

Court File No. CV-17-587463-00CL
Court File No. CV-18-593156-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

THE HONOURABLE) WEDNESDAY, THE 23RD
)
MR. JUSTICE MCEWEN) DAY OF DECEMBER, 2020

B E T W E E N:

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP 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 MAST 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

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

Justice T. McEwen

23 Dec 20

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

ORDER

THIS MOTION, made by the Plaintiffs in both the above-styled actions, for an order that the Defendants, Rob Copeland, Jacquie McNish, and Dow Jones and Company (the “Dow Jones Defendants”) produce without redaction the documents included in Volume VII of the Plaintiffs’ Supplementary Motion Record (the “Documents in Issue”), was heard by the Court on December 15 and 16, 2020.

UPON READING the Motion Record, Supplementary Motion Record and Responding Record, the Facta, Books of Authorities, Compendia and other materials filed by the Plaintiffs and the Dow Jones Defendants, and upon hearing submissions of counsel for the Plaintiffs and the Dow Jones Defendants on December 15 and 16, and upon the Court determining that in order to fully resolve the issues raised on the motion it would be necessary to appoint counsel to act as *amicus curiae* on the terms set out herein and to hear further argument *in camera* from the Amicus and from counsel for the Dow Jones Defendants regarding the redactions in the Documents in Issue that relate to journalist-confidential source privilege (“JCS Privilege”).

AND UPON BEING ADVISED that the Plaintiffs and the Dow Jones Defendants consent to the within Order.

1. THIS COURT ORDERS that Daniel Burnett, of the law firm Owen Bird Law Corporation, be and he is hereby, appointed as *amicus curiae* (the “Amicus”) to assist the court in its review of the content of the Documents in Issue that have been redacted on account of JCS Privilege, and in preparing for and participating in the hearing of further argument *in camera* on this motion on the following terms.
2. THIS COURT ORDERS that the Amicus shall promptly be provided by the Plaintiffs and by the Dow Jones Defendants with complete copies of their respective materials filed on this motion, together with any such other material that counsel for the Plaintiffs or counsel for the Dow Jones Defendants may wish to provide to the Amicus, in confidence or otherwise, by way of background to the matters in issue on the motion.
3. THIS COURT ORDERS that the Dow Jones Defendants shall, on a mutually agreed upon date, provide to the Amicus in confidence a complete, unredacted copy of all Documents in Issue (the “Unredacted Documents in Issue”).
4. THIS COURT ORDERS that the Dow Jones Defendants shall, on or before January 25, 2021, or on such other date prior to the hearing of further argument *in camera* on this motion as counsel for the Plaintiffs and the Dow Jones Defendants may agree with the Amicus, provide to Justice McEwen a copy of the Unredacted Documents in Issue. The Unredacted Documents in Issue shall not be filed in either court file except under seal.
5. THIS COURT ORDERS that the Amicus may, prior to the receipt of the Unredacted Documents in Issue in accordance with paragraph 3 of this Order, communicate freely with counsel for the Plaintiffs and/or counsel for the Dow Jones Defendants, to discuss and agree on any matters of process, and to receive – in confidence or otherwise as may be agreed – any other materials and oral information that counsel for the Plaintiffs or counsel for the Dow Jones Defendants consider relevant to the Amicus’s mandate.
6. THIS COURT ORDERS that, after the receipt of the Unredacted Documents in Issue in accordance with paragraph 3 of this Order the Amicus shall not have any further

communication with representatives of the Plaintiffs, including counsel for the Plaintiffs, without prior leave of the Court or agreement of counsel for the Plaintiffs and counsel for the Dow Jones Defendants.

7. THIS COURT ORDERS that:

- a. the Amicus shall keep confidential from all representatives of the Plaintiffs, and from counsel for the Plaintiffs, and from any others not participating in the hearing of further argument *in camera* on this motion, all confidential information and documents to which the Amicus has been given access by the Dow Jones Defendants pursuant to this Order, including the Unredacted Documents in Issue; and
- b. the Amicus shall keep confidential from all representatives of the Dow Jones Defendants, and from counsel for the Dow Jones Defendants, and from any others not participating in the hearing of further argument *in camera* on this motion, all confidential information and documents to which the Amicus has been given access by the Plaintiffs pursuant to this Order.

8. THIS COURT ORDERS that the Amicus shall have full authority and discretion to conduct a pre-hearing review of the Unredacted Documents in Issue and to reach binding agreements with counsel for the Dow Jones Defendants to narrow the issues and documents to be reviewed by the Court at the hearing of further argument *in camera* on this motion, including for greater certainty agreements to accept any redactions made by the Dow Jones Defendants on the Documents in Issue that fulfill the *Wigmore* test, and agreements to permit removal of the redactions (in whole or in part), word substitutions, and/or summaries of redacted information.

9. THIS COURT ORDERS that the Amicus shall conduct both his pre-hearing review and his argument at any *in camera* hearing of further argument on this motion,

- a. on the basis of the applicable common law relating to JCS Privilege, including in particular the *Wigmore* test and cases cited by counsel for the Plaintiffs and/or for the Dow Jones Defendants in their Facta filed on the motion; and

- b. acting as if he was counsel for the Plaintiffs during the *in camera* hearing of the motion.
10. THIS COURT ORDERS that, as soon as possible after reaching any agreements to permit additional removal of the redactions (in whole or in part), word substitutions, and/or summaries of redacted information on the Documents in Issue in accordance with this Order, the Amicus and counsel for the Dow Jones Defendants shall provide those documents to the Plaintiffs and all other parties to these actions.
11. THIS COURT ORDERS that the Unredacted Documents in Issue that are not the subject of agreements reached as a result of the pre-hearing review referred to in paragraph 8 of this Order shall be reviewed by the Court in a hearing *in camera* to receive further argument on this motion from the Amicus and counsel for the Dow Jones Defendants.
12. THIS COURT ORDERS that the Amicus shall institute an ethical wall between the Amicus and any lawyer at the Amicus' law firm who engages in any representation of any of the parties to these actions in order to screen off access to any documents, material or information obtained by the Amicus during his mandate as set out in this Order. So long as the ethical wall is in place, the Amicus' appointment to assist the Court in its review of the content of the Documents in Issue shall be personal to the Amicus and shall not be imputed to any other persons or lawyers at the Amicus' law firm.
13. THIS COURT ORDERS that the reasonable fees and disbursements invoiced by the Amicus shall be divided equally between, and paid by, the Plaintiffs and the Dow Jones Defendants, subject to the Court's discretion to treat such payments as a disbursement for the purposes of any decision on the costs of this motion and/or on the costs of the motions returnable on March 7-11, 2021, or as further ordered by this Court.

14. THIS COURT ORDERS that the Amicus is to destroy his copy of the Unredacted Documents in Issue following the decision of this Court on the within motion and the expiry of any appeal period.

McE T.

THE CATALYST CAPITAL GROUP INC., et al.
Plaintiffs

-and-

DOW JONES AND COMPANY, et al.
Defendants

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23 Dec 20

Subsequent to the hearing of the motions on Dec 15 and 16 the Plaintiffs and the Dow Jones Defendants agreed to this form of Order, which shall go, on consent of these parties.
I agree that the proposed method of proceeding is fair and reasonable.

McE T.

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)
PROCEEDING COMMENCED AT TORONTO

ORDER