalyst Parties, Catalyst MR, Vol. 7, Tab 4(III)-2-J, MR-1610-MR-1626.

[19] Mr. Cohodes is a prominent U.S.-based investor and short-seller. Specifically, the Vincent Hanna Email, and indeed the Statement of Claim in the Wolfpack Action accuse Mr. Cohodes of being a member of the "Wolfpack" of conspirators moving against Callidus (Vincent Hanna Email, Catalyst MR, Vol. 9, Tab 4(B)-2-B, MR-1799; Plaintiffs' Fresh as Amended Statement of Claim dated July 19, 2019, Catalyst MR, Vol. 2, Tab 4(I)-2-1).

[20] Mr. Spears is an alleged conspirator and personal Defendant to the Wolfpack Action (Plaintiffs' Fresh as Amended Statement of Claim dated July 19, 2019, Catalyst MR, Vol. 2, Tab 4(I)-2-1).

[21] See the Vincent Hanna Email, Catalyst MR, Vol. 9, Tab 4(B)-2-B, MR-1799 and the Catalyst's Parties allegations against Mr. Cohodes in paragraphs 119-124 & 176 of the Plaintiffs' Fresh as Amended Statement of Claim dated July 19, 2019, Catalyst MR, Vol. 2, Tab 4(I)-2-1.

[22] Decision, at para. 35, Catalyst MR, Vol. 1, Tab 3, MR-34.

[23] The Guy Documents were included in the Confidential Document Brief of the Catalyst Parties, Catalyst MR, Vols. 12-14, Tabs 4(VII)-1, 4(VII)-2, 4(VII)-3.

16. As Justice McEwen recognized in his Decision, the Vincent Hanna Email is inherently "murky" in nature.[24] It was an unsolicited email, from a pseudonymous account, sent using a heavily encrypted email service based in Norway that is designed to protect the sender's true identity.[25] The allegations in the email are obviously scandalous and far-fetched. (They are also untrue in fact, as West Face will prove at the return of the Anti-SLAPP Motions.) The Catalyst Parties have asserted that the true identity of Vincent Hanna is Mr. Guy. They have done so without providing a documentary basis for this claim or <u>any</u> evidence from Mr. Guy in which he corroborates this assertion. Moreover, in correspondence with counsel for West Face, Mr. Guy has unequivocally and explicitly <u>denied</u> that he is Vincent Hanna.[26] He has since become unresponsive to inquiries from West Face. The Catalyst Parties have not put forward any evidence from Mr. Guy or otherwise to resolve this conflict or explain why Mr. Guy has resiled from his purported prior claims of responsibility for the Vincent Hanna Email and the (false) allegations contained therein.

17. Because of the Catalyst Parties' refusal to produce the Guy Documents or allow Mr. Riley to answer any questions about them during cross-examination on his Affidavits in the Anti-SLAPP Motions, West Face has had no ability to assess the other communications to determine what impact they have on the obvious credibility problems surrounding the Vincent Hanna Email, which is the sole communication among the Guy Documents that the Catalyst Parties have cherry picked to rely on.

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[24] Decision, at para. 32, <u>Catalyst MR,</u> Vol. 1, Tab 3, MR-34.

[25] Decision, at para. 34, <u>Catalyst MR,</u> Vol. 1, Tab 3, MR-34.

[26] See Danny Guy Correspondence, <u>Catalyst MR</u>, Vol. 5, Tabs 4(I)-2-53 & 4(I)-2-54; Decision, at para. 32, <u>Catalyst MR,</u> Vol. 1, Tab 3, MR-34.

iii. The Dalton Report

18. The Dalton Report is a "Strategic Review and Remediation Plan" prepared by Patrick Dalton during his tenure as a consultant and interim CEO of Callidus between November 2018 and March 2019.[27] Mr. Dalton prepared the Report at the request of Callidus's Board of Directors and presented it to them at a Directors' meeting on February 28, 2019.[28] In Mr. Dalton's own words, the Report involved "looking at the business [of Callidus], understanding where it is, and understanding how it got there".[29]

19. Although the Catalyst Parties have made vague, *post hoc* claims that the purpose of the Dalton Report was "legal" in nature because it was reviewed by Mr. DiPucchio (who is in-house counsel to Catalyst, <u>not</u> Callidus), the contemporaneous Minutes of the Callidus Board Meeting at which the Report was presented by Mr. Dalton confirm that the purpose of the Report was predominantly commercial.[30] The Minutes do not suggest that either the Report itself or the ensuing discussions concerning the recommendations made by Mr. Dalton in the Report involved any legal advice. Mr. Dalton is a business professional, not a lawyer. He was retained by Callidus's Board of Directors, not by Mr. DiPucchio of Catalyst. Mr. Dalton confirmed during cross-examination that his Report was "based on [his] analysis of the company", that it was "grounded in the facts as [he] saw them," and that its recommendations were "business in nature."[31] The

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27 Decision, at paras. 3 & 13, <u>Catalyst MR,</u> Vol. 1, Tab 3, MR-29-MR-30.

28 Decision, at para. 13, <u>Catalyst MR,</u> Vol. 1, Tab 3, MR-30.

29 Transcript of the Examination of Patrick Dalton on January 5, 2021 ("**Dalton Examination**"), <u>Catalyst MR,</u> Vol. 6, Tab 4(11)-3, MR-1231.

30 These Minutes were taken by Jonathan Levin of the Fasken Martineau firm as Secretary, and Catalyst has not contested their accuracy or completeness (Minutes of the Board, <u>Catalyst MR,</u> Vol. 6, Tab 4(II)-4, MR-1250-MR-1254).

31 Dalton Examination, <u>Catalyst MR,</u> Vol. 6, Tab 4(11)-3, MR-1230, MR-1231 & MR-1235.

Minutes themselves make clear that the Dalton Report set out a business analysis and made business recommendations for use by Callidus's Board of Directors.[32]

20. While Mr. DiPucchio was present at the February 28, 2019 Callidus Board Meeting, the Minutes do not suggest that any counsel participated in any of the discussions concerning Mr. Dalton's Report, let alone in a meaningful or privileged manner.[33] The fact that counsel to Catalyst may also have used the Dalton Report is not itself sufficient to cloak the Report itself in solicitor-client privilege. The contemporaneous evidence shows that the purpose of the Dalton Report was assisting the Board of Callidus with its business, whatever other uses counsel to Catalyst may have made of it.[34]

21. Shortly after Mr. Dalton's departure from Callidus, Mr. Dalton had a conversation with Greg Boland, West Face's CEO, concerning the Dalton Report. Mr. Boland swore an Affidavit describing that conversation.[35] Mr. Boland's evidence is that Mr. Dalton stated that the Dalton Report "was prepared at the direction of and for the use of the Board," and that he made no reference to involvement of counsel.[36] On the Motion below, the Catalyst Parties chose not to cross-examine Mr. Boland on this Affidavit, and Mr. Dalton did not deny the substance of Mr. Boland's evidence in the responding Affidavit he swore in respect of the Report, nor during cross-examination. Rather, he professed not to recall the details of his discussion with Mr. Boland.[37]

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[32] Minutes of the Board, Catalyst MR, Vol. 6, Tab 4(II)-4, MR-1250-MR-1254.

[33] Minutes of the Board, Catalyst MR, Vol. 6, Tab 4(II)-4, MR-1250-MR-1254.

[34] Minutes of the Board, Catalyst MR, Vol. 6, Tab 4(II)-4, MR-1250-MR-1254; "Linked-In" Profile of Mr. Dalton, Catalyst MR, Vol. 6, Tab 4(II)-1-1, MR-1141; Excerpt of Callidus MD&A dated December 31, 2018, Catalyst MR, Vol. 6, Tab 4(II)-1-2, MR-1148.

[35] Affidavit of Greg Boland, Sworn December 31, 2020, Catalyst MR, Vol. 6, Tab 4(II)-1.

[36] Affidavit of Greg Boland, Sworn December 31, 2020, at para. 6, Catalyst MR, Vol. 6, Tab 4(II)-1, MR-1137-MR-1138.

[37] Dalton Examination, Catalyst MR, Vol. 6, Tab 4(11)-3, MR-1244 & MR-1246.

22. The Catalyst Parties have alleged that the defendants to the Wolfpack Action caused the collapse of Callidus.[38] Justice McEwen recognized that the Dalton Report is directly relevant to this allegation.[39] Specifically, Mr. Dalton conceded on cross-examination that his Report "didn't address any of Callidus's ongoing litigation", which implies that he identified causes of Callidus's dire financial condition that were independent of the matters raised in this litigation.[40] The Dalton Report therefore contains evidence that bears directly on, to use the language of the Anti-SLAPP provisions of the *Courts of Justice Act*, "the harm likely to be or have been suffered by [Catalyst] as a result of [West Face's] expression"[41] — or more particularly, whether the problems of Callidus were self-inflicted.

PART II - WEST FACE'S POSITIONS, LAW AND ARGUMENT

23. The sole issue on this Motion is whether the Catalyst Parties have satisfied the criteria required for the granting of leave to appeal. They have not.

A. The Test for Leave to Appeal

24. Rule 62.02(4) sets out the test for obtaining leave to appeal to the Divisional Court:

> 62.02(4) Leave to appeal ***shall not be granted*** unless,
>
> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal ***and*** it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
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> (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.[42] (emphasis added)

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38 Fresh as Amended Statement of Claim dated July 19, 2019, Catalyst MR, Vol. 2, Tab 4(I)-2-1.

39 Decision, at para. 24, Catalyst MR, Vol. 1, Tab 3, MR-33.

40 Dalton Examination, Catalyst MR, Vol. 6, Tab 4(11)-3, MR-1236.

41 Courts of Justice Act, R.S.O. 1990, c. C.43, s. 137(4)(b).

42 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 62.02(4).

25. Courts in Ontario have recognized repeatedly that leave to appeal to the Divisional Court in respect of interlocutory decisions should only be granted rarely. Accordingly, the requisite test for leave to appeal is a "very strict one". Each of the two branches for granting leave involves a two-part, conjunctive test. That is, both aspects of either two-part test must be met before leave to appeal can be granted.[43]

26. The Catalyst Parties have identified five alleged issues for this Court's consideration. Of these, three pertain to the Guy Documents and the Dalton Report. Each of these three issues will be addressed below in turn. The remaining two issues address Justice McEwen's Decision as it pertains to the Catalyst Parties' communications with the OSC and SEC. As noted above, West Face supports and adopts the submissions of ClaritySpring with regard to those latter issues.

27. The Catalyst Parties have taken the same approach to Rule 62.02(4) on this Motion as they took in their Motion for leave to appeal the Boswell Ruling. They do not expressly identify a single "conflicting decision" within the meaning of the Rule,[44] nor do they argue why leave would be "desirable" in the circumstances. Rather, the Catalyst Parties (again) focus entirely on the test set out in Rule 62.02(4)(b) – although, as set out below, they have largely ignored the second branch of this test.

28. To obtain leave under Rule 62.02(4)(b), the proposed appellant must establish both (i) "good reason to doubt the correctness" of the order in respect of which leave to appeal is sought, and (ii) that the proposed appeal concerns matters of general importance that transcend the interests

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43 *Hunt v. Carr*, [2015] O.J. No. 168 at para. 13 (S.C.J.).

44 For the purposes of Rule 62.02(4)(a), a "conflicting decision" is one in which different legal principles are chosen to decide a comparable legal problem or to guide the exercise of the Court's discretion. Conversely, an alleged inconsistency that merely reflects different judges reaching different results based on different facts or circumstances, or exercising their discretion differently in different circumstances, is not a "conflicting decision" within the meaning of the Rule. See, for example, *Mask v. Silvercorp*, [2014] O.J. No. 3708, at para. 8 (Div. Ct.) [*Silvercorp*]; *Economical Insurance Co v. Fairview*, [2011] O.J. No. 5863 at para. 9 (Div. Ct.) [*Economical Insurance*]; *Fernandes v. Marketforce*, 2012 ONSC 6392 at paras. 27-29 (Div. Ct.).

of the parties.[45] For the following reasons, the Catalyst Parties have not satisfied either part of the test with respect to any of the three issues that they have raised in respect of the Guy Documents and the Dalton Report, whether individually or cumulatively.[46]

B. None of the Three Issues Raised by the Catalyst Parties Casts Genuine Doubt on the Correctness of Justice McEwen's Decision

29. There is no reason to doubt the correctness of Justice McEwen's Decision concerning the latest privilege assertions made by the Catalyst Parties. Like Justice Boswell before him, Justice McEwen properly applied well-settled principles of the law of privilege to the evidence before him and concluded correctly that the Catalyst Parties' assertions of privilege were unsustainable.

i. Issue #1: The Dalton Report is not Subject to Solicitor-Client Privilege

30. Justice McEwen's Decision carefully considered the provenance, content and use of the Dalton Report to rightly conclude that it is not protected by solicitor-client privilege. His analysis was based on a clear and accurate understanding of the facts and on an impeccable application of uncontroversial legal principles. There is nothing in this aspect of his Decision that comes close to raising a serious issue for debate.

31. Before considering and rejecting them, Justice McEwen accurately summarized the key arguments advanced by the Catalyst Parties in support of their allegation that the Dalton Report was privileged:

> [17] […] [T]he Catalyst Parties submit that the purpose and scope of the Dalton Report was to enable DiPucchio to provide legal and strategic advice to Catalyst.
>
> [18] Indeed, DiPucchio did review the Dalton Report and certain information was added to it upon his recommendation. Ultimately, I accept that DiPucchio did use the Report to give legal advice to Catalyst and its principals concerning the proposed restructuring.

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45 *Silvercorp* at para. 11.

46 While not strictly speaking relevant given the Catalyst Parties' exclusive reliance on Rule 62.02(4)(b), these same reasons would also negate the Catalyst Parties' ability to obtain leave under Rule 62.02(4)(a).

> [19] In short, the Catalyst Parties submit that the purpose of the Dalton Report, its disclosure to DiPucchio, his work on the Report and his attendance at the board meeting enabled DiPucchio to provide legal advice to Catalyst with respect to possible restructuring proposals and, as such, is subject to solicitor-client privilege. I disagree.[47]

32. The crux of Justice McEwen's analysis of the Dalton Report was the fact that the Report was prepared for the purpose of informing and educating the Callidus Board regarding the company's financial situation, and otherwise assisting the directors in assessing the strategic options available to restructure the business.[48] Conversely, and necessarily, the primary purpose underlying the creation of the Report was not to assist counsel for Callidus or Catalyst to provide legal advice to their respective clients.

33. Justice McEwen acknowledged and considered the fact that the Dalton Report was provided to Mr. DiPucchio, a lawyer, who reviewed, commented on, and used it in providing legal advice to Catalyst.[49] However, Justice McEwen correctly concluded that none of these facts is sufficient to bring the Dalton Report under the umbrella of solicitor-client privilege:

> [21] I prefer the arguments of West Face and the Anderson Defendants who submit that the Dalton Report is not subject to solicitor-client privilege for the following reasons:
>
> - As noted, the Dalton Report was not prepared for the specific purpose of obtaining legal advice for Callidus.
> - The Dalton Report was an analysis of the business of Callidus; it was intended to assess Callidus's business realities relating to the cause of its financial problems and to offer recommendations regarding its future activities.
> - The Dalton Report was created as a briefing document for review by the Callidus Board and, therefore, does not attract solicitor-client privilege: *Nova Chemicals (Canada Ltd.) v. Ceda-Reactor Ltd.*, 2014 ONSC 3995, at paras. 34 and 37.
> - The fact that DiPucchio and/or Levin were involved in the preparation of the document does not automatically result in the Dalton Report being subject to solicitor-client privilege. Solicitor-client privilege is not intended to protect all

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47 Decision, at paras. 17-19, Catalyst MR, Vol. 1, Tab 3, MR-31.

48 Decision, at paras. 21 & 22, Catalyst MR, Vol. 1, Tab 3, MR-32-MR-33.

49 Decision, at para. 18, Catalyst MR, Vol. 1, Tab 3, MR-31.

communications or materials deemed useful by a lawyer to properly advise their client: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C. A.), at paras. 127-128; *R. v. Campbell*, [1999] 1 S.C.R. 565, at para. 50; *XCG Consultants Inc. v. ABB Inc.*, 2014 ONSC 1111, at para. 38.

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

- DiPucchio, at the time, was not in the employ of Callidus, but rather the related company Catalyst. At the time, Catalyst was not a shareholder of Callidus, although Catalyst's related companies did hold shares in Callidus. DiPucchio, therefore, was not a lawyer for Callidus and, in my view, his participation cannot establish a solicitor and client relationship with Callidus such that the Dalton Report would have been considered to be privileged.[50]

34. Justice McEwen's articulation of the law is both beyond reproach and entirely consistent with the rulings of the Supreme Court, of the Court of Appeal for Ontario and of this Court, which he specifically cited in the passage reproduced above. Most fundamentally, as recognized by Justice McEwen, a document that was principally drafted or compiled for one purpose (*e.g.*, to provide Board Members with a guide to the state of the business) does not become privileged merely because that same document was also shared with a lawyer and was used to provide legal advice to a client.[51] In support of this proposition, Justice McEwen cited several key paragraphs from the ruling of Justice Leach in *Nova Chemicals,* including the following clear and succinct statement of principle: "Documents prepared for purposes other than the seeking of legal advice will not attract solicitor-client privilege, even when supplied or copied to a lawyer."[52]

35. Many other cases have made this same, uncontroversial point. For example, in the recent

[50] Decision, at para. 21, Catalyst MR, Vol. 1, Tab 3, MR-32 [hyperlinks added].

[51] Decision, at para. 21, Catalyst MR, Vol. 1, Tab 3, MR-32.

[52] *Nova Chemicals (Canada) Ltd. v. Ceda-Reactor Ltd.*, 2014 ONSC 3995 at para. 34 [*Nova Chemicals*].

ruling in *R. v. Gong*, Justice Copeland accurately observed that: "The only information that is privileged is information that is *prepared primarily to assist the law firm in giving legal advice*, or contains legal advice from the law firm, or contains questions the law firm asked to get legal advice, or questions posed to the law firm, either by [the client] or the [third party consultant]…".[53] As further explained by Justice Copeland: "The fact that…legal advice was being provided, and that in giving it Gowling was working with PWC and relying on documents gathered and prepared by PWC, does not cloak all of the underlying financial documentation and analysis by PWC with privilege."[54]

36. There is no room for legitimate debate in respect of this issue. The Dalton Report is not and cannot be privileged because it was clearly "prepared for purposes *other* than the seeking of legal advice"; it was *not* "prepared *primarily* to assist [counsel] in giving legal advice"; and it was "developed for *other* purposes," even though "it was *also* forwarded to counsel as part of the information for counsel to consider in the formulation of legal advice."[55]

37. Left with little else to rely on, the Catalyst Parties direct this Court to a self-serving disclaimer at the end of the Dalton Report:

> "The information contained in the document is intended for the Board of Directors of Callidus Capital and their respective Counsel. Circulation or reproduction of this document outside of Callidus Capital Corporation or its Affiliates is not permitted. The information contained in the this [sic] document is proprietary and confidential"[56]

38. The above language does not support the Catalyst Parties' characterization of the purpose of the Dalton Report. On the contrary, its plain language confirms that the Report was intended to

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53 *R. v. Gong*, 2019 ONSC 5899 at para. 53 [emphasis added], *quashed*, 2020 ONCA 587, *leave ref'd* [2020] S.C.C.A. No. 24 [*R v. Gong*].

54 *R. v. Gong*, at para. 55 [emphasis added].

55 *Soprema Inc. v. Wolrige Mahon LLP*, [2016] B.C.J. No. 1359 (S.C.) at paras. 4 & 12 [emphasis added], and para. 14; Decision, at para. 21, Catalyst MR, Vol. 1, Tab 3, MR-32.

56 Factum of the Catalyst Parties dated February 24, 2021 ("**Catalyst Factum**"), at para. 47.

be received and acted upon, primarily, by "the Board of Directors of Callidus Capital" and, in that context, would also be reviewed by "their respective Counsel." That is precisely the argument made by West Face and accepted by Justice McEwen in rejecting the Catalyst Parties' assertion of privilege.

39. The Catalyst Parties attempt to analogize the Dalton Report to an "investigation conducted by counsel on behalf of a client in order to gather the facts necessary to render legal advice," where that investigation included "communications between legal counsel and third party consulting experts and between clients and such experts".[57] Whatever mandate Mr. DiPucchio had for Catalyst, Mr. Dalton was retained by the Board of Callidus to provide business advice.[58] It is misleading to suggest that Mr. DiPucchio was undertaking an "investigation" or that the Dalton Report was a mere "communication" between he and Mr. Dalton in the course of that investigation. Moreover, the ruling of the British Columbia Court of Appeal cited by the Catalyst Parties in support of this proposition in fact rejects the very argument that the Catalyst Parties advance. As explained by that Court: "Having concluded that the College's lawyer was engaged in rendering legal advice when she obtained the experts' opinions, the next question is whether those communications fall within the scope of the privilege. That is, did the communications take place within the relationship between the lawyer and her client, the College? ***In my view, they did not***"; and "[T]he experts ***did not*** perform a function on behalf of the client which was integral to the relationship between the College and its lawyer….While the experts' opinions were relevant, and even essential, to the legal problem confronting the College…[t]heir services were ***incidental*** to

57 Catalyst Factum, at para. 31.

58 Decision, at para. 21, Catalyst MR, Vol. 1, Tab 3, MR-32.

the seeking and obtaining of legal advice."[59]

40. Finally, the Catalyst Parties liken the drafting of the Dalton Report to the "assembling [of] information provided by the client" by an expert "consultant" who "provides or explains that information to the solicitor."[60] As is clear from the passage in the Court of Appeal's *Chrusz* ruling relied upon by the Catalyst Parties, this principle applies when the third party consultant is instructed by his client to assemble the relevant information for the specific purpose of meeting with and instructing the client's lawyer.[61] That is clearly not the case with the Dalton Report. As found by Justice McEwen, that Report was prepared specifically to assist Callidus's Board in its commercial decision-making and was only incidentally provided to Mr. DiPucchio to assist him in providing legal advice.[62]

ii. Issue #2: The Catalyst Parties Failed to Meet the Burden of Demonstrating Privilege

41. In their Motion for leave to appeal, the Catalyst Parties attempt to manufacture controversy by alleging that Justice McEwen imposed an "impossible onus" on them in considering their privilege claims over the Guy Documents. They Catalyst Parties, who did bear the onus of establishing privilege, allege that His Honour required that they "provide so much information that it would constitute a waiver of the very privilege that is claimed."[63] This allegation is both unmeritorious and unfair to Justice McEwen. It is clearly not a serious issue for debate.

42. The Catalyst Parties never specify what information (allegedly demanded by Justice McEwen) would have led to a waiver of privilege had it been disclosed. Nor do they identify any

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59 *College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665 at paras. 43 & 52 [emphasis added].

60 Catalyst Factum, at paras. 29(a) and 33.

61 *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 (C.A.) at para. 111 [*Chrusz*].

62 Decision, at para. 22, Catalyst MR, Vol. 1, Tab 3, MR-33.

63 Catalyst Factum, at para. 29(b); *Chrusz*, at para. 151; and *Pritchard v. Ontario*, 2004 SCC 31 at para. 15 [*Pritchard*].

statement in the Decision itself that supports this allegation.[64] The reality is that neither West Face (during argument) nor Justice McEwen (in the Decision) suggested that the Catalyst Parties were required to adduce evidence that would destroy any privilege they claimed to enjoy. On the contrary, it was the Catalyst Parties themselves who, on their own initiative, confidentially provided copies of the Guy Documents to Justice McEwen in support of their privilege claims, including documents not requested by West Face.[65] The fact that they still failed to substantiate those claims speaks to the weakness of the claims, not an unfair onus.[66]

43. Further, contrary to the implication of the Catalyst Parties in their Factum, the Decision never faulted them for describing documents on a grouped, rather than individual, basis. What Justice McEwen actually found was that the evidence adduced by the Catalyst Parties to establish privilege was "vague and unparticularized", "generalized" "largely unsubstantiated", and most importantly: "not supported by the contents of the [Guy Documents] themselves".[67]

(a) Burden of Proof to Establish Litigation Privilege

44. The principles of law employed by Justice McEwen in rejecting the Catalyst Parties' claim of litigation privilege over the Guy Documents are well-established and stable. Justice McEwen applied these principles in the course of a thorough review of the evidence before him. A party asserting the existence of this privilege bears the onus of establishing for each document that: (i) litigation was contemplated at the time the document was created; and (ii) that the document was

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64 See the Catalyst Factum, at paras. 29(b) & 52-59.

65 Decision, at para. 10, Catalyst MR, Vol. 1, Tab 3, MR-30.

66 To be clear, no Party contends that providing these documents to Justice McEwen on a confidential basis constituted a waiver of privilege (to the extent privilege ever existed over the Guy Documents).

67 Decision, at paras. 36, 38, Catalyst MR, Vol. 1, Tab 3, MR-34-MR-35.

created for the dominant purpose of preparing for litigation.[68]

45. In establishing litigation privilege, it is not sufficient to rely on bald and unsubstantiated assertions, or on vague and overly broad characterizations of the documents in question. What is required is a solid and compelling evidentiary basis that is sufficient to establish – on a balance of probabilities – the existence of both actual or anticipated litigation, and the requisite dominant purpose motivating the creation of each relevant document.[69]

46. This is what Justice McEwen required, and what Catalyst failed to provide. It is not an "impossible" onus, yet the Catalyst Parties still failed to meet it, including because many of the documents were created by individuals other than Catalyst Parties, including the pseudonymous Vincent Hanna, but the Catalyst Parties adduced no evidence that could "possibly" speak to the genesis of those documents in order to establish their dominant purpose.[70]

(b) Burden of Proof to Establish Solicitor-Client Privilege

47. Once again, the legal principles applied by Justice McEwen in assessing the Catalyst Parties' claims of solicitor-client privilege over the Guy Documents are beyond dispute. A party asserting the existence of this privilege bears the onus of establishing, generally on a document-by-document basis, that each document relates to communications: (i) between solicitor and client; (ii) that involve the seeking or giving of legal advice; and (iii) that passed in strict confidence.[71]

48. The governing authorities again make clear that a party in the position of the Catalyst

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68 *Chrusz*, at para. 151; *R. v. Gong,* at paras. 12 & 38; *Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256 at paras. 26, 27 & 30-32 [*Intact Insurance*]; *Nova Chemicals*, at para. 35; and *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, 2015 ONSC 4714 at paras. 73, 74, 80-82, 98, 99 & 101-103 [*Sky Solar*].

69 *Chrusz,* at para. 95; *Sky Solar,* at paras. 73-76, 82, 98, 99 & 101-103; *Fresco v. C.I.B.C.*, 2019 ONSC 3309 at para. 31 [*Fresco*]; *Intact Insurance,* at paras. 26, 27 & 30-32; *Nova Chemicals,* 2014 ONSC 3995 at paras. 35-37.

70 Decision, at para. 38, Catalyst MR, Vol. 1, Tab 3, MR-35.

71 *Pritchard,* at para. 15; *R. v. Gong*, at paras. 12, 38 & 78; *Intact Insurance,* at paras. 14 & 15; *Nova Chemicals,* at para. 34 & 37; *Sky Solar,* at paras. 73, 74, 77 & 78; and *St. Elizabeth Society v. Hamilton-Wentworth*, [2004] O.J. No. 1428 (S.C.J.) at para. 5 [*St. Elizabeth Society*].

Parties must offer much more than broad, vague or unsubstantiated assertions that the Guy Documents were linked in some manner to the giving of legal advice. In order to establish its claims of solicitor-client privilege, it was incumbent on the Catalyst Parties to proffer sufficient compelling evidence to establish – again, on a balance of probabilities – that "the communication [arose] out of an occasion in which the client is seeking legal advice with the intention that said advice remain confidential."[72]

49. Justice McEwen rightly concluded that the Catalyst Parties fell far short of satisfying this evidentiary burden. Their evidence entirely failed to establish that each of the Guy Documents came into existence in a context that was clearly and closely connected to the seeking or giving of actual legal advice.

iii. Issue #3: The Catalyst Parties Failed to Meet Their Burden to Demonstrate a Common Interest Privilege in Respect of the Guy Documents

50. In paragraphs 31, 44 to 45 of his Decision, Justice McEwen held that even if the Guy Documents had at some point been subject to some form of privilege, the Catalyst Parties had in any event clearly waived any such privilege over them by producing and relying (extensively) on the Vincent Hanna Email in support of its positions in the pending Anti-SLAPP Motions.[73] Justice McEwen held that Catalyst's "selective disclosure" in this regard was "manifestly unfair" in the circumstances, and "[ran] counter to the existing case law".[74] These statements were entirely justified by the facts and the law.[75]

51. Remarkably, the Catalyst Parties now assert on this Motion that Justice McEwen "erred in

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[72] *St. Elizabeth Society,* at para. 5. See more generally: *Pritchard,* at para. 16; *Chrusz*, at para. 95; *Intact Insurance,* at paras. 14, 15 & 20-23; *Nova Chemicals,* at para. 34 & 37; *Fresco,* at para. 28; and *Sky Solar,* at paras. 73-78.

[73] Decision, at paras. 44-45, Catalyst MR, Vol. 1, Tab 3, MR-35-MR-36.

[74] Decision, at para. 45, Catalyst MR, Vol. 1, Tab 3, MR-36.

[75] See, for example, *Ranger v. Penterman,* [2011] O.J. No. 2414 (C.A.) at para. 16 [*Ranger*].

principle", by purportedly "failing to consider" whether any of the non-Catalyst parties to the communications in the Guy Documents had "also" waived privilege over them. The Catalyst Parties seem to imply that such evidence should have been adduced by West Face.[76]

52. This argument lacks an air of reality and cannot justify granting leave to appeal, for a host of reasons. As a starting point, the entire premise of this argument necessarily requires the Catalyst Parties to have established: (i) some form of substantive privilege over the Guy Documents (whether litigation privilege or solicitor-client privilege); *and* (ii) a "common interest" with the Guy Parties. Justice McEwen held that there is no sustainable claim of solicitor-client, litigation, or common interest privilege over the Guy Documents and he clearly notes that his consideration of the concept of waiver is relevant only if he had erred in this finding.[77]

53. The Catalyst Parties have not raised any significant doubt as to the correctness of those conclusions. The issue of solicitor-client and litigation privilege was addressed above. Specifically with respect to a common interest, Justice McEwen found that "there is no evidence in the Guy Documents that the parties anticipated litigation against a common adversary, such as West Face or Dow Jones".[78] In short, this issue cannot call into doubt the correctness of Justice McEwen's Decision, which remains unimpeachable given his findings that no relevant privilege existed.

54. In any event, it cannot have been an "error in principle" for Justice McEwen to have "failed" to consider whether the Guy Parties had "also" waived the purported privilege over the Guy Documents where Catalyst never explicitly raised this issue on the motion below, in circumstances where there was no evidence that any individuals other than the Catalyst Parties had

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[76] Catalyst Factum, at para. 64.

[77] Decision, at para. 44, Catalyst MR, Vol. 1, Tab 3, MR-35-MR-36.

[78] Decision, at para. 43, Catalyst MR, Vol. 1, Tab 3, MR-35.

ever asserted privilege over the Guy Documents to begin with.[79] Indeed, the evidence on the Motion below (which was adduced by West Face) was that Mr. Guy denied having authored the Vincent Hanna emails.[80] It cannot have been an error for Justice McEwen to have "failed" to consider whether he or others "intended" to waive privilege or not, when there was no evidence that these individuals had ever intended or asserted the existence of a privilege capable of being waived (and indeed in the face of evidence that a common interest could not exist, such as the inclusion of Marc Cohodes and Adam Spears in certain of the correspondence).[81]

55. Finally, while unclear from its Factum, the Catalyst Parties also appear to impugn Justice McEwen's application of the principles concerning the law of waiver of privilege. While the Catalyst Parties recognize that privileged documents must be disclosed where principles of fairness and consistency require, they incorrectly assert that these principles "typically only mandate a waiver of privilege where a party has injected its reliance on its state of mind regarding legal advice into the heart of the substantive matter to be determined at trial".[82] First of all, as a factual matter, the Catalyst Parties did "inject their reliance in their state of mind regarding legal advice" – as described above, Mr. Riley repeatedly relied on the Vincent Hanna Email to justify (i) commencing the Wolfpack Action, and (ii) Catalyst writing a defamatory letter to its investors repeating the allegations in the Vincent Hanna Email.[83]

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[79] As referenced above, the Catalyst Parties' Factum at paragraph 64 appears to criticize West Face for not presenting direct evidence from the Guy Parties – in circumstances where it is the Catalyst Parties' position that the Guy Parties are adverse to West Face and have a common interest with the Catalyst Parties – and where the original onus of establishing privilege lies with Catalyst, and not with West Face.

[80] See Danny Guy Correspondence, Catalyst MR, Vol. 5, Tabs 4(I)-2-53 & 4(I)-2-54; Decision, at para. 32, Catalyst MR, Vol. 1, Tab 3, MR-34.

[81] Decision, at paras. 32, 35, 42 &43, Catalyst MR, Vol. 1, Tab 3, MR-35-MR-35.

[82] Catalyst Factum, at para. 66.

[83] See: (i) the Excerpted Affidavit of James Riley dated December 5, 2019, at paras. 108-109, Catalyst MR, Vol. 4, Tab 4(I)-2-48, MR-1080-1081; (ii) Excerpted Affidavit of James Riley dated May 29, 2020, at paras. 101-105, Catalyst MR, Vol. 4, Tab 4(I)-2-49, MR-1088-MR-1089; and (iii) the Excerpted Affidavit of James Riley dated August 20, 2020, at paras. 140-146, Catalyst MR, Vol. 4, Tab 4(I)-2-50, MR-1094-MR-1096.

56. In any event, the Catalyst Parties have not accurately described the applicable law. They have cited a 2011 decision of the Alberta Court of Queen's Bench in *Angus Partnership v. Salvation Army (Canada)*.[84] While that case related to whether a party had waived privileged by putting its state of mind as informed by legal advice in issue, it does not stand for the proposition that those are the only situations that warrant a waiver of privilege.

57. On the contrary, as set out by the Ontario Court of Appeal in *Ranger v. Penterman*, a litigant also waives privilege in the more general situation where they selectively disclose and rely on privileged documents in respect of a substantive issue, and where it would be unfair to maintain privilege over other documents pertaining to the same subject matter.[85] Justice McEwen expressly cited *Ranger v. Penterman* when he ruled that the Catalyst Parties' withholding the remaining Guy Documents would be "manifestly unfair".[86] Again, it should be reiterated that Justice McEwen reviewed the very documents over which Catalyst is claiming privilege, and he is the judge who is both case managing and who will hear and determine the pending Anti-SLAPP Motions in which the Catalyst Parties have placed so heavy a reliance on the initial Vincent Hanna Email. His Honour was perfectly positioned to assess whether the Catalyst Parties' selective disclosure was "fair" in the circumstances. His conclusion on this point is unassailable.

C. The Proposed Appeal Raises No Issue of General Importance

58. As set out above, the second requirement for leave to appeal under Rule 62.02(4)(b) is that the proposed appeal concerns a matter of "such importance" to merit an appeal court's attention to an interlocutory matter. 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

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84 *Angus Partnership v. Salvation Army (Canada)*, [2011] AJ No 915, Book of Authorities of the Catalyst Parties, Tab 2.

85 *Ranger,* at para. 16.

86 Decision, at para. 45, Catalyst MR, Vol. 1, Tab 3, MR-36.

importance of the matter transcends the interests of the particular parties.[87] The Catalyst Parties have asserted essentially the same arguments in respect of this portion of the test for leave to appeal to the Divisional Court for both the McEwen Decision and the Boswell Ruling. Accordingly, paragraphs 59-65 of this Factum closely follow and reiterate West Face's arguments made on this issue in response to the Catalyst Parties' Motion for leave to appeal in respect of the Boswell Ruling.

59. The Catalyst Parties make almost no effort to address this factor in respect of the above three issues. As in their Motion for leave to appeal from the Boswell Ruling, they rely principally on an unreported, 22-year-old decision of Justice Hartt in *Bank Leu AG v. Gaming Lottery Corporation et. al.* to assert that virtually any interlocutory decision relating to privilege issues (even one as mundane as an interim "refusals Motion" such as the Motion below) meets this test.[88] The Catalyst Parties make this submission in spite of the fact that the jurisprudence of this Honourable Court has repeatedly recognized (for at least a decade) that a highly fact-specific decision such as that of Justice McEwen cannot and does not satisfy the requirement of general importance simply because it involved issues of privilege.[89]

60. In the 2010 decision of *Pytka v. Pytka Estate*, the Divisional Court refused to grant leave to appeal from a motion judge's decision which had ruled that the applicant had waived privilege over advice that she had received from her former law firm. In considering the second part of the test under Rule 62.02(4)(b), the Divisional Court characterized the underlying Motion for disclosure of (formerly) privileged materials as a "common procedural motion based on well-recognized legal principles", and concluded that the case did not meet the level of general

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[87] *Silvercorp*, at para. 12.

[88] See Catalyst Factum, at para. 28.

[89] *Economical Insurance,* at para. 14.

importance necessary for the granting of leave.[90]

61. In the 2015 decision of *Beckerman v. Synthion Energy Inc.*,[91] the respondent Julian DeVante sought to stay an order of Justice Newbould pending the disposition of his Motion for leave to appeal (and potential appeal) from that order. Justice Newbould's order had required the Norton Rose law firm to produce a number of files to the applicants, which DeVante had argued before Newbould J. were protected by solicitor-client privilege. In considering the first part of the well-known *RJR* test regarding whether or not to grant the stay, Justice Pattillo held that DeVante had failed to establish a "serious issue" with respect to either branch of the test under Rule 62.02(4). Justice Pattillo viewed the underlying decision as one that simply "deal[t] with production issues in the course of an action" and thus did not raise issues "of such importance that leave should be granted".[92]

62. Finally, in last year's decision of *Callidus v. Opes Resources Inc.*,[93] Justice Myers denied a stay of an order obtained by the plaintiff Callidus (a Plaintiff/Defendant by Counterclaim in these proceedings and one of the moving parties on this Motion) compelling production of documents over a claim of privilege by the defendant Darryl Levitt (one of the Defendants in these proceedings), regarding whether a disclosure Motion raised sufficiently important concerns to merit leave to appeal. Mr. Levitt sought an order from Justice Myers staying an order of Justice Chiapetta pending an intended Motion by Mr. Levitt for leave to appeal Justice Chiapetta's order. Justice Chiapetta's order had expressly required Mr. Levitt to produce documents to Callidus

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90 *Pytka v. Pytka Estate*, 2010 ONSC 2549, at paras. 12-17.

91 *Beckerman v. Synthion Energy Inc.*, 2015 ONSC 3384 (Commercial List) [*Beckerman*].

92 *Beckerman*, at para. 21.

93 *Callidus v. Opes Resources Inc.*, 2019 ONSC 1288 (S.C.J.) [*Callidus*]. Callidus brought this Action to enforce a guarantee allegedly given by Mr. Levitt and others. Certain facts in *Callidus* overlap with the case at bar but it is a separate proceeding.

"regardless of any claim for privilege" he might have had. While Justice Myers was willing to accept that the harm faced by Mr. Levitt from the production of privileged material qualified as "irreparable harm",[94] His Honour nevertheless refused to grant the stay for a number of reasons, including because he agreed with the submission made by Callidus's counsel that "while privilege is important generally, a single decision of whether privilege exists on the particular facts of a case is routine".[95]

63. Having made the very submission to our Courts less than a year ago that an interlocutory decision ordering the production of purportedly privileged (and in Mr. Levitt's case, actually privileged) documents is insufficiently important to merit leave to appeal, and having achieved success at least in part on the basis of that submission, it hardly lies in the mouth of the Catalyst Parties to now assert that Justice McEwen's Decision in respect of the Guy Documents and Dalton Report meets the requisite degree of importance.

64. In crafting the Decision, Justice McEwen did not break new ground. He simply applied well-established principles of the law of solicitor-client and litigation privilege to the facts and circumstances underlying the Catalyst Parties' privilege claims. They have engaged in a years-long attempt to conceal swaths of relevant evidence using the veil of privilege in the WolfPack Action and Counterclaim, which each seek hundreds of millions of dollars in relief. The Decision is of course important to the parties in this high-stakes commercial litigation, but the proposed appeal involves no novel issue of law or broad importance that merit the attention of this Court.

65. For these reasons, the Catalyst Parties have failed to satisfy the second element of the test under Rule 62.02(4)(b), and this Motion fails for that reason alone.

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94 *Callidus*, at para. 13.

95 *Callidus*, at para. 20.

PART III - NO ADDITIONAL ISSUES AND ORDER REQUESTED

66. West Face has no additional issues to raise on this Motion. It respectfully requests an Order denying the Catalyst Parties leave to appeal from the Decision of Justice McEwen and granting West Face $5,000 in respect of its costs of this Motion (inclusive of disbursements and HST).

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of March, 2021.

Davies Ward Phillips & Vineberg LLP
Lawyers for the Responding Parties West Face Capital Inc. and Gregory Boland

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Beckerman v. Synthion Energy Inc.*, 2015 ONSC 3384 (Commercial List)
2. *Callidus v. Opes Resources Inc.*, 2019 ONSC 1288 (S.C.J.)
3. *College of Physicians of British Columbia v British Columbia (Information and Privacy Commissioner)*, 2002 BCCA 665
4. *Economical Insurance Co. v. Fairview Assessment Centre Inc.*, [2011] O.J. No. 5863 (Div. Ct.)
5. *Fernandes v. Marketforce*, 2012 ONSC 3692 (Div. Ct.)
6. *Fresco v. Canadian Imperial Bank of Commerce*, 2019 ONSC 3309
7. *General Accident Assurance Co. v. Chrusz*, [1999] O.J. No. 3291 (C.A.)
8. *Hunt v. Carr*, [2015] O.J. No. 168 (S.C.J.)
9. *Intact Insurance Co. v. 1367229 Ontario Inc.*, 2012 ONSC 5256
10. *Mask v. Silvercorp*, [2014] O.J. No. 3708 (Div. Ct.)
11. *Nova Chemicals (Canada) Ltd. v. Ceda-Reactor Ltd.*, 2014 ONSC 3995
12. *Pritchard v. Ontario*, 2004 SCC 31
13. *Pytka v. Pytka Estate*, 2010 ONSC 2549 (Div. Ct.)
14. *R. v. Gong*, 2019 ONSC 5899 at paras. 34, 41, 46-50, *quashed*, 2020 ONCA 587, *leave ref'd* [2020] S.C.C.A. No. 24
15. *Ranger v. Penterman*, [2011] O.J. No. 2414 (C.A.)
16. *Sky Solar (Canada) Ltd. v. Economical Mutual Insurance Co.*, 2015 ONSC 4714
17. *Soprema Inc. v. Wolrige Mahon LLP*, [2016] B.C.J. No. 1359 (S.C.)
18. *St. Elizabeth Society v. Hamilton-Wentworth*, [2004] O.J. No. 1428 (S.C.J.)

SCHEDULE "B"
RELEVANT STATUTE

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

RULE 62 APPEALS FROM INTERLOCUTORY ORDERS AND OTHER APPEALS
PROCEDURE ON APPEAL
Application of Rule

62.02 Motion for Leave to Appeal

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).

***COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43**

PREVENTION OF PROCEEDINGS THAT LIMIT FREEDOM OF EXPRESSION ON MATTERS OF PUBLIC INTEREST (GAG PROCEEDINGS)

Dismissal of proceeding that limits debate
Purposes
137.1 (1) The purposes of this section and sections 137.2 to 137.5 are,

(a) to encourage individuals to express themselves on matters of public interest;

(b) to promote broad participation in debates on matters of public interest;

(c) to discourage the use of litigation as a means of unduly limiting expression on matters of public interest; and

(d) to reduce the risk that participation by the public in debates on matters of public interest will be hampered by fear of legal action. 2015, c. 23, s. 3.

Definition, "expression"

(2) In this section,

"expression" means any communication, regardless of whether it is made verbally or non-verbally, whether it is made publicly or privately, and whether or not it is directed at a person or entity. 2015, c. 23, s. 3.

Order to dismiss

(3) On motion by a person against whom a proceeding is brought, a judge shall, subject to subsection (4), dismiss the proceeding against the person if the person satisfies the judge that the proceeding arises from an expression made by the person that relates to a matter of public interest. 2015, c. 23, s. 3.

THE CATALYST CAPITAL GROUP INC. et al
Plaintiffs / Moving Parties

-and-

WEST FACE CAPITAL INC. et al
Defendants / Responding Parties

-and-

CANACCORD GENUITY CORP.
Third Party

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

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

FACTUM OF THE RESPONDING PARTIES, WEST FACE CAPITAL INC. AND GREGORY BOLAND
(RE: CATALYST PARTIES' MOTION FOR LEAVE TO APPEAL THE RULING OF JUSTICE MCEWEN DATED FEBRUARY 12, 2021)

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