

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL
CORPORATION

Plaintiffs

and

DOW JONES AND COMPANY, ROB COPELAND, JACQUIE MCNISH and
JEFFREY MCFARLANE

Defendants

THE CATALYST CAPITAL GROUP INC. and CALLIDUS CAPITAL CORPORATION

Plaintiffs

and

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

Defendants
(Respondents)

**PLAINTIFFS' FACTUM
(CONFIDENTIAL SOURCE REDACTIONS MOTION)**

Date: December 10, 2020

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PART I – OVERVIEW

1. The *Wall Street Journal* accused the Plaintiffs of fraud in online and print articles published to a global audience of over a million readers. This motion is about whether a journalist-source privilege applies to redactions made by the Dow Jones Defendants¹ to 201 pages of productions to protect the identity of an unidentified number of sources.

2. At common law, the appropriate framework for considering whether a journalist-source privilege exists is the four-part *Wigmore* criteria for case by case privilege. The evidence is presumptively compellable and admissible until the journalist has satisfied the *Wigmore* test.

3. The Plaintiffs have sued Dow Jones and Company, Rob Copeland and Jacquie McNish for libel.² *The Wall Street Journal's* online article was headlined “Canadian Private Equity Giant Catalyst Accused of Fraud by Whistleblowers”.³ Placed immediately below the headline was a photograph of a Toronto Police car. The lead paragraph stated: “At least four individuals have filed whistleblower complaints with Canadian securities regulators alleging fraud” against the Plaintiffs. The Plaintiffs know the identities of these four whistleblowers.

4. The online article was published at 3:32 PM on August 9, 2017 causing Callidus Capital’s share price to nose-dive 21.4% in 28 minutes. The next day, the Front Page of the print edition of *The Wall Street Journal* published a graphic demonstrating Callidus Capital’s share price plummeting under the heading: “Stock Swoons”. The fraud article was published on the front page of the Business and Finance section of the print edition headlined “Top Buyout Firm Scrutinized on Loans”.⁴

¹ Dow Jones and Company, Rob Copeland and Jacquie McNish.

² CV-18-593156-00CL.

³ Exhibit A to the Affidavit of Tom Collins, sworn October 9, 2020, at page 27 of the Plaintiffs’ Motion Record, Volume I.

⁴ Exhibit C to the Affidavit of Tom Collins, sworn October 9, 2020, at page 36 of the Plaintiffs’ Motion Record, Volume I.

5. The Plaintiffs have also sued Rob Copeland individually in a conspiracy action, in which it is claimed that the Defendants conspired through a short and distort campaign to harm the Plaintiffs by publishing the *Wall Street Journal* fraud article to cause a rapid decline in Callidus Capital's share price.⁵

6. The Dow Jones Defendants initially produced 316 pages (82 documents) that included redactions that were marked "confidential source privilege". The Plaintiffs' Motion Record provided evidence that revealed the identity of eight alleged confidential sources.⁶ After this motion was served, the Dow Jones Defendants disclosed 142 of the 316 redacted pages. The Dow Jones Defendants also produced an additional 105 documents, (15 documents contained redacted pages). There are 201 confidential source redacted pages in issue in this motion found in Volume VII of the Supplementary Motion Record.

7. No journalist-source privilege arises until the Dow Jones Defendants have met all four criteria of the *Wigmore* test. The privilege protects the identity of the source. The privilege does not protect information that does not identify the source and does not protect information that the journalist provided to the source.

8. The public interest in protecting the identity of the confidential sources does not outweigh the public interest in getting at the truth and the correct disposal of this litigation.

9. The onus is on the Dow Jones Defendants to prove all four elements of the *Wigmore* test for each of their alleged confidential sources and the redactions in issue in this motion. Their evidentiary record fails to do so.

⁵ CV-17-587463-00CL; collectively "the Dow Jones Defendants".

⁶ Exhibit A to the Affidavit of Tom Collins, sworn October 9, 2020, at page 26 of the Plaintiffs' Motion Record, Volume I; Exhibit B to the Affidavit of Tom Collins, sworn October 9, 2020, at page 30 of the Plaintiffs' Motion Record, Volume I; Exhibit D to the Affidavit of Tom Collins, sworn October 9, 2020, at page 37 of the Plaintiffs' Motion Record, Volume I.

PART II – FACTS

10. The Plaintiffs have commenced a libel action against Dow Jones and Company, Jacquie McNish (“**McNish**”), Rob Copeland (“**Copeland**”) and Jeffrey McFarlane (“**McFarlane**”) regarding *Wall Street Journal* online and print articles that accused the Plaintiffs of fraud (the “**WSJ Fraud Articles**”).⁷ The Plaintiffs have also commenced a conspiracy action against Copeland, McFarlane, Nathan Anderson (“**Anderson**”), and others.

11. The Dow Jones Defendants have brought an anti-SLAPP motion pursuant to section 137.1 of the *Courts of Justice Act* (“**CJA**”) to have the libel action dismissed. Copeland has also brought an anti-SLAPP motion to have the conspiracy action dismissed as against him.

12. Schedule “B” to Copeland’s Affidavit of Documents sworn on January 27, 2020 did not claim confidential journalist source privilege.⁸ Schedule “B” to McNish’s Affidavit of Documents sworn on February 19, 2020 did not claim confidential journalist source privilege.⁹

13. On October 9, 2020 the Plaintiffs served a Motion Record requesting an Order that the Dow Jones Defendants disclose the information that was redacted from 316 pages (82 documents) and marked as “confidential source privilege”. After the Motion Record was served, 142 of the 316 redacted pages were disclosed to the Plaintiffs.

14. Copeland affirmed an affidavit on October 23, 2020 opposing this motion with regard to his alleged confidential sources.¹⁰ McNish did not swear an affidavit opposing this motion with regard to her alleged confidential sources.

⁷ Exhibit A to the Affidavit of Tom Collins, sworn October 9, 2020, at page 26 of the Plaintiffs’ Motion Record, Volume I; Exhibit B to the Affidavit of Tom Collins, sworn October 9, 2020, at page 30 of the Plaintiffs’ Motion Record, Volume I; Exhibit D to the Affidavit of Tom Collins, sworn October 9, 2020, at page 37 of the Plaintiffs’ Motion Record, Volume I.

⁸ Exhibit F to the Affidavit of Tom Collins, sworn October 9, 2020, at page 396 of the Plaintiffs’ Motion Record, Volume II.

⁹ Exhibit L to the Affidavit of Tom Collins, sworn October 9, 2020, at page 412 of the Plaintiffs’ Motion Record, Volume III.

¹⁰ Tab 1 of the Defendants’ Responding Motion Record.

PART III – ISSUES

15. The issues in this motion are:

(1) Whether Copeland’s hearsay evidence about McNish’s alleged confidential sources is admissible?

It is inexplicable that McNish failed to swear an affidavit regarding the relationship between her and her sources. The redactions relating to McNish’s alleged confidential sources are in dispute in this motion. Hearsay evidence about contentious matters in a motion is inadmissible.

(2) Whether the Defendants have proven the *Wigmore* test’s four elements for each alleged confidential source and the redactions in issue in this motion?

A consideration in deciding whether protecting the identity of a source outweighs the public interest in getting at the truth is the degree of public importance of the journalist’s story. Copeland’s affidavit stated that he did not include in the story the Plaintiffs’ position that there was a conspiracy that perhaps involved some of the whistleblowers and short selling securities of Callidus because: “I viewed that allegation as unproven at best. I certainly had no reason to include such allegations in the WSJ Publications.”¹¹

Yet, Copeland admitted that the allegations in the whistleblower complaints were also “unproven”.¹² To use Copeland’s words, there was certainly no reason to include the unproven whistleblowers’ fraud allegations in the *Wall Street Journal* publications.¹³ This story was tantamount to a drive-by smear and of no public importance.

The Defendants have failed to meet their onus of proving all four elements of the *Wigmore* test for each of their alleged confidential sources and the redactions in issue.

¹¹ Affidavit of Rob Copeland, affirmed August 17, 2020 at para 15.

¹² Transcript of the cross-examination of Rob Copeland on November 13, 2020, Question 101, at tab K of the Plaintiffs’ Supplemental Motion Record, Volume III, at pages 49-50.

¹³ Affidavit of Rob Copeland, affirmed August 17, 2020 at para 15.

PART IV – LAW

A. INTRODUCTION

16. At common law, the appropriate framework for considering whether a journalist-source privilege exists is the four-part *Wigmore* criteria for case-by-case privilege.¹⁴ The burden is on the Dow Jones Defendants to prove that:

- (1) the communication originated in a confidence that the identity of the informant would not be disclosed;
- (2) the confidence is essential to the relationship in which the communication arises;
- (3) the relationship is one which should be “sedulously fostered” in the public good; and,
- (4) the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.¹⁵

17. Until the media have met all *four* Wigmore criteria, no journalistic source privilege arises. There is a presumption in favour of disclosing the identity of a source unless the journalist meets the four criteria of the *Wigmore* test.¹⁶ The evidence is presumptively compellable and admissible until the journalist has satisfied the *Wigmore* test.¹⁷

18. No journalist can give a source an absolute promise of confidentiality.¹⁸

¹⁴ [Globe and Mail v Canada \(Attorney General\)](#), 2010 SCC 41 at para 26.

¹⁵ [R v National Post](#), 2010 SCC 16 at para 53; [1654776 Ontario Limited v Stewart](#), 2013 ONCA 184 at paras 3, 80.

¹⁶ [Denis v Côté](#), 2019 SCC 44, CJ Wagner at para 33.

¹⁷ [R v National Post](#), 2010 SCC 16 at para 60; [1654776 Ontario Limited v Stewart](#), 2013 ONCA 184 at para 80.

¹⁸ [R v National Post](#), 2010 SCC 16 at para 69; [1654776 Ontario Limited v Stewart](#), 2013 ONCA 184 at para 124.

B. COPELAND'S HEARSAY EVIDENCE REGARDING JACQUIE MCNISH'S ALLEGED CONFIDENTIAL SOURCES IS INADMISSABLE

19. McNish did not swear an affidavit opposing this motion to disclose her alleged confidential sources. McNish also did not assert confidential source privilege in Schedule "B" to her Affidavit of Documents sworn on February 19, 2020.

20. Copeland's affidavit contains hearsay evidence regarding McNish's alleged confidential sources.

21. Hearsay evidence is not admissible on contentious issues in a motion.¹⁹ In *Beach v Toronto Real Estate Board*, Justice Brown (as he then was) held:

Although the rules permit a party to include evidence based on information and belief in an affidavit in support of a motion, the inclusion of hearsay evidence on a key point is not proper. Direct evidence should be filed.²⁰

22. The relationship between a journalist and a source is unique to those two individuals. Why McNish failed to swear her own affidavit to support her claims for confidential source privilege is unknown and inexplicable.

23. When the Plaintiffs examined McNish pursuant to Rule 39.03, she refused to answer any questions about sourcing.²¹ The Plaintiffs are seriously prejudiced by being denied an opportunity to cross-examine McNish on her own affidavit that should have provided specific evidence about her relationship with each of her alleged confidential sources and the redacted information they provided to her.

¹⁹ [Beach v Toronto Real Estate Board](#), 2010 ONSC 30001 at para 5.

²⁰ [Beach v Toronto Real Estate Board](#), 2010 ONSC 30001 at para 5.

²¹ Transcript of the cross-examination of Jacquie McNish on November 12, 2020, at tab J of the Plaintiffs' Supplemental Motion Record, Volume II, at pages 21, 33, 50, 63, 67, 137-140, 149-151, 153-155, 162, 164, 174-176.

24. It is submitted that all redactions involving an alleged confidential source of McNish must be disclosed because: (i) Copeland's hearsay evidence regarding McNish's alleged confidential sources is inadmissible, and (ii) McNish's affidavit of documents did not assert any confidential source privilege in Schedule "B".

C. THE FOUR-ELEMENTS OF THE *WIGMORE* TEST HAVE NOT BEEN PROVEN

(a) The Communications Must Originate in a Confidence that the Identity of the Informant Will Not Be Disclosed

25. The first element of the *Wigmore* test requires that a communication originated in a confidence that the identity of the informant would not be disclosed. This is a factual question.²²

26. Numerous redactions involve communications exchanged between Copeland and McNish. This Court has no evidence that an alleged confidential source asked both McNish and Copeland for a promise of confidentiality and that they both made that promise to the source. By disclosing their sources' identities to each another, Copeland and McNish lost any alleged privilege they could assert because they disclosed their sources' identities to each other, destroying the confidentiality.

27. This Court has no evidence about how many sources Copeland claims are confidential sources – are there 1, 10, 25, or more? We do not know. This Court has no evidentiary foundation to assess which source's identity will allegedly be disclosed by a specific redaction. This Court has no evidentiary foundation to assess how Copeland and McNish evaluated the reliability and credibility of each source. For the reasons set out below, the statements in

²² [R v National Post](#), 2008 ONCA 139 at para 82, rev'd in 2010 SCC 16 but not on this point.

Copeland's affidavits about the alleged confidential sources cannot be taken at face value and should be given little weight.

(i) After the Plaintiffs' Motion Record Was Served, the Dow Jones Defendants Removed Redactions from 142 Pages

28. Copeland testified during his cross-examination that, when he swore his Affidavit of Documents on January 27, 2020, he reviewed the redacted documents to ensure that they properly related to the source of the information.²³ Copeland also testified that when he swore his affidavit of documents, he reviewed the redacted documents to ensure that the redactions were limited to matters that may tend to reveal the source's identity.²⁴

29. Yet, after this motion was served, the Dow Jones Defendants disclosed 142 of the 316 redacted pages in issue in the Plaintiffs' Motion Record, notwithstanding that their continuing disclosure obligation under Rule 30.07 required them to do so prior to this motion. Contrary to Copeland's testimony, he clearly did not ensure that the 316 redacted pages in the Plaintiffs' Motion Record were limited to matters that may tend to reveal the source's identity when he swore his Affidavit of Documents.

30. This Court cannot take at face value Copeland's blanket statements (and, in certain instances, conclusory statements) claiming confidential source privilege with regard to the 201 redacted pages in issue in this motion.

²³ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Question 28, at tab K of the Plaintiffs' Supplemental Motion Record, Volume III, at page 20.

²⁴ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Question 29, at tab K of the Plaintiffs' Supplemental Motion Record, Volume III, at page 20.

(ii) **Confidentiality Was Not Essential To Numerous Alleged Confidential Sources**

31. The Plaintiffs' Motion Record included evidence that revealed the identity of eight alleged confidential sources: McFarlane, Wesley Voorheis, Anderson, Bryan Wood, Kevin Baumann, Darryl Levitt, Bruce Livesey, and Gerald Duhamel. Examples are set out below.

(1) **Jeffrey McFarlane**

32. The Dow Jones Defendants produced several redacted emails involving McFarlane.²⁵ The Plaintiffs' Motion Record included unredacted copies of these emails revealing McFarlane's identity.²⁶ Further, McFarlane was identified as a whistleblower and was quoted in *The Wall Street Journal* article.²⁷ McFarlane was never a confidential source, which counsel for the Dow Jones Defendants advised after the Motion Record was served.²⁸

(2) **Wesley Voorheis**

33. The Dow Jones Defendants produced an email exchange between McNish and Wesley Voorheis ("**Voorheis**") that redacted Voorheis's name and email address.²⁹ Voorheis held over \$1 million in short positions in Callidus Capital's shares in August, 2017. The Plaintiffs' Motion

²⁵ Exhibit L to the Affidavit of Tom Collins, sworn October 9, 2020, at pages 446 and 448 of the Plaintiffs' Motion Record, Volume III; Exhibit M to the Affidavit of Tom Collins, sworn October 9, 2020, at pages 450 and 452 of the Plaintiffs' Motion Record, Volume III; Exhibit P to the Affidavit of Tom Collins, sworn October 9, 2020, at page 463 of the Plaintiffs' Motion Record, Volume III; Exhibit Q to the Affidavit of Tom Collins, sworn October 9, 2020, at page 465 of the Plaintiffs' Motion Record, Volume III; Exhibit R to the Affidavit of Tom Collins, sworn October 9, 2020, at page 467 of the Plaintiffs' Motion Record, Volume III; Exhibit S to the Affidavit of Tom Collins, sworn October 9, 2020, at page 469 of the Plaintiffs' Motion Record, Volume III.

²⁶ Volume IV of the Plaintiffs' Supplemental Motion Record at tab L-32; Volume IV of the Plaintiffs' Supplemental Motion Record at tab L-38.

²⁷ Exhibit A to the Affidavit of Tom Collins, sworn October 9, 2020 at pages 28-29 of the Plaintiffs' Motion Record, Volume I; Exhibit B to the Affidavit of Tom Collins, sworn October 9, 2020 at pages 33-34 of the Plaintiffs' Motion Record, Volume I; Exhibit D to the Affidavit of Tom Collins, sworn October 9, 2020 at page 39 of the Plaintiffs' Motion Record, Volume I.

²⁸ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Question 20, at tab K of the Plaintiffs' Supplemental Motion Record, Volume III, at page 13.

²⁹ Exhibit E to the Affidavit of Tom Collins, sworn October 9, 2020, at pages 70-71 of the Plaintiffs' Motion Record, Volume I.

Record included a copy of this email exchange which was produced completely unredacted by Voorheis, who did not consider himself to be a confidential source.³⁰

34. Counsel for the Dow Jones Defendants stated during the cross-examination of McNish that Voorheis waived his alleged confidential source privilege “sometime after we received your motion record” (which was October 9, 2020).³¹ This position is untenable in light of the fact that Voorheis produced his emails with McNish in December 2019 with no redactions and no claim that he was a confidential source.

(3) Nathan Anderson

35. The Dow Jones Defendants redacted Anderson’s name from a document notwithstanding that they produced numerous text messages exchanged between Copeland and Anderson.³² After service of the Plaintiffs’ Motion Record, counsel for the Dow Jones Defendants advised that at the time of exchanging affidavits of documents in December, 2017, they did not treat Anderson as a confidential source.

(4) Bryan Wood

36. Bryan Wood (“**Wood**”) is Nathan Anderson’s U.S. attorney. Wood filed Anderson’s Ontario Securities Commission Whistleblower Submission Form. The Dow Jones Defendants redacted Wood’s name and his law firm’s name and address from the Form. Anderson

³⁰ Volume IV of the Plaintiffs’ Supplemental Motion Record at tab L-1; Volume IV of the Plaintiffs’ Supplemental Motion Record at tab L-2.

³¹ Transcript of the cross-examination of Jacquie McNish on November 12, 2020, Question 146, at tab J of the Plaintiffs’ Supplemental Motion Record, Volume II, at pages 41-42.

³² Exhibit PP to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000876-0001), at page 762 of the Plaintiffs’ Motion Record, Volume IV; Volume V of the Plaintiffs’ Supplemental Motion Record at tab L-20 (DOW001025-0001) at page 210; exhibit GG to the Affidavit of Tom Collins, sworn October 9, 2020, at pages 615-651 of the Plaintiffs’ Motion Record, Volume IV.

produced that Form unredacted.³³ Wood was not a confidential source. Only after the service of this motion did the Dow Jones Defendants remove these redactions.³⁴

(5) Kevin Baumann

37. The Dow Jones Defendants redacted a document with the filename “Accounts Payable Comparison 31 March to Receivers Report.xlsx”.³⁵ Anderson produced that document, unredacted. It is an attachment to an email that Kevin Baumann (“Baumann”) sent Anderson on March 18, 2017.³⁶ Baumann was the alleged confidential source. After service of this motion, the Dow Jones Defendants removed the Baumann redactions.³⁷

(6) Darryl Levitt

38. The Dow Jones Defendants redacted an email that disclosed it was sent by Darryl Levitt to Copeland on July 27, 2017. The email was from “Darryl Levitt”,³⁸ the alleged confidential source. After service of this motion, the Dow Jones Defendants removed the Levitt redactions.³⁹

(7) Bruce Livesey

39. The Dow Jones Defendants initially produced 6 pages that were entirely redacted.⁴⁰ Subsequently, the 6 pages were produced partially redacted that included the top line of each page.⁴¹ Livesey produced these 6 pages without redactions that included the information

³³ Exhibit U to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000867-0001; AND0002006; AND0001928), at pages 477-514 of the Plaintiffs’ Motion Record, Volume III.

³⁴ Volume V of the Plaintiffs’ Supplemental Motion Record at tab M-18 (DOW001023-0001).

³⁵ Exhibit X to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000799-0001), at pages 529-549 of the Plaintiffs’ Motion Record, Volume III.

³⁶ Exhibit X to the Affidavit of Tom Collins, sworn October 9, 2020 (AND0001630; AND0001631), at pages 551 and 554-573 of the Plaintiffs’ Motion Record, Volume III.

³⁷ Volume V of the Plaintiffs’ Supplemental Motion Record at tab 13 (DOW001001-0001); Volume IV of the Plaintiffs’ Supplemental Motion Record at tab 16 (DOW000999-0001).

³⁸ Exhibit CC to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000835-0001), at page 602 of the Plaintiffs’ Motion Record, Volume IV.

³⁹ Volume IV of the Plaintiffs’ Supplemental Motion Record at Tab L-24 (DOW001006-0001).

⁴⁰ Exhibit E to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000886-0001), at page 385 of the Plaintiffs’ Motion Record, Volume II; Volume I of the Plaintiffs’ Supplemental Motion Record at tab I, page 35 (DOW000886-0001).

⁴¹ Volume I of the Plaintiffs’ Supplemental Motion Record at tab I, page 42 (DOW001030-0001).

included in the top line of the partially redacted 6 pages.⁴² Livesey was the author of these 6 redacted pages and is the alleged confidential source.⁴³ All redactions relating to Livesey must be disclosed.

(8) Gerald Duhamel

40. The Dow Jones Defendants redacted two emails that relate to the Defendant Gerald Duhamel (“Duhamel”). Alleged confidential sources sent both emails to Copeland on July 14, 2017:

1. An email sent at 5:15 PM with the filename “Fwd TR Bluberi Callidus.eml”;⁴⁴
2. An email sent at 6:38 PM with the filename “Fwd Extension of the Stay Period.eml” and two attachments titled “2017-05-10 Blu. 12th Monitor Reports.pdf” and “2017-05-25 Extension of Stay till sept.06.pdf”.⁴⁵

41. Duhamel revealed that he is the confidential source by producing an unredacted email he sent to Levitt on June 5, 2017 with the subject line: “Extension of the Stay Period” and the same attachments as the email from July 14, 2017 at 6:38.⁴⁶ After service of this motion, the Dow Jones Defendants removed the Duhamel redactions, revealing that Levitt had forwarded both Duhamel emails to Copeland.⁴⁷

⁴² Volume I of the Plaintiffs’ Supplemental Motion Record at tab I, page 49 (BLIV0000266).

⁴³ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Questions 112-113, at tab K of the Plaintiffs’ Supplemental Motion Record, Volume III, at pages 55-56.

⁴⁴ Exhibit E to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000739-0001), at page 145 of the Plaintiffs’ Motion Record, Volume I.

⁴⁵ Exhibit DD to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000717-0001), at page 604 of the Plaintiffs’ Motion Record, Volume IV.

⁴⁶ Exhibit DD to the Affidavit of Tom Collins, sworn October 9, 2020 (DUH000143), at page 606 of the Plaintiffs’ Motion Record, Volume IV.

⁴⁷ Volume IV of the Plaintiffs’ Supplemental Motion Record at tab 15 (DOW000998-0001); Volume IV of the Plaintiffs’ Supplemental Motion Record at tab 30 (DOW001009-0001).

(iii) Text Messages Exchanged between Copeland and Anderson

42. Initially, 19 pages of text messages between Copeland and Anderson included redactions. Today, 10 pages of these text messages are in issue in this motion.⁴⁸ This Court has no evidence of whether a redaction in the text messages involves the identity of Copeland's alleged confidential source or whether the redaction involves the identity of Anderson's alleged confidential source.

43. This Court has no evidence that Copeland's sources agreed that their identities could be disclosed to Anderson. Likewise, this Court has no evidence that Anderson's sources agreed that their identities could be disclosed to Copeland. By disclosing their sources' identities to each other, Anderson and Copeland lost any alleged privilege they could assert because they disclosed their sources' identities to each other, destroying the confidentiality.

(b) The Confidence Must Be Essential to the Relationship in which the Communication Arises

44. The second element of the *Wigmore* test is that the confidence is essential to the relationship in which the communication arises.

45. To satisfy the second element of the *Wigmore* test, the journalist must establish that the journalist-source relationship requires confidentiality to survive.⁴⁹ This is a factual question.⁵⁰

46. To establish a relationship of confidentiality, the communication must be made in exchange for an explicit promise of confidentiality.⁵¹ If the source does not insist on

⁴⁸ Volume VII of the Plaintiffs' Supplemental Motion Record at tabs O-44 (DOW000927-0001); O-45 (DOW000937-0001); O-46 (DOW000943-0001); O-47 (DOW000946-0001); O-48 (DOW000947-0001); O-49 (DOW000948-0001); O-50 (DOW000949-0001); O-51 (DOW000950-0001); O-52 (DOW000951-0001); O-53 (DOW000952-0001).

⁴⁹ [R v National Post](#), 2010 SCC 16 at para 56.

⁵⁰ [R v National Post](#), 2008 ONCA 139 at para 82, rev'd in 2010 SCC 16 but not on this point.

⁵¹ [R v National Post](#), 2010 SCC 16 at para 56.

confidentiality as a condition precedent to the disclosure, then no promise of confidentiality will be made and no privilege arises.⁵²

47. Bald statements by Copeland about an unknown number of confidential sources is an inadequate evidentiary foundation for proving the confidence was essential to the relationship in which the communication arose. We do not even know how many relationships exist regarding the 201 pages of redactions. Further, the fact that 142 of the 316 redacted pages initially in issue in this motion were disclosed after the motion was served, demonstrates that the journalist-source relationship did not require confidentiality to survive for the eight alleged confidential sources referred to above (McFarlane, Voorheis, Anderson, Wood, Baumann, Levitt, Livesey, and Duhamel).

(i) West Face Capital Sources

48. It is submitted that any redactions involving West Face Capital officials Gregory Boland (“**Boland**”) and Philip Panet (“**Panet**”) must be disclosed.

(1) Gregory Boland – CEO – West Face Capital Inc

49. McNish was asked whether she had any communications with anybody at West Face Capital, such as Gregory Boland or Phil Panet, about a family law proceeding involving Newton Glassman’s stepdaughter⁵³. McNish answered: “I am not going to talk about confidential sources.”⁵⁴ She asserted confidential source privilege.⁵⁵

⁵² [R v National Post](#), 2010 SCC 16 at para 56.

⁵³ Newton Glassman co-founded Catalyst Capital.

⁵⁴ Transcript of the cross-examination of Jacquie McNish on November 12, 2020, Question 173, at tab J of the Plaintiffs’ Supplemental Motion Record, Volume II, at page 50.

⁵⁵ Transcript of the cross-examination of Jacquie McNish on November 12, 2020, Question 176, at tab J of the Plaintiffs’ Supplemental Motion Record, Volume II, at pages 50-51.

50. Boland is not a confidential source, because paragraph 129 of his November 8, 2019 affidavit disclosed that McNish contacted him in early 2017 and asked him whether he could corroborate the existence of investigations by the Ontario Securities Commission and Toronto Police into Catalyst and/or Callidus.⁵⁶

51. Notwithstanding that Boland swore an affidavit stating that McNish spoke to him, counsel for the Dow Jones Defendants refused to allow Copeland to answer the question: “So did you, Mr. Copeland, speak to Greg Boland, the CEO of West Face about this report?”⁵⁷ Boland is not a confidential source and all redactions relating to Boland must be disclosed.

(2) Philip Panet – General Counsel – West Face Capital Inc

52. Copeland was asked during cross-examination whether he used CONFIDE (a messaging App) to communicate: with the Defendant McFarlane – he did not remember; with the Defendant Levitt – he did not remember; the Defendant Baumann – he did not remember.⁵⁸ However, Copeland remembered Phil Panet when asked the very next question:

Q 79: Phil Panet of West Face?

A: I am not going to answer questions that would confirm or deny potential sources who haven't been otherwise revealed in this litigation.

Q 80: You just did.⁵⁹

53. Copeland answered the questions about the use of CONFIDE with three co-defendants (he did not remember) but refused to answer the question regarding Panet because it related

⁵⁶ Paragraph 129 of the affidavit of Gregory Boland, sworn November 8, 2019, at tab G of the Plaintiffs' Supplemental Motion Record, Volume I, at page 33.

⁵⁷ Transcript of the cross-examination of Jacquie McNish on November 12, 2020, Question 407, at tab J of the Plaintiffs' Supplemental Motion Record, Volume II, at pages 165-66.

⁵⁸ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Questions 76-78, at tab K of the Plaintiffs' Supplemental Motion Record, Volume III, at page 37.

⁵⁹ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Questions 79-80, at tab K of the Plaintiffs' Supplemental Motion Record, Volume III, at pages 37-38.

to a source. It is submitted that Panet is an alleged confidential source and any redactions involving Panet must be disclosed.

(ii) Information that Copeland or McNish Provided to their Sources Is Not Privileged

54. In *Moysa v Alberta (Labour Relations Board)*, the Supreme Court of Canada held unanimously that information provided by the journalist to the source is not privileged:

It is also worth noting that the labour board suggests that the union was primarily interested in the information that the appellant gave to the company officials [the source] concerning the organizing efforts. This information would not come within the ambit of any qualified privilege with respect to information received from sources.⁶⁰ [Emphasis in the original]

55. Any redactions that contain information provided by Copeland or McNish to a source that does not reveal the source's identity must be disclosed.

(c) The Relationship Must Be One That Should Be Sedulously Fostered

56. The third element of the *Wigmore* test requires that the relationship be one which should be “sedulously fostered” in the public good.

57. In general, the relationships between a professional journalist and their secret sources is a relationship that ought to be sedulously fostered.⁶¹

58. While it is generally in the public interest to promote relationships between professional journalists, who are subject to institutional accountability, and sources, details of the specific relationship in question remain relevant in the *Wigmore* test. Chief Justice Wagner recognized in *Denis v Côté* that “this premise does not bar a court, in the course of the balancing exercise, from assessing the importance of this relationship in the context of the actual facts of a specific

⁶⁰ *Moysa v Alberta (Labour Relations Board)*, [1989] SCR 1572, 1989 CanLII 55 at para 13 (SCC).

⁶¹ *R v National Post*, 2010 SCC 16 at para 57.

case, especially where a clear attempt has been made to divert journalism from its legitimate purposes.”⁶² The Court has been provided no “details [of] the specific relationship in question” for either Copeland or McNish’s alleged confidential sources.

(d) Whether the Public Interest Served by Protecting the Identity of the Source from Disclosure Outweighs the Public Interest in Getting at the Truth

59. To satisfy the fourth element of the *Wigmore* test, the onus is on the Dow Jones Defendants to prove that the public interest that is served by protecting the identity of a confidential source from disclosure outweighs the public interest in getting at the truth. The correct disposal of litigation is deserving of weight under the *Wigmore* test.⁶³

60. Underlying this analysis is the need to achieve proportionality in striking a balance among the competing interests.⁶⁴ This balancing must be conducted in a context specific manner, having regard to the particular demand for disclosure at issue. It is for the party seeking to establish the privilege to demonstrate that the interest in maintaining journalist-source confidentiality outweighs the public interest in the disclosure the law would normally require.⁶⁵

61. The relevant considerations at this stage of analysis, when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and perhaps most importantly, whether the information is available through other means. This list is not comprehensive.⁶⁶ Each of these considerations is discussed below.

⁶² [Denis v Côté](#), 2019 SCC 44 at para 37.

⁶³ [1654776 Ontario Limited v Stewart](#), para 136.

⁶⁴ [R v National Post](#), 2010 SCC 16 at para 59.

⁶⁵ [Globe and Mail v Canada \(Attorney General\)](#), 2010 SCC 41 at para 65.

⁶⁶ [Globe and Mail v Canada \(Attorney General\)](#), 2010 SCC 41 at para 66.

(i) The Centrality to the Dispute of the Evidence Sought to Be Disclosed

62. The identity of the source is “more likely to be central to the dispute between the parties” where the journalist is a party to the litigation.⁶⁷ Copeland and McNish are parties in the libel action and Copeland is a party in the conspiracy action. The identity of the alleged confidential sources is central to the dispute between the parties.

(ii) The Redacted Information Is Central to Key Issues in the Libel Action: Malice and Falsity

63. Section 137.1(4)(a)(ii) of the *CJA* requires the Plaintiffs to satisfy the Motions Judge that there are grounds to believe that the Dow Jones Defendants have no valid defence. It is therefore imperative that the Plaintiffs are not deprived of any evidence to defend these anti-SLAPP motions that seek to dismiss the libel action and the conspiracy action.

64. Three of the libel defences can be defeated by malice – fair comment, qualified privilege and public interest responsible communication. The 201 pages of redactions that remain in issue in this motion are relevant to the issue of whether statements in the WSJ Fraud Articles are true or false and whether Copeland and McNish acted maliciously.

65. In *Dr. Leenen v Canadian Broadcasting Corporation*, Justice Cunningham (as he then was) issued a leading decision on what constitutes malice:

1. Malice is commonly understood as spite or ill will towards someone. Malice is also established by showing that the defendant either knew he was not telling the truth or was reckless in that regard.⁶⁸
2. Evidence of malice may be intrinsic or extrinsic. Extrinsic evidence consists of evidence apart from the statements themselves from which the trier of fact can infer some improper motive and a court will look at

⁶⁷ *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 61.

⁶⁸ *Leenen v Canadian Broadcasting Corporation*, [2000] OJ No 1359, 2000 CanLII 22380 at paras 138-141 (Sup Ct J), aff'd [2001] OJ No 2228, 54 OR (3d) 626 (CA), leave to appeal denied [2001] SCCA No 433.

the conduct of the defendant throughout the course of events both before and after the defamatory publication.⁶⁹

3. Even one piece of evidence is enough to find malice so long as one piece of evidence proves the existence of an ongoing improper state of mind towards the person defamed by one or more of the defendants.⁷⁰
4. The failure to present a fair portrayal of the Plaintiff is malice.⁷¹ Selectivity in reporting is malicious.⁷²
5. The failure of the defendant to provide the plaintiff with a fair opportunity to defend against the defamatory allegations is evidence of malice.⁷³
6. The reporting of one side of the story, the deliberate refrain by the Defendants from making important further inquiries and, the omission of highly significant information contrary to the story's thesis is evidence of malice.⁷⁴
7. The reliance on information from a biased source is evidence of malice. A biased source includes a disgruntled employee or persons with axes to grind against the Plaintiff.⁷⁵
8. The Defendants' dismissive, disdainful and biased attitude towards the Plaintiff is evidence of malice.⁷⁶

66. Sources who use anonymity to put information into the public domain maliciously cannot avoid a measure of accountability.⁷⁷

67. The text messages Copeland exchanged with Anderson that were initially redacted and subsequently disclosed demonstrate bias towards the Plaintiffs and are evidence of malice.

68. Another example of a redaction that was subsequently disclosed that contains evidence relating to a defence is the following sentence in an email Copeland sent to McNish about 3

⁶⁹ [Leenen v Canadian Broadcasting Corporation](#), at para 143.

⁷⁰ [Leenen v Canadian Broadcasting Corporation](#), at para 146.

⁷¹ [Leenen v Canadian Broadcasting Corporation](#), at paras 174-75.

⁷² [Leenen v Canadian Broadcasting Corporation](#), at para 180.

⁷³ [Leenen v Canadian Broadcasting Corporation](#), at para 145.

⁷⁴ [Leenen v Canadian Broadcasting Corporation](#), at para 162.

⁷⁵ [Leenen v Canadian Broadcasting Corporation](#), at para 178.

⁷⁶ [Leenen v Canadian Broadcasting Corporation](#), at para 181.

⁷⁷ [R v National Post](#), 2010 SCC 16 at para 69.

hours prior to publication of the online fraud article: “He said his company began borrowing from Catalyst in late 2012 after the lender purchased its \$11.6 million loan from a US bank”.⁷⁸ This redaction revealed that about 3 hours prior to publication, the Dow Jones Defendants did not know that Callidus made the loans to McFarlane’s company XTG, not Catalyst. XTG was featured prominently in the WSJ fraud articles. This redaction that was subsequently disclosed is relevant to the public interest responsible communication defence whether Copeland and McNish were in fact diligent in their research and reporting.

69. A third example is found in a redacted text that was subsequently disclosed that was sent by Copeland to Anderson on July 16, 2017: “Your boy Darryl has been shopping this for a long time. He spoke to my colleague ben dummett about it years ago”. “Your boy Darryl” revealed that Anderson and Levitt were working closely together. And, Levitt’s shopping the fraud allegations to the media is relevant to the conspiracy action.

(iii) The Stage of Proceedings

70. From the Plaintiffs perspective, they are presently at a stage of the proceedings in which their actions could be dismissed if the Dow Jones Defendants’ anti-SLAPP motions succeed. The redactions in issue should be disclosed to the Plaintiffs so they can meet their obligations under section 137.1(4) of the *CJA*, and have a trial on the merits.

(iv) Knowledge of the Conspiracy Is in the Hands of Co-Conspirators

71. Copeland is a defendant in the conspiracy action. The Plaintiffs have not conducted examinations for discovery in the libel action or the conspiracy action. A number of the

⁷⁸ Exhibit L to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000361-0001), at page 446 of the Plaintiffs’ Motion Record, Volume III. Emphasis added.

defendants in the conspiracy action did not bring anti-SLAPP motions and have not even been cross-examined, let alone examined for discovery.

72. In *Meditrust Healthcare Inc v Shoppers Drugmart*, Justice Molloy held:

A conspiracy by its very nature is undertaken in secrecy and while its victim may discover some of the acts carried out in furtherance of the conspiracy and through that come to know the identity of some of the actors, it is almost impossible for the victim to know at the outset such details as who met with whom, when, and what specifically was discussed. The Plaintiff has some, but not all of the information it needs to set out all of the elements of the conspiracy plea. In these circumstances, and given the nature of the cause of action and the allegations made, I consider it in the interests of justice to allow the plaintiff to proceed at least to the discovery stage.⁷⁹ [Emphasis added]

73. In *North York Branson Hospital v Praxair Canada Inc*, Justice Cumming held:

In truth, the very nature of a claim for conspiracy is that the tort resists particularization at early stages. The relevant evidence will likely be in the hands and minds of the alleged conspirators. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims...Such details would not usually be available to a plaintiff until discoveries⁸⁰ [Emphasis added]

74. In *Catalyst Capital v West Face Capital*, Justice Wilton-Siegel stated:

Given the allegation of a conspiracy, it is not reasonable to expect the plaintiffs would necessarily know the specific communications among Spears, Puri and the other conspirators in respect of the conspiracy or the extent of the short positions of the Anson Corporate Defendants, if any, in the Callidus shares.⁸¹ [Emphasis added]

75. Part of the character of a conspiracy is its secrecy and the withholding of information from alleged victims. The particulars of a conspiracy are not broadcast widely and Plaintiffs at

⁷⁹ *Meditrust Healthcare Inc v Shoppers Drugmart*, 1998 Carswell Ont 5285 at para 9 (Ct J, Gen Div).

⁸⁰ *North York Branson Hospital v Praxair Canada Inc*, [1998] OJ No 5993, 1998 CanLII 14799 at para 22 (Sup Ct).

⁸¹ *Catalyst Capital v West Face Capital*, 2019 ONSC 128 at para 115.

the outset of proceedings frequently do not possess the precise details of the alleged conspiracy.⁸²

76. The redactions in issue in this motion are presumptively admissible. Depriving the Plaintiffs of this evidence at this stage of the actions (prior to examinations for discovery) would be unfair and prejudicial to the Plaintiffs. This is especially so in a conspiracy action, where evidence of the conspiracy is likely in the hands of the conspirators. It is in the interests of justice that the redacted information be disclosed to the Plaintiffs.

(v) Overclaiming Privilege

77. Many documents contain extensive redactions. One of the documents that has been entirely redacted is 57 pages.⁸³ Facts regarding the conspiracy and facts regarding the research and reporting for the WSJ fraud articles are not protected by a journalist-source privilege. It is simply not possible that all 57 pages of this document will disclose the identity of a confidential source. The Plaintiffs take the same position regarding the other documents that have been heavily redacted (vs. the redaction of a name).

(vi) The Redacted Information Is Not Available from Other Sources

78. The information found in the 201 redacted pages in issue in this motion is not available from other sources. Thus far the Dow Jones Defendants have kept these redactions secret.

⁸² [Multiformulations Ltd v Allmax Nutrition Inc](#), 2009 FC 375 at para 11.

⁸³ Exhibit KK to the Affidavit of Tom Collins, sworn October 9, 2020 (DOW000861-0001), at pages 667-723 of the Plaintiffs' Motion Record, Volume IV.

(vii) The Degree of Public Importance of the Journalist's Story

79. Other considerations that may be relevant in a particular case include the degree of public importance of the journalist's story.⁸⁴ The Plaintiffs know the identities of the four whistleblowers referred to in the lead paragraph of the WSJ fraud articles.

80. The WSJ fraud articles in issue in these actions should never have been published. There was no urgency in informing a global audience that confidential whistleblower complaints were filed with Canadian securities regulators. Whistleblower complaints are filed confidentially with the regulators and are not supposed to be shopped to the media for publication before the regulators have completed their assessment of the validity of the complaints.

81. Notable evidence as to why there was no public importance of a story reporting the filing of whistleblower complaints came out during Copeland's cross-examination. Copeland's August 17, 2020 affidavit stated that he was aware that the Plaintiffs were alleging that there was a conspiracy that included perhaps some of the whistleblowers and the short selling of securities of Callidus Capital. Copeland affirmed that, "at the time, I viewed that allegation as unproven at best. I certainly had no reason to include such allegations in the WSJ Publications."⁸⁵ Yet, Copeland agreed during cross-examination that "on the date of the publication of the articles in issue in these actions, the allegations in the whistleblower complaints were also unproven."⁸⁶

82. It is shocking that, although Copeland viewed the Plaintiffs' allegations about a conspiracy as "unproven at best", and "certainly had no reason to include such allegations in

⁸⁴ *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41 at para 64.

⁸⁵ Affidavit of Rob Copeland, affirmed August 17, 2020 at para 15.

⁸⁶ Transcript of the cross-examination of Rob Copeland on November 13, 2020, Question 101, at tab K of the Plaintiffs' Supplemental Motion Record, Volume III, at pages 49-50.

the WSJ Publications”, the unproven fraud allegations in the whistleblower complaints were published on the front pages of the *Wall Street Journal* to a global audience. To use Copeland’s words, there was certainly “no reason to include such allegations in the WSJ Publications.” Doing so was tantamount to a drive by smear and of no public importance.

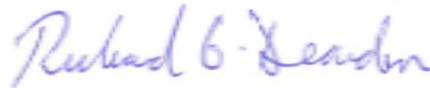
83. In conclusion, it is submitted that the protection of the identities of the confidential sources does not outweigh the public interest in getting at the evidence found in the 201 redacted pages.

PART V – RELIEF REQUESTED

84. The Plaintiffs request the following relief:

- (a) an Order that the Defendants Dow Jones and Company, Jacquie McNish and Rob Copeland (for both actions) produce without redactions all of the documents they have redacted and marked “confidential source privilege”;
- (b) the costs of this motion on a substantial indemnity basis; and
- (c) such further and other relief as to this Honourable Court deems just.

Date: December 10, 2020



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SCHEDULE "A" – AUTHORITIES

1. *R v National Post*, 2010 SCC 16.
2. *Globe and Mail v Canada (Attorney General)*, 2010 SCC 41.
3. *Denis v Côté*, 2019 SCC 44.
4. *1654776 Ontario limited v Stewart*, 2013 ONCA 184.
5. *Beach v Toronto Real Estate Board*, 2010 ONSC 30001.
6. *R v National Post*, 2008 ONCA 139.
7. *Moysa v Alberta (Labour Relations Board)*, [1989] SCR 1572, 1989 CanLII 55 (SCC).
8. *Leenen v Canadian Broadcasting Corp*, [2000] OJ No 1359, 2000 CanLII 22380 (Sup Ct J), aff'd [2001] OJ No 2228, 54 OR (3d) 626 (CA), leave to appeal denied [2001] SCCA No 433.
9. *Meditrust Healthcare Inc v Shoppers Drugmart*, 1998 Carswell Ont 5285 (Ct J, Gen Div).
10. *North York Branson Hospital v Praxair Canada Inc*, [1998] OJ No 5993, 1998 CanLII 14799.
11. *Catalyst Capital v West Face Capital*, 2019 ONSC 128.
12. *Multiformulations Ltd v Allmax Nutrition Inc*, 2009 FC 375.

SCHEDULE "B" – STATUTES AND REGULATIONS

1. *Courts of Justice Act*, RSO 1990, c C.43, s 137.1

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.

No dismissal

(4) A judge shall not dismiss a proceeding under subsection (3) if the responding party satisfies the judge that,

(a) there are grounds to believe that,

(i) the proceeding has substantial merit, and

(ii) the moving party has no valid defence in the proceeding; and

(b) the harm likely to be or have been suffered by the responding party as a result of the moving party's expression is sufficiently serious that the public interest in permitting the proceeding to continue outweighs the public interest in protecting that expression.

No further steps in proceeding

(5) Once a motion under this section is made, no further steps may be taken in the proceeding by any party until the motion, including any appeal of the motion, has been finally disposed of.

No amendment to pleadings

(6) Unless a judge orders otherwise, the responding party shall not be permitted to amend his or her pleadings in the proceeding,

(a) in order to prevent or avoid an order under this section dismissing the proceeding; or

(b) if the proceeding is dismissed under this section, in order to continue the proceeding.

Costs on dismissal

(7) If a judge dismisses a proceeding under this section, the moving party is entitled to costs on the motion and in the proceeding on a full indemnity basis, unless the judge determines that such an award is not appropriate in the circumstances. 2015, c. 23, s. 3.

Costs if motion to dismiss denied

(8) If a judge does not dismiss a proceeding under this section, the responding party is not entitled to costs on the motion, unless the judge determines that such an award is appropriate in the circumstances. 2015, c. 23, s. 3.

Damages

(9) If, in dismissing a proceeding under this section, the judge finds that the responding party brought the proceeding in bad faith or for an improper purpose, the judge may award the moving party such damages as the judge considers appropriate.

2. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 30.02(2)

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document.

3. *Rules of Civil Procedure*, RRO 1990, Reg 194, r 30.07

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

37.07 Where a party, after serving an affidavit of documents,

- (a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or
- (b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents.

THE CATALYST CAPITAL GROUP et al.
Plaintiffs

- and - DOW JONES et al.

Court File No. CV-18-593156-00CL

Defendants

THE CATALYST CAPITAL GROUP et al.
Plaintiffs

- and - WEST FACE CAPITAL INC et al.

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

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

PROCEEDING COMMENCED AT
TORONTO

**PLAINTIFFS' FACTUM (CONFIDENTIAL SOURCE
REDACTIONS MOTION)**

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