Court File No. C62655

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents)

FACTUM OF THE PLAINTIFF (APPELLANT)

February 15, 2017

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PART I - OVERVIEW

1. This appeal concerns the test for the novel tort of spoliation of evidence and the conduct of a six-day hybrid trial in which, among other things, the trial judge applied different standards of scrutiny in order to assess the credibility of the parties' witnesses.

2. In early August 2014, The Catalyst Capital Group Inc. ("Catalyst") and VimpelCom Ltd. ("VimpelCom") finalized the terms of a transaction pursuant to which VimpelCom would sell its majority interest in Wind Mobile ("Wind") to Catalyst. At the time, the parties had agreed to an exclusivity period during which VimpelCom was precluded from considering other offers.

3. The day before VimpelCom's board met to approve the deal, a consortium of private equity firms (the "Consortium"), which included West Face Capital Inc. ("West Face"), tendered an unsolicited "superior" offer to Catalyst's offer. Immediately thereafter, VimpelCom sought changes to the Catalyst transaction that scuttled that deal and cleared the way for the Consortium.

4. West Face had previously been negotiating with VimpelCom for several months, with no success. It knew Catalyst was a rival bidder and it knew that VimpelCom's minimum enterprise value for Wind was $300 million. Curiously, the Consortium's offer came in at the minimum price. The offer was only "superior" to Catalyst's offer in that the Consortium waived a requirement for regulatory approval for the sale – a condition that Catalyst could not match.

5. How could West Face know that the Consortium's offer was "superior"? How could it know that Catalyst would not match that offer? How did it know that the regulatory risk was negligible? The answer to these questions is related to earlier events in 2014.

6. In May 2014, Brandon Moyse ("Moyse"), an analyst at Catalyst, left Catalyst to take a position at West Face. Moyse had been working on Catalyst's telecom deal team and was

intimately familiar with Catalyst's Wind strategy, including its approach to managing regulatory risk. That confidential information, if shared with West Face, would give it an unfair advantage.

7. In June 2014, West Face and Moyse refused to honour the non-competition covenant in Moyse's employment agreement, even though West Face had no real work for Moyse. Catalyst commenced this action, obtained an interim order in July 2014, and an interlocutory injunction in November 2014. But it was too late: West Face had already bought Wind. Catalyst amended its claim to seek, among other things, a constructive trust over West Face's interest in Wind.

8. In 2015, Catalyst learned through a report from an independent supervising solicitor ("ISS") that Moyse had launched military-grade deletion software (known as a "scrubber") the night before he turned over his computer for the making of a forensic image of its contents. Moyse also deleted his web browser history. Catalyst amended its claim to add a claim for spoliation.

9. In January 2016, the Consortium applied for approval for a plan of arrangement to sell Wind to Shaw Cable. Catalyst opposed the application, which sought to compromise its constructive trust claim. In the plan of arrangement approval hearing, Catalyst averted to its intention to add the Consortium members as defendants to this action and to expand the scope of its claim for misuse of confidential information.

10. Justice Newbould, the application judge and the case management judge in this action, denied Catalyst permission to expand its claim and directed that an expedited hybrid trial proceed only as against West Face and Moyse on a narrower set of issues, including the spoliation claim.

11. The trial was heard by Justice Newbould over six days with evidence in chief adduced mainly in affidavit form, and with brief oral examinations in chief followed by extensive cross-examinations. The trial judge dismissed the action in its entirety.

12. Catalyst advances four grounds of appeal. First, the trial judge applied the wrong test for spoliation and/or erred in his application of the test by accepting evidence of Moyse's subjective intent to ground a finding that he did not intend to destroy evidence. This error held Catalyst to an incorrect standard of proof that would make it nearly impossible to ever prove spoliation.

13. Second, the trial judge erred by applying different standards in assessing the evidence and credibility of Catalyst's witnesses and the defendants' witnesses. The trial judge relied on minor inconsistencies in evidence to determine that Catalyst's witnesses were not credible. In contrast, the trial judge excused glaring inconsistencies in the defendants' witnesses' evidence.

14. Third, the trial judge erred by making factual findings on issues he previously ordered were not to form part of Catalyst's case. Despite his prior ruling, and with knowledge that Catalyst had commenced a separate claim against the Consortium and VimpelCom, the trial judge made findings of fact on an incomplete evidentiary record that were irrelevant to the issues raised in the trial. It is impossible to know how these *obiter* findings may have affected the trial judge's overall findings at trial.

15. Finally, the trial judge committed important palpable and overriding errors of fact:

(a) He found that Moyse did not possess confidential knowledge about Catalyst's negotiations with VimpelCom when documentary evidence proved otherwise;

(b) He found that West Face did not possess Catalyst's confidential information about Wind in the face of internal communications that contradict that assertion; and

(c) He found that West Face did not misuse Catalyst's confidential information in the face of West Face's own documents that suggested otherwise.

16. These errors are too significant to resolve on the record before this Court. Catalyst requests that this Court vacate the trial judge's judgment, make a finding of spoliation as against Moyse and order a new trial on all other issues.

PART II - FACTS

A. THE PARTIES

17. Catalyst is an investment management firm specializing in distressed and undervalued situations for control or influence. It uses a flat staffing model to manage more than $3 billion in assets.[1] During the relevant period, Catalyst had three partners, a vice-president and two analysts.

18. Brandon Moyse was one of those analysts.[2] He commenced employment at Catalyst in November 2012. Moyse previously worked at Credit Suisse and RBC Capital Markets. Moyse obtained a degree in mathematics from the University of Pennsylvania.[3]

19. In 2014, as part of his search for new employment, Moyse's description of his role as an analyst at Catalyst emphasized his leadership in the initial analysis of potential distressed debt and special situation investments and his performance of complex financial modelling.[4] Although Moyse was the lowest level of investment professional at Catalyst,[5] Catalyst is an extremely small organization – at all material times, it employed only six investment professionals (including the three partners) while Moyse was working there.

20. West Face is a competitor to Catalyst. In 2014, West Face launched a fund that focused on similar investments and used a similar funding model as Catalyst.[6] Like Catalyst, West Face has a flat staffing model: in 2014, it employed four partners and four analysts.[7]

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[1] CCG0028716 - Affidavit of James Riley sworn February 18, 2015 ("CCG0028716 - Riley Feb 18, 2015 Affidavit"), at ¶3 **(Compendium ("CPM") Tab 12, page 272)**; CCG0028710 - Affidavit of Gabriel de Alba, sworn May 27, 2016 ("CCG0028710 - de Alba May 27, 2016 Affidavit") at ¶4 **(CPM Tab 12, page 273)**.
[2] BM0005359 - Affidavit of Brandon Moyse, affirmed June 2, 2016 ("BM0005359 - Moyse June 2, 2016 Affidavit"), at ¶14 **(CPM Tab 12, page 274)**.
[3] BM0005359 - Moyse June 2, 2016 Affidavit at ¶10-11 **(CPM Tab 12, page 275)**.
[4] WFC0108870 – Moyse *curriculum vitae* **(CPM Tab 12, pages 276-277)**.
[5] Reasons for Judgment of Justice Newbould dated August 18, 2016 **("TJ")**, at ¶35 **(CPM Tab 4, page 34)**.
[6] Affidavit of Anthony Griffin sworn June 4, 2016 ("Griffin June 4, 2016 Affidavit") at ¶18 **(CPM Tab 12, page 278)**.
[7] Read-in from Examination for Discovery of Anthony Griffin held May 10, 2016 ("Griffin May 10, 2016 Discovery"), pp. 102:15 – 103:25 **(CPM Tab 11, pages 183-184)**.

B. THE WIND OPPORTUNITY

21. The confidential information at the heart of this action concerns Catalyst's efforts to purchase Wind, an independent wireless telecommunications company. Wind owned spectrum licenses set aside by the Canadian government to encourage small wireless players to enter the market, which is dominated by three "incumbent" companies: Bell, Rogers and Telus.[8]

22. Wind's principals were Globalive Canada Inc., a Canadian corporation, and Orascom Telecom Holdings, a foreign company. Orascom owned a majority financial interest in Wind but, in order to satisfy foreign ownership regulations, Globalive controlled the voting interest. In 2011, VimpelCom, a Dutch company, bought Orascom's interest in Wind.[9]

23. In 2012, the Canadian government loosened its restrictions on foreign control of small telecoms such as Wind. VimpelCom tried to acquire full control of Wind, but the government refused to approve the takeover notwithstanding the loosened restrictions.[10] In early 2013, after Wind suffered repeated losses, VimpelCom began the process of selling its investment in Wind.[11]

24. The sales process was confidential – potential bidders did not know who else was interested in the acquisition. Catalyst owned a significant debt position in Mobilicity, a wireless operator that was in a *CCAA* restructuring process, and saw an opportunity to merge Wind and Mobilicity to form a viable fourth wireless carrier to compete with the three incumbents.[12]

25. Catalyst's negotiations with VimpelCom began in late 2013. On January 2, 2014, Catalyst delivered a letter of intent to VimpelCom. The negotiations were briefly put on "pause" while the

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[8] Affidavit of Simon Lockie, sworn June 6, 2016 ("Lockie June 6, 2016 Affidavit"), at ¶6 **(CPM Tab 12, page 279)**; CCG0028710 - de Alba May 27, 2016 Affidavit at ¶17 **(CPM Tab 12, page 280)**.
[9] Lockie June 6, 2016 Affidavit at ¶9 **(CPM Tab 12, pages 281-282)**; CCG0028710 - de Alba May 27, 2016 Affidavit at ¶19 **(CPM Tab 12, page 283)**.
[10] TJ at ¶22 **(CPM Tab 4, page 32)**.
[11] Lockie June 6, 2016 Affidavit at ¶17 **(CPM Tab 12, pages 284-285)**.
[12] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶16 **(CPM Tab 12, page 286)**.

parties participated in a new spectrum auction, so as to avoid any perception of collusion. In February 2014, Catalyst re-engaged with VimpelCom.[13]

C. MARCH 2014: MOYSE JOINS CATALYST'S TELECOM TEAM

26. Moyse joined Catalyst's "core" telecommunications team in early March. At the time, he was aware that Catalyst sought to build a fourth retail wireless carrier through a combination of Wind and Mobilicity.[14] Between March and May 2014, Moyse was heavily involved with Catalyst's mobile deal team, and in particular in the Wind opportunity. Among other things:

(a) Moyse prepared a *pro-forma* financial statement showing Catalyst's understanding of the value of a combined Wind and Mobilicity entity;[15]

(b) Moyse prepared materials to deliver to the regulatory authorities[16];

(c) Moyse assisted in preparing Catalyst's investment memorandum for Wind, which set out Catalyst's investment thesis;[17] and

(d) Moyse actively participated in the due diligence review process for Wind.[18]

27. Notably, Moyse created two crucial presentations that Catalyst delivered to the federal government in confidential meetings held in March and May 2014 to seek support for Catalyst's anticipated purchase of Wind. The first presentation summarized Catalyst's strategy to build a fourth retail mobile carrier. The presentation also set out in detail the concessions that Catalyst sought from Industry Canada and the federal government at a meeting held in late March 2014:[19]

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[13] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶26 **(CPM Tab 12, page 287);** CCG0025176 and CCG0025177 **(CPM Tab 12, pages 288-290).**
[14] TJ at ¶40 **(CPM Tab 4, page 36).**
[15] TJ at ¶35 **(CPM Tab 4, page 34);** CCG0011536 **(CPM Tab 12, pages 291-292).**
[16] CCG0011564 and CCG0011565 - March 2014 Presentation **(CPM Tab 12, pages 293-308);** TJ at ¶41-42 **(CPM Tab 4, page 36).**
[17] CCG0009516 and CCG0009517 - May 2014 Presentation **(CPM Tab 12, pages 309-320).**
[18] TJ at ¶50 **(CPM Tab 4, pages 39-40).**
[19] TJ at ¶41-42 **(CPM Tab 4, page 36).**

Strategic Options: Option 1

Option 1 — Combination of WIND Canada / Mobilicity to create a 4th National Carrier focused on the retail market:

- Negotiations with Vimpelcom are well advanced but no deal can be completed without establishing a viable regulatory and economic framework
- Meets Government policy: delivers to the Consumer while eliminating incumbent dominance
- Requires:
  - Guaranteed regulated wholesale cost and roaming contracts
    - Cost-plus approach – towers and roaming
    - Caps on roaming fees
  - Potential to partner/exchange/rent spectrum from and to incumbents ("subordinate licensing") to fill spectrum requirements to operate competitive LTE network
  - The ability to operate as a retail-only business using incumbents' networks outside license areas to accelerate subscriber growth and move to breakeven quicker
  - Ability to exit the investment with no restrictions in 5 years
    - Catalyst will make an undertaking that before selling to an incumbent, it will pursue an IPO or another strategic sale prior to the end of the 5 year period

CCG0011565

28. In May 2014 Moyse created a second presentation, which was largely a recreation of the March presentation and which contained similar details concerning regulatory risk:[20]

Strategic Options: Option 1 (now severely hindered)

Option 1 (now severely hindered) — Combination of WIND Canada / Mobilicity to create a 4th National Carrier focused on the retail market:

- Negotiations with Vimpelcom are well advanced but no deal can be completed without establishing a viable regulatory and economic framework. Deadline is May 23, 2014, to complete sale and purchase agreement ("SPA")
- Meets Government policy: delivers to the Consumer while eliminating incumbent dominance

Requires

- In due diligence, WIND has confirmed that the business will "hit a wall" in 2018 or earlier without additional spectrum
- Guaranteed regulated wholesale cost and roaming contracts
  - Cost-plus approach – towers and roaming
  - Caps on roaming fees
- Potential to partner/exchange/rent spectrum from and to incumbents ("subordinate licensing") to fill spectrum requirements to operate competitive LTE network
- The ability to operate as a retail-only business using incumbents' networks outside license areas to accelerate subscriber growth and move to breakeven quicker
- Ability to exit the investment with no restrictions in 5 years
  - Catalyst will make an undertaking that before selling to an incumbent, it will pursue an IPO or another strategic sale prior to the end of the 5 year period

CCG0009517

[20] CCG0011565 - March 2014 Presentation **(CPM Tab 12, pages 321-335).** This page was slightly altered to remove excess white space.

29. After the May meeting with Industry Canada, Newton Glassman, Catalyst's managing partner, sent an email to the deal team that affirmed his opinion that the government would eventually yield to Catalyst's demands, but not before Catalyst committed to purchase Wind.[21]

D. MOYSE'S EFFORTS TO FIND ANOTHER JOB LEAD TO WEST FACE

30. By late 2013, Moyse was dissatisfied with his role at Catalyst and started searching for another job.[22] However, despite searching in both New York and Toronto, he did not have any luck in securing employment until he applied to West Face in March 2014.

31. On March 23, 2014, the same day that he prepared the presentation referred to above, Moyse met with Tom Dea ("Dea"), a West Face partner, to discuss a possible move to West Face.

32. Immediately following his first interview with Dea, Moyse emailed four of Catalyst's internal confidential investment memoranda to Dea and passed them off as his own "writing samples".[23] Dea saw that the memoranda were marked confidential, but that did not stop him from distributing them to his partners or from reviewing them. Dea claimed he was not concerned about the confidentiality stamp because West Face was not interested in the investments described in the memos, as if that justified his review and distribution of Catalyst's confidential memos.[24]

33. West Face did not disclose to Catalyst what Moyse or Dea had done. Moyse deleted the email by which he sent the memos so as to hide the record of his conduct.[25] This was not the only time that Moyse would delete evidence of his activities to avoid its discovery by Catalyst.

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[21] CCG0025842 **(CPM Tab 12, pages 336-337).**
[22] TJ at ¶53 **(CPM Tab 4, page 40)**.
[23] WFC0108593 - Email from Moyse to Dea and memos **(CPM Tab 12, pages 338-341).**
[24] Trial Transcript June 10, 2016 at pp. 1259:1 – 1261:20 **(CPM Tab 11, pages 185-187).**
[25] CCG0028717 – Affidavit of James Riley sworn July 14, 2014 at ¶12-13 **(CPM Tab 12, pages 342-343).**

34. In April 2014, Moyse met with the other three West Face partners.[26] Immediately prior to these meetings, Dea re-circulated Catalyst's confidential memos to his partners.

35. On May 16, 2014, Moyse received an oral employment offer from Dea. On May 22, 2014 Dea sent Moyse a written offer.[27] The next day, Moyse resigned from Catalyst via email while he was on vacation in Southeast Asia. Because Moyse was required to give thirty days' notice of resignation, his employment at West Face was scheduled to commence on June 23, 2014.[28]

36. Despite being on vacation half way across the globe and planning to leave Catalyst, Moyse continued to show interest in the Wind transaction. On May 20 and 21, 2014, Moyse and the other analyst on the Wind transaction, Lorne Creighton, exchanged emails using their personal email accounts.[29] Amidst a discussion concerning when Moyse intended to inform Catalyst of his intention to resign, Moyse asked Creighton on May 20, 2014, "What's the story with Wind?"

37. Creighton replied on May 21, "On Wind, Zach said as far as he knows the plan is to submit and offer Friday…I'm continuing to work on the memo, and Zach asked for more diligence questions that we can bombard them with…no real idea what's going on or if we are actually going to do the deal."

38. On May 23, 2014, Moyse spoke with Dea by phone using his Catayst-issued Blackberry. The call lasted 16 minutes.[30]

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[26] WFC0108736 - Email from Dea to Fraser and Zhu sent April 15, 2014 **(CPM Tab 12, page 344).**
[27] WFC00112266 – Affidavit of Thomas Dea sworn June 3, 2016 at ¶28 **(CPM Tab 12, page 345).**
[28] TJ at ¶58 **(CPM Tab 4, page 42).**
[29] BM0004981 – Emails between Creighton and Moyse dated May 20 & 21, 2014 **(CPM Tab 12, pages 346-347).** Moyse produced dozens of emails, some of which expressly concerned the circumstances of his resignation and the Wind transaction, in April and May 2016 after a demand from Catalyst and a 9:30 appointment with the Court.
[30] WFC0109530 - Log of phone calls between Moyse and West Face's office telephone system **(CPM Tab 12, page 348).**

39. Notably, after he spoke to Dea, Moyse emailed Creighton to ask, among other things, if Catalyst made a Wind bid.[31] Moyse testified that his interest was "idle curiosity". But this curiosity is inconsistent with Moyse's subsequent affidavits, sworn just over a month later, that stated Moyse barely worked on the Wind deal or knew any of its details.[32] Moyse's inquiries to Creighton were not idle curiosity but specific questions about the state of Catalyst's negotiations.

40. Moyse's resignation email deliberately neglected to mention that he had accepted a position at West Face. Moyse first revealed this information when he returned to Catalyst on May 26. That day, Moyse was placed on "garden leave". Catalyst later demanded that Moyse return his Catalyst-issued Blackberry. He did so with the knowledge that Catalyst was contemplating legal action against him, but only after wiping its memory clean, thereby destroying records of his text communications and call history.[33] Moyse claimed his intention was to protect personal information, but this is questionable given that he owned a second, personal phone at the time.[34]

E. WEST FACE AND MOYSE MISLEAD CATALYST BEFORE ACTION COMMENCED

41. By letter from its outside counsel sent May 30, 2014, Catalyst informed West Face that Moyse was bound by a six-month non-compete clause and a strict confidentiality covenant. In reply, West Face took the position that the non-compete was unenforceable and that Catalyst had not provided any evidence that Moyse had breached his confidentiality obligations.[35] As Justice Lederer pointed out in his November 2014 injunction decision, this reply was misleading, as West

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[31] BM0004983 – Emails exchanged between Moyse and Creighton on May 23 and 24, 2014 **(CPM Tab 12, pages 349-350)**.
[32] Trial Transcript June 13, 2016 – Moyse Cross-examination at pp. 1577:7 - 1579:5 **(CPM Tab 11, pages 188-190)**.
[33] CCG0018698 **(CPM Tab 12, page 351)**.
[34] Moyse May 11, 2015 Cross-examination at pp. 104:20 – 105:1 **(CPM Tab 11, pages 191-192)**.
[35] TJ at ¶62 **(CPM Tab 4, page 43)**.

Face already knew that Moyse had, in fact, breached his confidentiality obligations by sending West Face the four confidential investment memos.

42. In further correspondence, West Face and Moyse continued to deny any wrongdoing. In response to a comment from Catalyst's counsel about Moyse's involvement in a "telecom" deal, West Face erected a "confidentiality wall" on June 20 to bar Moyse from communicating with anyone at West Face about Wind, but not Mobilicity, even though at the time, Catalyst's pursuit of Wind was confidential and its involvement in Mobilicity was public knowledge.[36]

43. Catalyst's suspicion over Moyse's departure was heightened by West Face's refusal to delay Moyse's start date while the parties sorted out the issue of his restrictive covenant. Catalyst investigated Moyse's electronic activity prior to his resignation. This investigation revealed that:

(a) In late March 2014, two days after his interview with Dea, Moyse accessed several investor letters over an eleven-minute period of time (too short to actually read the letters) that were unrelated to his employment duties;[37] and

(b) Moyse had transferred hundreds of Catalyst files to his personal Dropbox account.[38]

44. On June 26, 2014, Catalyst commenced a claim against Moyse and West Face for breach of the covenants in his employment agreement. Catalyst also sought an interim and interlocutory injunction to prevent Moyse from working at West Face during his non-compete period.[39]

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[36] WFC0000050 **(CPM Tab 12, page 352).**
[37] CCG0028714 - Affidavit of Martin Musters sworn June 26, 2014 ("CCG0028714 - Musters June 26, 2014 Affidavit") at ¶12 **(CPM Tab 12, page 353).**
[38] CCG0028714 - Musters June 26, 2014 Affidavit ¶8-9 **(CPM Tab 12, page 354).** Dropbox is a cloud-based storage program that allows a user to save files and access them from any other computer or mobile device (*ie.* iPhone or iPad).
[39] Catalyst's Notice of Motion for injunction dated June 26, 2014 **(CPM Tab 12, pages 355-363);** Statement of Claim **(CPM Tab 12, page 364-379).**

F. MOYSE SCRUBS HIS COMPUTER AND DELETES HIS WEB HISTORY

45. On July 16, 2014, at the hearing for the motion for interim relief, the parties consented to an interim order, pursuant to which:

(a) Moyse agreed not to work at West Face pending the determination of Catalyst's motion for interlocutory relief;

(b) The defendants agreed to preserve their records, whether electronic or otherwise, that related to Catalyst, and/or related to their activities since March 27, 2014 and/or related to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst;

(c) Moyse consented to the creation of a forensic image of his personal devices, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief (which sought the appointment of an ISS to review the images); and

(d) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[40]

46. The forensic images of Moyse's devices (the "Images") were made on Monday, July 21, 2014. On November 10, 2014, Justice Lederer authorized an ISS to analyze the Images. Among other things, Justice Lederer found that:

(a) West Face and Moyse did not respond to Catalyst's concerns regarding its confidentiality in a meaningful way until after Catalyst sought an injunction;

(b) Moyse swore an affidavit that dismissed Catalyst's concerns as "speculation and innuendo" when he knew or ought to have known that it was wrong to do so;

(c) Moyse admitted that between March and May 2014, he deleted documents, which were expected to be found via the ISS's analysis of the Images;

(d) Moyse could not be trusted to review his documents and determine for himself what should be produced in the action.[41]

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[40] CCG0028703 - Order of Justice Firestone dated July 16, 2014 **(CPM Tab 12, pages 380-383)**.

47. In its report, delivered in 2015, the ISS revealed that on the morning of the interim motion, Moyse installed registry cleaning software and the scrubber software on his personal computer. The ISS also determined that at 8:09 p.m. on July 20, 2014, the night before he handed his devices over for the creation of the Images, Moyse launched the scrubber.[42] Later, it was revealed that Moyse also deleted his web browsing history and ran the registry cleaner on that night.[43]

48. At trial, forensic IT experts for both Catalyst and Moyse testified that in order to launch the scrubber, Moyse would have had to click on specific buttons on two different screens of the software. It was therefore highly unlikely that the scrubber was launched by accident, as claimed by Moyse in his sworn evidence before trial.[44]

49. Moyse testified that he deleted his web browsing history to hide evidence of his having visited pornography and gambling websites. He claimed he did not want that activity to come to light in this action. However, he admitted that he never sought advice from his then-counsel as to whether that activity would be disclosed in the action, nor did he tell his lawyers that he intended to delete his web browsing history before he turned over his computer for imaging.[45]

G. CATALYST LOSES ITS BID FOR WIND DESPITE A "DONE" DEAL

50. While Moyse was pursuing a job at West Face, Catalyst was pursuing the Wind opportunity. In March 2014, Catalyst and VimpelCom agreed to maintain confidentiality over the

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[41] Judgment of Justice Lederer dated November 10, 2014 **(CPM Tab 7A, pages 103-132).**
[42] CCG0018671 - Draft Report of the ISS, pp. 41-43 at ¶44-48 **(CPM Tab 12, pages 384-386).**
[43] TJ at ¶45 **(CPM Tab 4, page 37).**
[44] Moyse May 11, 2015 Cross-examination at pp. 87:9 – 89:14 **(CPM Tab 11, pages 193-195);** BM001935 – Affidavit of Brandon Moyse sworn April 2, 2015 at ¶45-47 **(CPM Tab 12, pages 387-388);** Trial Transcript June 8, 2016 at p. 667:7-25 **(CPM Tab 11, page 196);** Trial Transcript June 10, 2016 at pp. 1348:10 – 1349:3 **(CPM Tab 11, pages 197-198).**
[45] Trial Transcript June 13, 2016 pp. 1501:4 – 1502:11 **(CPM Tab 11, pages 199-200);** Moyse May 11, 2015 Cross-examination at pp. 51:1 – 52: 14 **(CPM Tab 11, pages 201-202).**

content and existence of their negotiations.[46] Thereafter, Catalyst delivered draft share purchase agreements ("SPA") to VimpelCom and conducted due diligence.

51. West Face and the other Consortium members were engaging in these same activities, but with little success: their offers to VimpelCom were repeatedly rejected.

52. On July 23, 2014, Catalyst and VimpelCom entered into an agreement (the "Exclusivity Agreement") pursuant to which VimpelCom could only negotiate with Catalyst. By August 3, 2014, the parties agreed that the deal was "substantially settled", subject to approval from VimpelCom's directors.[47]

53. On August 11, VimpelCom and Catalyst held a joint call with Industry Canada to tell the regulator that a Wind deal "was done".[48] However, the next day, VimpelCom returned to Catalyst with new, substantial demands concerning regulatory approvals. VimpelCom insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and it asked for a $5-20 million break fee if the deal did not close.[49] Catalyst did not believe it was possible to obtain regulatory approval within two months.

54. These new proposed terms, which were sought by VimpelCom after it had previously told Catalyst that the SPA was substantially settled and after the parties had told Industry Canada that the deal was done, confused Catalyst and left it unwilling to continue negotiations. The exclusivity period terminated without a signed SPA.[50]

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[46] CCG0023894 **(CPM Tab 12, pages 389-396).**
[47] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶133-145 **(CPM Tab 12, pages 397-400).**
[48] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶156 **(CPM Tab 12, page 401).**
[49] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶157-159 **(CPM Tab 12, pages 402-403).**
[50] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶157 and 160 **(CPM Tab 12, pages 404-405);** Exhibit 67 (CCG0024521), Exhibit 69 (CCG0024558), Exhibit 71 (CCG0027248) and Exhibit 73 (CCG0024788) to CCG0028710 - de Alba May 27, 2016 Affidavit **(CPM Tab 12, pages 406-420).**

55. Unbeknownst to Catalyst, on August 7, 2014, the Consortium, which had inside knowledge that the VimpelCom board was meeting to consider the Catalyst deal, sent VimpelCom a "superior" proposal to purchase Wind (the "August Proposal"). The August Proposal offered to purchase VimpelCom's debt and equity interests in Wind without conditions.

56. The Consortium essentially offered to step into VimpelCom's position as the majority financial shareholder and minority voting shareholder with no guarantee that it would be able to re-structure the voting interests in Wind at a later date. Either the Consortium was taking an unbelievable risk with its investors' money (unlikely) or it made the offer with the benefit of inside knowledge that the federal government would grant it the regulatory approvals it required to restructure Wind's interests. The only possible source of that knowledge was Brandon Moyse.

H. WEST FACE COPIES CATALYST'S REGULATORY STRATEGY

57. After the exclusivity period with Catalyst ended, VimpelCom agreed to sell its interest in Wind to the Consortium on the terms set out in the August Proposal.

58. In September 2014, as West Face and the Consortium were concluding a deal with VimpelCom, West Face circulated an investment memorandum to its investors. The memorandum set out West Face's investment thesis regarding Wind, including its justification for the investment and its exit strategy. This included discussion of how Wind would mitigate its losses if the investment did not work as expected.

59. West Face's "collateral coverage" in the event that Wind was unsuccessful was the exact same scenario that Catalyst proposed to the Federal Government in March and May 2014:

> 1. Scenario 1 - Sale to an Incumbent: In the event that Wind fails and there are no other buyer options, **the government cannot logically continue to**

> **block a sale to an incumbent**. In this scenario, valuation range is C$500 to C$800 million. [Emphasis added.][51]

60. The impact of this memorandum cannot be understated. In justifying a multi-million-dollar investment to its investors, West Face explained how it would mitigate losses in the event of Wind's failure. This mitigation strategy never appeared in West Face's analysis of the Wind transaction **before it hired Moyse**. Moreover, at trial, Tony Griffin, West Face's main witness, expressly denied that West Face considered a sale to an incumbent to be a necessary exit strategy.[52]

61. On September 15, 2014, West Face announced that the Consortium had acquired Wind. As information came to light about West Face's involvement in the Wind deal, it became clear to Catalyst that West Face had inside information about Catalyst's bidding strategy in its negotiations with VimpelCom.

62. Catalyst believed that the source of that information was Moyse. He had the knowledge, opportunity, and motivation to share Catalyst's confidential information with West Face. Moyse had full knowledge of Catalyst's regulatory risk strategy, was eager to impress his potential/new employer, and demonstrated an animus towards Catalyst's principals.[53]

63. West Face's documents confirmed to Catalyst that West Face was in possession of its confidential information concerning the Wind deal. First, on June 4, 2014, Griffin commented to a third party that Catalyst's bid for Wind "seems to be a lot of air". **Griffin's familiarity with Catalyst's bid occurs after he met Moyse.** The fact that Griffin had sufficient knowledge of Catalyst's bid in June 2014 to be able to comment on the quality of its offer demonstrates he

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[51] WFC0108033 - West Face September 2014 Investment Memo **(CPM Tab 12, page 421).**
[52] Griffin June 4, 2016 Affidavit at ¶101-102 **(CPM Tab 12, pages 422-423).**
[53] BM003688 - Affidavit of Brandon Moyse sworn July 7, 2014 ("BM003688 - Moyse July 7, 2014 Affidavit") at ¶23-25 **(CPM Tab 12, pages 424-425)**. He engages in a significant description of the "hostile" work environment and delves into a personal animus about Glassman himself.

possessed Catalyst's confidential information, with no other explanation as to how this information came into his possession.[54]

64. Catalyst's position at trial was that Moyse and West Face committed a clear breach of confidence. Moyse communicated Catalyst's confidential negotiating positions and regulatory strategy with respect to Wind to West Face, which knew that the information was confidential.

65. When Catalyst and VimpelCom were in exclusive negotiations and West Face and the Consortium feared that it would lose Wind, the Consortium made an offer that required knowledge of Catalyst's confidential information. West Face knew that Catalyst could not agree to waive government approval as a condition to the deal because its investments in other regulated industries prevented it from taking an aggressive stance with the government. In contrast, West Face **could** waive the condition because it knew from Moyse that Catalyst believed, based on its discussions with Industry Canada, that the government would yield to whomever purchased Wind and permit a restructuring. West Face also knew from Moyse that in the event that Wind did not succeed as an independent carrier, the Consortium could implement the strategy developed by Catalyst to compel the government to end the restrictions on the transfer of spectrum and to sell the spectrum assets to an incumbent. Armed with this knowledge, West Face, through the Consortium, submitted a "superior" bid to VimpelCom during the exclusivity period. As a result of West Face's actions and information transmitted by Moyse, Catalyst lost the Wind bid.

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[54] WFC0068142 - June 4, 2014 email Griffin to Lacavera **(CPM Tab 12, pages 426-427)**; CCG0023894 - Confidentiality Agreement **(CPM Tab 12, pages 428-435).**

I. TRIAL JUDGE DISMISSES CATALYST'S CLAIM

66. The trial judge dismissed Catalyst's action on the basis of a number of erroneous factual and legal conclusions, described below. The trial judge awarded West Face substantial indemnity costs in the amount of $1,239,965. He awarded Moyse partial indemnity costs of $339,500.18.[55]

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

67. This appeal raises three issues:

(a) Did the trial judge commit an error of in law in determining and/or applying the test for spoliation;

(b) Did the trial judge deny Catalyst procedural fairness at trial by:

(i) applying an inconsistent standard of scrutiny to the evidence of Catalyst than to that of West Face and Moyse; and

(ii) by making findings of fact on issues that the trial judge had previously barred Catalyst from raising in this proceeding;

(c) Did the trial judge commit palpable and overriding errors in fact of finding that:

(i) Moyse did not know Catalyst's confidential regulatory strategy and negotiating positions with respect to VimpelCom;

(ii) Moyse did not communicate Catalyst's confidential information to West Face; and

(iii) West Face did not act on Catalyst's confidential information.

68. Catalyst also seeks leave to appeal the trial judge's costs award.

ISSUE 1: TRIAL JUDGE ERRED IN LAW REGARDING SPOLIATION

69. The trial judge erred in determining and applying the legal test for spoliation. The trial judge added an element to the test that required Catalyst to prove an intent to destroy relevant

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[55] Catalyst v. West Face et al, 2016; 2016 ONSC 6285, Cost Endorsement of Justice Newbould dated October 7, 2016; ("Costs Endorsement") **(CPM Tab 6, pages 78-85).**

evidence rather than an intent to merely commit the act of destruction. This error affected the trial judge's findings regarding spoliation and, consequently, his findings with respect to Moyse, a key witness in the action.

A. STANDARD OF REVIEW

70. The proper legal test for spoliation and the application of that test to the facts is a question of law.[56] This Court reviews questions of law on a standard of correctness.[57]

B. TRIAL JUDGE ERRED IN DETERMINING TEST FOR SPOLIATION

(i) Trial Judge's Test for Spoliation

71. The trial judge set out a four-pronged test for the tort of spoliation as follows:

(a) The missing evidence must be relevant;

(b) The missing evidence must have been destroyed intentionally;

(c) At the time of destruction, litigation must have been ongoing or contemplated; and

(d) It must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.[58]

72. The trial judge articulated this test himself in *Nova Growth Corp. v. Kepiniski*. In that case, the trial judge explained that the source of the test was a passage from *McDougall v. Black & Decker*, an Alberta Court of Appeal decision. In *McDougall,* the Alberta Court of Appeal set out its understanding of spoliation, but did not analyze whether spoliation occurred.[59]

73. The Alberta Court of Appeal cited no precedent for its test, nor did it apply the test to the facts of that case. Its reasoning was *obiter*.

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[56] *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748 at ¶35.
[57] *Wilk v. Arbour*, 2017 ONCA 21 at ¶18.
[58] *Nova Growth Corp. et al v. Andrezej Roman Kepinski*, 2014 ONSC 2763 at ¶296.
[59] *McDougall v. Black & Decker Canada Inc.* (2008), 440 AR 253 at ¶18 (CA).

(ii) Trial Judge's Test for Spoliation Adds Specific Intent Element

74. In his reasons for judgment, the trial judge held, in relation to the spoliation allegations:

> I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. **There is no evidence to contradict his statements as to why he deleted his internet browsing history.** He was a young man at the time who had a very close relationship with his girlfriend who is now his fiancee. He did not want his internet searching to become part of the public record. **In deleting this history, he did not intend to breach the order of July 16, 2014 or to destroy any evidence relevant to this litigation.** This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history.[60] [Emphasis added.]

75. The trial judge's reasons indicate that he considered the fourth element of his articulated test for spoliation, that "it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation," to raise spoliation to an act requiring "specific intent". This heightened level of intent is not supported by any precedent and, respectfully, does not make sense in the spoliation context.

76. In the criminal context, specific intent offences require that the accused intend a particular consequence to satisfy the *mens rea* requirement for a finding of guilt. In contrast, "general intent" offences only require the performance of the illegal act and do not require that the accused intended a particular consequence or possess actual knowledge of the consequences of his act.[61]

77. Proving specific intent is difficult because it requires evidence that a person intended to bring about a certain consequence with his or her actions. In *R. v. Tatton,* Justice Moldaver explained that determining an accused's intention can be an obtuse exercise unless the accused engaged in conduct that is obviously intentional or reckless.[62]

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[60] TJ at ¶144 **(CPM Tab 4, page 67)**.
[61] *R v. Tatton*, 2015 SCC 33 at ¶26 (*Tatton*).
[62] *Tatton, supra* at ¶54.

78. In the context of spoliation, the trial judge focused on Moyse's subjective intent and required Catalyst to establish that Moyse intentionally relevant destroyed evidence *for the purpose* of affecting the outcome of litigation. As a matter of logic, by relying on Moyse's subjective evidence on this issue, and requiring production of evidence that contradicted this subjective evidence, the trial judge's test effectively eliminated the possibility that a defendant could be found liable for spoliation, as a defendant can always claim (as Moyse did in this case) that he did not intend to destroy relevant evidence.

(iii) The Court Did Not Apply Heightened Intent for Spoliation in Spasic

79. Courts in Ontario have not required proof of this same heightened level of intent to make out spoliation. Instead, Ontario courts have left open the possibility that spoliation can be established where evidence is destroyed negligently. This was made clear by this Court in *Spasic Estate v. Imperial Tobacco Ltd.* In *Spasic*, the defendants moved to strike a pleading of the tort of spoliation. On appeal, this Court restored the pleading and permitted the plaintiff to claim an independent tort of spoliation.

80. The Court in *Spasic* provided insight into the intent required to establish spoliation. It did not indicate that spoliation required intentional destruction of evidence for a specific purpose:

> I view the plaintiff's claim based on the tort of spoliation as an additional, or alternative, claim to be considered only if it is established that the destruction or suppression of evidence by the respondents results in the inability of the plaintiff to establish the other nominate torts pleaded in the statement of claim.[63]

81. This quotation does not establish a need to prove specific intent – the Court's analysis focuses on the *effect* of the defendant's conduct, and not the *intent* of that conduct.

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[63] *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 OR (3d) 699 at ¶21 (CA).

(iv) Ontario Superior Court Makes No Mention of Heightened Intent for Spoliation

82. Other cases in the Superior Court have not required the claimant to establish specific intent. In *Cheung v. Toyota*, the Court described spoliation as the "destruction or material alteration of evidence or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation".[64] The Court's formulation of spoliation only includes the first three elements of the test used by the trial judge: (i) the evidence was relevant; (ii) the evidence was destroyed; and (iii) there was pending or reasonably foreseeable litigation.

83. Moreover, the Court's use of the term "failure to preserve" indicates that spoliation can be established where a defendant acted negligently, without a specific intent to destroy evidence.

84. In *Cheung,* a car accident killed a driver and injured passengers. A defendant hired an expert to examine the vehicle and its components. The expert did so and "preserved all the evidence the [he] believed at that time was crucial or involved [in the litigation]".[65] The remainder of the vehicle was destroyed, unbeknownst to the other defendants.

85. Following the destruction of the vehicle, the Court ordered that the expert preserve all material arising out of his investigation, including the two rear tires of the vehicle. The expert failed to do so but could not explain why. The expert did not destroy the tires in bad faith or with an intent to deprive the other parties of evidence in the case.

86. The Court left it to the trial judge to "determine whether intentional destruction through bad faith is required before this adverse inference can be drawn". The Court expressed its opinion

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[64] *Cheung (Litigation Guardian of) v. Toyota Canada Inc* (2003), 29 CPC (5th) 267 at ¶1 (SCJ) (*Cheung*).
[65] *Cheung, supra* at ¶4.

that spoliation was available in the absence of evidence of intentional destruction or bad faith and that a court can impose sanctions in the appropriate case using its inherent jurisdiction.[66]

87. In *Dickson v. Broan-Nuton Canada Inc.*, the Court held that spoliation did not require evidence of intent to suppress the truth. The Court expressly rejected that the mental element required to establish spoliation included specific intent.[67]

(v) American Jurisprudence Permits Spoliation Due to Negligence or Recklessness

88. In the American context, the test for spoliation does not require that the spoliator destroy evidence for the express purpose of affecting the litigation. Instead, the test for spoliation allows a drawing of the inference if evidence is destroyed by a spoliator acting negligently or recklessly.

89. In the leading American case for electronic spoliation, the plaintiff sought an adverse inference instruction to be given to the jury after evidence appeared to have been destroyed by the defendant. Prior to the commencement of litigation, the defendant's in-house counsel instructed its employees to preserve some documents but not with respect to back-up tapes. Other employees ignored the instruction and failed to retain relevant emails, even after the litigation commenced.[68]

90. The Court determined that the elements of the test for spoliation were as follows:

(a) The destroyed evidence is "relevant" to the party's claim or defence such that a reasonable trier of fact could find that it would support that claim or defence;

(b) The party having control over the evidence had an obligation to preserve it at the time it was destroyed; and

(c) The party destroyed the evidence with a "culpable state of mind".

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[66] *Cheung, supra* at ¶23.
[67] *Dickson v. Broan-Nuton Canada Inc.*, 2007 CarswellOnt 9931 (SCJ).
[68] *Zubulake v. UBS Warburg LLC;* 229 FRD 422 (SDNY, 2004) at ¶1 (*Zubulake V*).

91. The test in *Zubulake* is largely the same as that used by the trial judge. However, under the *Zubulake* test, a "culpable state of mind" can be established through a finding of negligence:

> In this circuit, **a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence**. [Emphasis added, footnotes omitted.][69]

92. In *Residential Funding*, the Second Circuit of the Court of Appeals affirmed that a culpable state of mind is established by showing that evidence was "destroyed knowingly, **even without intent to [breach a duty to preserve it],** or negligently.[70] The Court's reasoning is based on the premise that "each party should bear the risk of its own evidence":

> It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. **The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.**[71] [emphasis added]

93. Thus, a claimant need not prove specific intent to destroy evidence to establish spoliation. To do so severely hampers the purpose behind the doctrine of spoliation.[72] In *Zubulake*, the Court found spoliation on the basis of the defendant's failure to preserve relevant documents. The Court's observation regarding the defendant's actions applies to the current case:

> At the end of the day, however, the duty to preserve and produce documents rests on the party. **Once that duty is made clear to a party, either by court**

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[69] *Zubulake V* at ¶7.
[70] *Residential Funding Co. v. DeGeorge Financial Corp*: 306 F.3d 99 (USCA, 2nd Circuit 2002).
[71] *Residential Funding Co. v. DeGeorge Financial Corp*: 306 F.3d 99 (USCA, 2nd Circuit 2002) citing *Turner v. Hudson Transit Lines Inc.*, 142 FRD 68, 75 (SDNY, 1991).
[72] Note that since *Residential Funding Co*, the Federal Rules of Civil Procedure have been amended with respect to the obligations of parties to preserve electronically stored information. Under the Rules, an adverse inference now requires a finding that the spoliating party "acted with the intent to deprive another party of the information's use in the litigation". The Advisory Committee that made the 2015 amendment notes that the new codified test rejects the principle that the adverse inference can be granted on a finding of negligence or gross negligence. See also *Bagley v Yale University*, 2016 WL 7407707 (Dis Crt D. Connecticut: 2016).

> **order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril.** [Emphasis added.][73]

94. In *The Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities LLC et al.*, the judge who heard *Zubulake* revisited her conclusions regarding the mental culpability required to establish spoliation. In *University of Montreal*, there was no purposeful destruction of evidence: the plaintiffs failed to institute document holds and engaged in careless and indifferent collection efforts after the preservation duty arose. In the words of the Court, "there [could] be little doubt that some documents were lost or destroyed".[74]

95. The Court found that the culpability of a party that destroyed evidence could be described as a continuum between negligence and willfulness. A party is obliged to participate meaningfully and fairly in the discovery process, and a failure to do so is negligent, even if it results "from a pure heart and an empty head".[75]

(vi) Trial Judge's Test Raised the Mental State for Spoliation Above Civil Contempt

96. The fourth element in the trial judge's test for spoliation is so strict that it demands proof of a level of intent that exceeds that required for civil contempt to be made out.

97. In *Carey v. Laiken*, the Supreme Court expressly rejected the argument that an alleged contemnor must intend to interfere with the administration of justice in in order to have the mental state necessary to commit civil contempt. Such a requirement put the test "too high" and would improperly allow for mistakes of law to serve as a defence to civil contempt.[76]

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[73] *Zubulake V* at ¶11.
[74] *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC et al*: 685 F. Supp. 2d 456 (SDNY, 2010).
[75] *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC et al*: 685 F. Supp. 2d 456 at 15 (SDNY, 2010).
[76] *Carey v. Laiken*, 2015 SCC 17 at ¶29 and 38 (*Laiken*).

98. Like civil contempt, spoliation is intended to deter litigants from acting in a manner that undermines the civil litigation process. Litigants must be deterred from negligently destroying documents where the information could be relevant to pending or ongoing litigation. The logic for requiring a "general intent" standard for contempt applies with equal force to spoliation.

(vii) Requiring Specific Intent Gives Rise to a Universal "Porn Defence"

99. A specific intent requirement for spoliation leads to the very mischief that the Supreme Court warned could flow from a heightened intention requirement for civil contempt:

> [...] requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.[77]

100. The trial judge's requirement that Catalyst prove Moyse intentionally destroyed relevant evidence to affect the trial incentivizes those accused of spoliation to assert, as Moyse did in this case, an unverifiable "porn defence". Under this defence, the alleged spoliator could always assert that he had a good faith intention to preserve relevant evidence, and that he or she only destroyed electronic data to hide evidence of visits to adult entertainment websites. The mischief of this defence is that it is impossible to disprove, as the information in question was destroyed.

(viii) Effect of the Trial Judge's Reasoning

101. Instead of requiring specific intent to destroy evidence, the trial judge should have applied the following test for spoliation:

(a) The missing evidence must be relevant;

(b) The missing evidence must have been destroyed intentionally; and

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[77] *Laiken* at ¶42.

(c) At the time of destruction, litigation must have been ongoing or contemplated.

102. On the record before the trial judge, it is submitted that it was clear that Moyse did destroy relevant evidence.

103. On July 16, 2014, Moyse consented to an interim order (the "Interim Order") that required him to preserve his electronic records, including on his personal electronic devices, pending the creation of a forensic image of those devices. The Interim Order was intended to prevent Moyse from destroying evidence of his electronic conduct in the months spanning his first meeting with Dea and the commencement of the action in a case where it had already been established that Moyse had communicated Catalyst's confidential information (the investment memos) to West Face.

104. Instead, after consenting to the Order, Moyse committed the very act Catalyst was seeking to prevent: he intentionally deleted his internet browsing history, launched a program to wipe his hard drive and cleaned his computer's registry. These undisputed facts are sufficient to ground a finding of spoliation. In *Zubulake*, the Court found spoliation after a defendant issued an incomplete litigation hold. In this case, Moyse's misconduct was far more severe: he intentionally deleted electronic records in the face of a Court Order and launched a military-grade scrubber the night before his computer was to be forensically imaged. As the U.S. Second Circuit Court of Appeals held in *Residential Funding*, *supra*, an adverse inference is justified to restore the evidentiary balance.[78]

105. The evidence from both IT expert witnesses at the trial confirmed that Moyse's web browsing history would have included records of his use of his personal email account (Gmail) and his use of web-based document storage services such as Dropbox. There was also clear evidence at

[78] TJ at ¶141-165 **(CPM Tab 4, pages 66-72)**.

trial that Moyse used his Blackberry to communicate with West Face. It is thus clear on the evidentiary record that Moyse intentionally destroyed relevant evidence that might have effected the outcome of the action, and that Catalyst has been left without a remedy for this conduct.[79]

106. This Court can and should overturn the trial judge's finding that Moyse did not commit the tort of spoliation and should find that Moyse destroyed evidence in this proceeding. Moyse deleted evidence in the face of a Court Order. He should not be permitted to hide behind a "porn defence" to avoid liability for his conduct.

107. There is sufficient evidence in the record for this Court to find that Moyse committed the tort of spoliation, and this Court can determine a suitable remedy for this conduct. That remedy should include an order the Moyse personally pay Catalyst's costs of the previous trial and that the breach of confidence issue should be re-tried with a direction to the trial judge to take into account the finding that Moyse destroyed evidence both before and after the action was commenced.

C. IN THE ALTERNATIVE, THE TRIAL JUDGE FAILED TO APPLY THE TEST CORRECTLY

108. In the alternative, if the trial judge applied the correct legal test, Catalyst submits that he failed to correctly apply it to the facts by conflating the first (relevance) and second (intention) factors in the spoliation test.[80] In applying the test for spoliation, the trial judge found that Moyse believed he was deleting personal information "not relevant to the litigation".[81]

109. With the greatest of respect, the test is **not** whether Moyse intended to delete relevant evidence. Under the test set out by the trial judge, there is a four-step analysis that first asks

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[79] Lo Examination May 14, 105 at pp. 22:5 – 25:10 and p. 26:4-10 **(CPM Tab 11, pages 203-207)**; Trial Transcript June 8, 2016 at pp. 685:7-24, 706:11 – 707:1 and 708:3-16 **(CPM Tab 11, pages 28-211)**; Trial Transcript June 13, 2016 at p. 1403:1-6 **(CPM Tab 11, page 212).**

[80] TJ at ¶144, 163 and 165 **(CPM Tab 4, pages 67 and 72)**.

[81] TJ at ¶142 **(CPM Tab 4, page 66)**.

whether the missing evidence was relevant. The intention question does not concern whether the intention was to destroy "relevant evidence", but rather whether destruction occurred on purpose or by accident (*i.e.*, conduct beyond the control of the defendant). Moyse's web browsing history and Catalyst-issued Blackberry were relevant evidence and Moyse clearly intended to commit the act of deletion. The conflation of the first two steps of the analysis led to an erroneous application of the trial judge's test to these facts.

110. Finally, the trial judge failed to properly determine if an inference should be drawn that evidence was destroyed to affect the litigation. The trial judge concluded that there was insufficient evidence to conclude that the evidence was destroyed to affect the litigation without considering the question of whether the established facts supported a reasonable inference on this question. As a result of these errors, the trial judge erred in his application of the spoliation test.

ISSUE 2: THE TRIAL JUDGE USED DIFFERENT STANDARDS TO SCRUTINIZE EVIDENCE

111. The trial judge applied different standards of scrutiny to the evidence of Catalyst, Moyse and West Face. The trial judge refused to accept any of Catalyst's uncorroborated evidence because of alleged inconsistencies, refusals to admit certain facts and overstatements of the evidence. At the same time, the trial judge accepted the evidence of the defendants' witnesses, and even commented that they were "impressive", while overlooking similar or worse inconsistencies in the defendants' witnesses' evidence, including evidence on key issues from Moyse and Griffin.

A. STANDARD OF REVIEW

112. This Court has repeatedly held that it is an error of law for a trial judge to apply a higher level of scrutiny to the evidence of one party than the other. In order to succeed in demonstrating

that the trial judge made such an error, the appellant must only identify "something clear" in the trial judge's reasons or the record indicating that a different standard of scrutiny was applied.[82]

B. CLEAR ENUNCIATIONS OF A DIFFERENT STANDARD OF SCRUTINY

113. The trial judge's reasons include four clear examples that demonstrate that he scrutinized the evidence of Catalyst and that of West Face and Moyse differently:

(a) The trial judge presumed the veracity of West Face's witnesses and Moyse, but not of Catalyst's witnesses;

(b) The trial judge fixated on repetition in the affidavits sworn by Catalyst's witnesses, rather than on substance;

(c) The trial judge applied a double-standard to inconsistencies in testimony; and

(d) The trial judge harshly criticized Catalyst's witnesses, but excused the defendants' witnesses for perceived overstatements in the affidavit evidence.

(i) The Trial Judge Assumed West Face and Moyse were Credible

114. The trial judge's costs award demonstrates that his assessment of Catalyst's evidence assumed that Catalyst's witnesses were not credible. Conversely, the trial judge assumed that West Face's witnesses were credible and that it was Catalyst's burden to prove that West Face's witnesses were lying:

> This was not a case in which it was acknowledged by West Face that it had obtained Catalyst information from Mr. Moyse and the issue was whether it constituted confidential information or was used by West Face. Rather it was a straight contest as to whether West Face had obtained confidential Catalyst information about Wind and had used it. Catalyst was aware aware [sic] that in order to prove its allegations it had to establish that West Face witnesses were lying. There was no way around that.[83]

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[82] *R. v. Gravesande*, 2015 ONCA 774 at paras 15-16; *Noriega v. College of Physicians and Surgeons of Ontario*, 2016 ONSC 924 at ¶¶81-89 (Div Ct); *R. v. Owen* (2001), 150 OAC 378, at ¶3 (CA); *R. v. H.C.*, 2009 ONCA 56 at ¶62; *R. v. Phan*, 2013 ONCA 787 at ¶30.

[83] Costs Endorsement at ¶8 **(CPM Tab 4, pages 80-81)**.

115. The trial judge was sympathetic to Moyse, despite acknowledging that he **did** delete evidence in the face of a Court Order. In his costs decision, the trial judge went out of his way to excuse Moyse's behaviour:

> Mr. Moyse made some mistakes at the outset of this sorry saga. He destroyed evidence of his web browsing history out of a concern that it would show he had accessed adult entertainment websites and become part of the public record. He wiped his blackberry to remove personal information. He always asserted that they were honest mistakes and that he never passed on to West Face any confidential Catalyst information regarding its Wind initiative or destroyed any evidence of any such activities. Mr. Moyse was a young man at that time who had a very close relationship with his girlfriend who is now his fiancée. [84]

116. By contrast, the trial judge did not hesitate in laying the blame for the action at the feet of Newton Glassman, even though there was no evidence in the record to support this harsh assessment. The trial judge was of the view that Moyse's and West Face's denials of wrongdoing ought to have been accepted wholesale, even in the face of deceit and improper conduct:

> Mr. Glassman caused Catalyst to assert a full scale attack on this young man. No thought was given to all of the denials by Mr. Moyse as well as by the West Face witnesses that there had not been any confidential Catalyst information regarding Wind given to West Face by Mr. Moyse.[85]

117. The trial judge's statements demonstrate that he viewed the Catalyst witnesses, and specifically Mr. Glassman, as aggressive and unlikely to be truthful, while he assumed that Moyse and the West Face witnesses had no reason to tell anything but the truth. This finding ignored the fact that, prior to the commencement of the action, it was Moyse and West Face who deliberately misled Catalyst concerning treatment of Catalyst's confidential information and that Catalyst's motions led to production of evidence of Moyse's wrongdoing. Yet, this never entered into the trial

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[84] TJ at ¶16-17 **(CPM Tab 4, page 31)**.
[85] TJ at ¶16-17 **(CPM Tab 4, page 31).**

judge's analysis of the credibility of Moyse or West Face's witnesses. The trial judge's different attitude towards the witnesses demonstrates that he weighed their evidence differently.

(ii) The Trial Judge Discounted Catalyst's Affidavit Evidence for Repetition

118. The trial judge also treated the affidavit evidence of the parties differently in his analysis of credibility. The trial judge ordered the parties to lead evidence in chief by affidavit.[86] In his judgment, the trial judge impugned the usefulness of affidavits and concluded that affidavit evidence "can lead to repetition of evidence by more than one witness". He criticized Catalyst's evidence because the affidavits of two Catalyst witnesses were repetitive regarding Moyse's role in preparing the regulatory presentation to the Federal Government in March 2014:

> What it can lead to in some cases however, as to some extent in this case, is the repetition of evidence by more than one witness. This occurred, for example, in Messrs. Glassman and De Alba of Catalyst both stating in their affidavits that Mr. Moyse "led the preparation" of a PowerPoint presentation that Catalyst used in making a presentation to Industry Canada in Ottawa. This evidence was given to support the assertion of the deep knowledge that Mr. Moyse possessed of the strategic position being taken by Catalyst with the Government and thus with the negotiating strategy that Catalyst was taking with VimpelCom Ltd. regarding the acquisition of WIND. As I will discuss, this evidence was an overstatement of what occurred.[87]

119. Conversely, the trial judge ignored the repetition in the affidavits of the West Face witnesses when assessing their credibility. He found no fault in the fact that West Face's witnesses repeated certain propositions that they relied on quite dramatically during trial and which were discredited through documentary evidence. For example, on the issue of whether the Consortium had discussed Catalyst's regulatory strategy, West Face's witnesses gave nearly identical statements. Hamish Burt's (of 64NM) affidavit states:

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[86] Mid-Bowline Group Corp, 2016 ONSC 669 ("Mid-Bowline Decision") **(CPM Tab 7, pages 86-102).**
[87] TJ at ¶10 **(CPM Tab 4, page 27).**

> I have now had the opportunity to read the Affidavit of Newton Glassman sworn May 27, 2016. At no point before reading Mr. Glassman's Affidavit did I know what Catalyst's confidential regulatory strategy was. Now that I understand for the first time Catalyst's regulatory strategy regarding WIND, I can definitively re-affirm that 64NM was never privy to such a strategy. To the best of my knowledge, Catalyst's strategy to demand regulatory concessions from Industry Canada was never discussed among the Investors, whether as a strategy that we should or could pursue ourselves, as the strategy of Catalyst in particular, or as the possible strategy of a competing bidder in general.
>
> For this reason, Catalyst's confidential regulatory strategy did not and could not have played any role in our negotiations with VimpelCom, nor our own assessment of the risk involved in pursuing the transaction structure that we put forward. As I previously testified, my understanding is that the successful transaction structure that the Investors ultimately proposed to VimpelCom was developed among the Investors in order to meet VimpelCom's well-known desire for a transaction that would proceed swiftly and with little to no regulatory risk to VimpelCom. This structure was not based on and had nothing to do with any Catalyst confidential information.[88]

120. The affidavit of Michael Leitner of Tennebaum Capital Partners used nearly identical language:

> I have now had the opportunity to read the Affidavit of Newton Glassman sworn May 27, 2016. At no point prior to reading Mr. Glassman's Affidavit did I know what Catalyst's confidential regulatory strategy regarding WIND was. Now that I understand for the first time Catalyst's regulatory strategy regarding WIND, I can categorically reaffirm that West Face never communicated any such information to Tennenbaum; that Tennenbaum never learned such information from any other source (including the Defendant Brandon Moyse); and that no such information was discussed among the Investors.
>
> To be absolutely clear, Catalyst's regulatory strategy was never discussed among the Investors, whether as a strategy that we should pursue ourselves, as an identified strategy of Catalyst, or as the possible strategy of another competing bidder in general. For this reason, it did not and could not have played any role in our negotiations with VimpelCom, nor in our own assessment of the risk involved in pursuing the transaction structure that we put forward to VimpelCom and which ultimately proved to be successful.[89]

121. Likewise, the affidavit of Anthony Griffin of West Face states:

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[88] WFC0112289 - Affidavit of Hamish Burt sworn June 1, 2016 at ¶5-6 **(CPM Tab 12, pages 436-437).**
[89] WFC0112222 - Affidavit of Michael Leitner sworn June 1, 2016 at ¶5-6 **(CPM Tab 12, pages 438-439).**

> I have read the Affidavits of Newton Glassman and Gabriel De Alba sworn May 27, 2016, and in particular their evidence about Catalyst's confidential regulatory strategy regarding WIND. As a preliminary matter, I can unequivocally say that during the events in question in 2014 and right up to the time that I read the Glassman and De Alba Affidavits, I had no awareness of Catalyst's confidential regulatory strategy regarding WIND. Mr. Moyse never informed West Face of anything about WIND, let alone Catalyst's confidential regulatory strategy regarding WIND.
>
> Now that I understand for the first time Catalyst's regulatory strategy regarding WIND, I can confidently state that knowledge of Catalyst's strategy would not have affected West Face's strategy. By the time our consortium came together in late July and we had committed financing to acquire the entire company, we knew that we were in a competitive auction process. VimpelCom entering exclusivity with Catalyst only heightened the need to make the best bid possible. We were in a "Hail Mary" situation. We knew based on VimpelCom's expressed desires - and not based on anything Catalyst may have intended to do - that we needed to offer the greatest certainty of closing and the lowest risk to VimpelCom, whether regulatory, financial, or otherwise. That was what the Investors' bid did.[90]

122. The trial judge made no mention of this repetition. He accepted each of Burt, Leitner and Griffin's evidence on the issue of whether West Face used Catalyst's regulatory strategy as being more credible because they testified to the same facts. While repetition in affidavit evidence was held to detract from Catalyst's witnesses' credibility, repetition in the affidavit evidence of West Face's witnesses enhanced their credibility. This application of different standards of scrutiny to the affidavit evidence tainted the trial judge's findings of credibility and his overall decision.

(iii) The Trial Judge Discounted Catalyst's Evidence for Inconsistency

123. Not only did the trial judge criticize Catalyst's evidence because it was repetitive, he also criticized it because witnesses had slightly different recollections of events. The trial judge relied on these minor differences to discount evidence of the Catalyst witnesses almost entirely.[91]

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[90] Griffin June 4, 2016 Affidavit at ¶87-88 **(CPM Tab 12, page 440)**.
[91] TJ at ¶14-35 **(CPM Tab 4, pages 30-34)**.

124. In particular, in justifying his refusal to believe Mr. Glassman's evidence, the trial judge gave four examples of contradictions or refusals to concede a point in cross-examination by Mr. Glassman that, in the trial judge's view, discredited his evidence entirely.

125. For example, a presentation made to the federal government on March 27, 2014 stated that Catalyst was in "advanced discussions" with VimpelCom to gain control of Wind. On cross-examination, Mr. Glassman refused to agree that this statement was misleading. He testified that, in his opinion, the discussions with VimpelCom were advanced. Mr. Glassman referred, among other things, to the fact that Catalyst and VimpelCom had recently entered into a confidentiality agreement. Even though there was **no evidence** to contradict Mr. Glassman's subjective opinion, the trial judge chastised Mr. Glassman for refusing to agree on cross-examination that the statement was misleading.

126. In fact, Mr. Glassman's opinion was reasonable and defensible. There was ample evidence in the record to demonstrate as much. By March 27, 2014 (the date of the presentation to the federal government):

(a) Catalyst had submitted a letter of intent that included an offer to purchase VimpelCom's shares, a set price and a mechanism for completing the sale;[92]

(b) VimpelCom backed out of a spectrum auction that Catalyst was also participating in and reengaged in negotiations with Catalyst;[93]

(c) Catalyst met with Wind and UBS on four occasions between January 13 and March 27, 2014 to discuss potential terms, and Wind provided Catalyst with its management presentation;[94]

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[92] CCG0025176 - LOI from January 2, 2014 **(CPM Tab 12, pages 441-443)**.
[93] CCG0028710 - de Alba May 27, 2016 Affidavit at ¶28 and 30 **(CPM Tab 12, pages 444-445)**.
[94] CCG0011506 - Email from Z. Michaud to B. Moyse dated February 25, 2014 attaching CCG0011507 - Wind Management Presentation **(CPM Tab 12, pages 446-478)**.

(d) The day after VimpelCom announced it had written off its entire investment in Wind, Catalyst met with UBS and Wind to negotiate terms of a purchase on the basis of the new information in the market;[95] and

(e) Catalyst and VimpelCom executed a confidentiality agreement and VimpelCom agreed to provide information about Wind's business plan and VimpelCom's equity structure in Wind.[96]

127. Negotiations between Catalyst and VimpelCom were sufficiently "advanced" by March 27, 2014 to represent as much to the federal government in meetings concerning regulatory issues about a possible purchase of Wind. Mr. Glassman was entitled to his opinion on this issue. West Face adduced no evidence to contradict Mr. Glassman's opinion. Yet, the trial judge refused to accept uncontradicted evidence and instead used his unfair finding that somehow Mr. Glassman did not hold this opinion to undermine Mr. Glassman's credibility.

128. The trial judge also relied on an unfounded inconsistency in Mr. Glassman's evidence and that of the contemporaneous documents regarding Mr. Glassman's subjective impressions of the body language of government officials in meetings. Mr. Glassman's evidence was that he believed that the "unofficial" position of the government was that it would grant the concessions that Catalyst was seeking. Mr. Glassman was in the room with Industry Canada on two separate occasions to seek regulatory concessions in the event Catalyst purchased Wind and formed his opinion based on his observation of the persons with whom he met

129. The trial judge refused to accept Mr. Glassman's evidence about his own subjective impressions. The trial judge claimed that the record did not include a "single contemporaneous document" to evidence Mr. Glassman's view of a softening government position or that the

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[95] CCG0028710 - de Alba May 27, 2016 Affidavit ¶35 **(CPM Tab 12, page 479)**.
[96] CCG0023894 - Confidentiality Agreement w/ VIP **(CPM Tab 12, pages 480-487)**.

government would grant concessions. In fact, the record contained several emails that demonstrated that Mr. Glassman disagreed with Catalyst's advisors on this very point.[97]

130. The trial judge also suggested that Mr. Glassman's impressions did not align with Catalyst's government relations advisors' impressions. Whether Mr. Glassman and Catalyst's government relations advisor had different opinions on this point could not be a basis to question Mr. Glassman's credibility when testifying as to his own **subjective** belief. The trial judge's reliance on this non-existent "inconsistency" to impugn Mr. Glassman's credibility in general was unfair.

131. The trial judge also took issue with Mr. Glassman's use of the phrase "crucial" in describing the need to sell Wind to an incumbent within five years of purchase. During his cross-examination, Mr. Glassman stated that this was very, very important, but did not agree that it was "crucial". As it turned out, Mr. Glassman had used the word "crucial" in his affidavit but could not remember that during cross-examination. The trial judge faulted Mr. Glassman for not memorizing every word in his affidavit, even though the defendants' witnesses made much more material errors in their affidavit evidence (as explained in detail below).[98]

132. The trial judge also claimed that Gabriel De Alba "overstated matters and refused to concede points that he should have". The trial judge points to Mr. De Alba's refusal to concede that Moyse was not an important part of Catalyst's Wind team. Mr. De Alba's evidence was that Moyse was a critical part of the deal team.

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[97] Response to Drysdale, Response to de Alba in May 2014 – Exhibit 2 (CCG0009482), Exhibit 4 (CCG0025842) and Exhibit 5 (CCG0024609) to CCG0028711 – Affidavit of Newton Glassman sworn May 27, 2016 ("CCG0028711 – Glassman May 27, 2016 Affidavit") **(CPM Tab 12, pages 488-503).**

[98] TJ at ¶11(a) **(CPM Tab 4, page 28).**

133. In fact, Moyse was one of two analysts on the Wind deal team, which totalled four persons. Moyse performed the key analysis used by Catalyst to establish an estimated market value for Wind. He helped prepare presentations concerning Catalyst's regulatory strategy and the concessions it was seeking from the federal government.[99] There was no question that Moyse was important part of the Catalyst team. Despite this uncontroverted evidence, the trial judge chastised Mr. De Alba for standing his ground on the issue of Moyse's important role on the deal team.

134. The trial judge also took issue with unspecified mistakes and speculation in some of James Riley's affidavits prior to trial.[100] The trial judge never articulated these mistakes or speculation in his reasons, but seemed to wholly dismiss Mr. Riley's evidence on this basis.

(iv) The Trial Judge Excused Similar Problems with Defendants' Evidence

135. In contrast to the standard applied to Catalyst's witnesses, stark contradictions in West Face's witnesses' evidence did not prevent the trial judge from finding them to be "impressive".

136. In his affidavits and at trial, Tony Griffin testified that he had no knowledge that Catalyst was a bidder for Wind. On the critical issue of whether West Face made use of Catalyst's confidential regulatory strategy – the strategy that Mr. Glassman had developed with his team – Griffin claimed that West Face never used **or even considered** the strategy. He further testified in direct examination that, even if Moyse had communicated Catalyst's regulatory strategy to West Face, he would never have believed or relied on it.[101] Among other things, Griffin claimed:

> [...] I categorically disagree with Mr. Glassman's statement in paragraph 34 of his Affidavit that "knowledge of this analysis and approach would prove **invaluable** to any other potential bidder since it in essence would **massively mitigate,** if not entirely **eliminate,** their financial risk in bidding". In fact, we

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[99] CCG0011564 and CCG0011565 **(CPM Tab 12, pages 504-519).**
[100] TJ at ¶12 **(CPM Tab 4, pages 29-30).**
[101] Griffin June 4, 2016 Affidavit at ¶110 **(CPM Tab 12, page 520).**

> fundamentally disagreed with Mr. Glassman's analysis. Based on our own discussions with Industry Canada, including during the May 21 meeting with Industry Canada, described above, West Face believed that the Government was going to continue to promote a fourth wireless carrier by maintaining the existing restrictions on transfers of spectrum to incumbents. We never understood the Government's policy stance to be a "bluff". [102]

137. Griffin held fast to this position during cross-examination:

> Q. I just asked you the simple question, did you ever at any point consider the prospect of selling spectrum to an incumbent?
>
> A. Would it enter our thinking? Sure. Did we rely upon it? No.
>
> Q. So it did enter your thinking at minimum? Yes?
>
> A. It is a possibility, **like lightning striking**.[103]

138. Griffin swore that selling Wind to an incumbent was not part of West Face's investment thesis:

> Q. Was there ever any thinking at all about selling Wind to an incumbent as part of your investment thesis?
>
> A. If an incumbent includes Rogers, Bell or Telus, the three large firms as we traditionally thought about it, no, that was not viewed as a possibility.[104]

139. Following Griffin's steadfast refusal to acknowledge that West Face considered a sale to an incumbent as part of its investment thesis, Griffin was presented with an internal West Face investor memorandum, dated September 10, 2014, which proved the complete opposite. The memorandum was distributed to West Face's limited partners to raise capital for the purchase of Wind.[105] It states that West Face's investment in Wind would be supported by "significant asset valuc" in a liquidation scenario and outlines "Scenario 1" in a liquidation as follows:

> 1. *Scenario 1 – Sale to an Incumbent:* **In the event that Wind fails and there are no other buyer options, the government cannot logically**

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[102] Griffin June 4, 2016 Affidavit at ¶107 **(CPM Tab 12, page 521)**.
[103] Griffin Trial Cross-examination June 10, 2016 at p. 1122:4-12 [emphasis added] **(CPM Tab 11, page 213)**.
[104] Griffin Trial Cross-examination June 10, 2016 at p. 1124:6-12 **(CPM Tab 11, page 214)**.
[105] Griffin Trial Cross-examination June 10, 2016 at pp. 1132:18 - 1133:4 **(CPM Tab 11, pages 215-216)**.

> **continue to block a sale to an incumbent.** In this scenario, valuation range in C$500 to C$800 million.[106] (emphasis added)

140. This is precisely **the same analysis** that Catalyst and Mr. Glassman developed and that Griffin repeatedly stated under oath was **never** part of West Face's thinking. Griffin's evidence was undermined by the clear language of West Face's own internal memorandum.

141. In addition to the contradiction between Griffin's evidence and contemporaneous documents, Griffin repeatedly denied that he knew Catalyst was bidding for Wind despite clear statements in his own emails that commented not only on the fact that Catalyst was involved in the bidding process, but also on the quality of Catalyst's bid.[107] Griffin's denials were incredible in the face of these documents, but the trial judge accepted his evidence in any event. Unlike in Mr. Glassman's case, inconsistency or unreasonable denials did not prevent a finding that Griffin was an "impressive" witness.

(v) Moyse's "Mistakes" in his Affidavits did not Affect his Credibility

142. Similarly, the trial judge applied a much more lenient level of scrutiny to Moyse's evidence. The trial judge accepted all of Moyse's evidence at trial, even though Moyse was the only witness who was caught misrepresenting facts in affidavits he swore before trial.

143. At trial, Catalyst identified a significant number of statements that Moyse had made in pre-trial affidavits that were, viewed generously, misstatements, and which should have affected his credibility at trial. Moyse repeatedly embellished facts and deleted information relevant to the issues in the litigation. For example:

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[106] WFC0108033 - West Face September 2014 Investment Memo at p. 18 **(CPM Tab 12, page 522)**; Griffin Trial Cross-examination June 10, 2016 at pp. 1136:22 to 1139:17 **(CPM Tab 11, pages 217-220).**

[107] WFC0068142 – Emails between Griffin and Lacavera dated June 4, 2014 **(CPM Tab 12, pages 523-524)**; Griffin Trial Cross-examination – June 9, 2016 at pp. 1007:25 – 1010:8 **(CPM Tab 11, pages 221-224)** [emphasis added]; Griffin Trial Examination-In-Chief June 8, 2016 at p. 756:13-19 **(CPM Tab 11, page 225).**

(a) Moyse admitted he "embellished" his *c.v.* by claiming to be an "associate" at Catalyst when a promotion had not yet been finalized;[108]

(b) Moyse admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have "led" a due diligence process he merely participated in;[109]

(c) Moyse justified the "embellishments" on his deal sheet because he wanted a job, and because it was not a sworn document;[110]

(d) Moyse made untruthful statements regarding his involvement in a Catalyst deal in an email to a former colleague;[111]

(e) Moyse knowingly caused Catalyst to breach a non-disclosure agreement through the disclosure of one of the investment memos he sent to West Face;[112]

(f) Moyse wiped his Blackberry before returning it to Catalyst and misrepresented the facts concerning his use of the device to communicate with West Face;[113]

(g) Contrary to his sworn evidence in 2014 regarding his "limited" role on the Wind deal team, Moyse received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft share purchase agreement;[114] and

(h) In 2014, when asked what matters he worked on at West Face, Moyse omitted reference to his analysis of a company that Catalyst had previously studied and that was the subject of one of the confidential memos he sent to Dea.[115]

144. In addition, Moyse admits to having deleted his web browser history, the March 27, 2014 email he sent to Dea containing the confidential memoranda and at least one other email he received from Dea.

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[108] Moyse July 31, 2014 Cross-examination at p. 15:2-25 **(CPM Tab 11, page 226)**.
[109] Moyse July 31, 2014 Cross-examination at pp. 17:6 – 20:25 **(CPM Tab 11, pages 227-230)**.
[110] Moyse July 31, 2014 Cross-examination at p. 20:3-25 **(CPM Tab 11, page 231)**.
[111] Moyse July 31, 2014 Cross-examination at pp. 85:21 – 86:12 **(CPM Tab 11, pages 232-233)**.
[112] Moyse July 31, 2014 Cross-examination at pp. 96:17 – 98:6 **(CPM Tab 11, pages 234-236)**.
[113] Moyse July 31, 2014 Cross-examination at pp. 103:13 – 106:3 **(CPM Tab 11, pages 237-240)**.
[114] Moyse July 31, 2014 Cross-examination at pp. 174:11 – 175:16 **(CPM Tab 11, pages 241-242)**.
[115] Moyse July 31, 2014 Cross-examination at pp. 171:4 – 172:2 **(CPM Tab 11, pages 243-244)**.

145. However, rather than finding that Moyse's pattern of dishonest conduct negatively affected his credibility, the trial judge characterized Moyse's past transgressions as "youthful mistakes", even when they went to the core factual issues at trial. For example, in footnote 2 of the trial judgment, the trial judge explained that Moyse's understatement of his role at Catalyst in an affidavit filed in July 2014 was a "mistake" and not an attempt to hide or downplay his knowledge of Wind. The trial judge **also** found that it was a "mistake" when Moyse swore in the same affidavit that he was not privy to internal discussions about the strategy behind Catalyst's potential acquisition of Wind.[116] In fact, that statement was obviously false and directly contradicted by the contemporaneous documents in the record.[117] The trial judge's reduction of these false statements to "mistakes" demonstrated a markedly different standard of scrutiny to Moyse's evidence as compared to the evidence of Catalyst's witnesses, and completely ignores the fact that the impugned statements were sworn in July 2014, approximately two months after Moyse performed the work he claimed to have innocently "forgotten".

(vi) The Trial Judge's Differing Standards of Scrutiny Led to an Erroneous Result

146. The trial judge's application of a different standard of scrutiny to the evidence led to findings of credibility that respectfully cannot withstand appellate review and which, on their own, amount to an error of law that warrants a new trial.

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[116] **TJ at FN 2 (CPM Tab 4, page 39).**

[117] List of emails between Catalyst team about Wind deal: Exhibit 1 (CCG0011564) and Exhibit 3 (CCG0009516) from Glassman May 27, 2016 Affidavit **(CPM Tab 12, pages 525-527)**; Exhibit 12 (CCG0011410), Exhibit 13 (CCG0011536), Exhibit 14 (CCG0011520), Exhibit 15 (CCG0011521), Exhibit 16 (CCG0011526), Exhibit 17 (CCG0011535), Exhibit 19 (CCG0011561), Exhibit 21 (CCG0009474), Exhibit 23 (CCG0009482), Exhibit 24 (CCG0011614), Exhibit 25 (CCG0011118), Exhibit 26 (CCG0011618), Exhibit 27 (CCG0009483), Exhibit 28 (CCG0011123), Exhibit 29 (CCG0005254), Exhibit 30 (CCG0011169), Exhibit 31 (CCG0011171), Exhibit 32 (CCG0011631), Exhibit 33 (CCG0011194), Exhibit 34 (CCG0010008), Exhibit 35 (CCG0028661), Exhibit 36 (CCG0010040), Exhibit 39 (CCG0009529), Exhibit 40 (CCG0010037), Exhibit 42 (CCG0011192), Exhibit 43 (CCG0009540), Exhibit 45 (CCG0014413), Exhibit 46 (CCG0011275), Exhibit 48 (CCG0011342) and Exhibit 49 (CCG0011362) from CCG0028710 - de Alba May 27, 2016 Affidavit **(CPM Tab 12, pages 528-759).**

ISSUE 3: THE TRIAL JUDGE MADE FINDINGS REGARDING VIMPELCOM IN A FACTUAL VACUUM

147. In January 2016, the trial judge expressly ordered that issues concerning possible breaches of the exclusivity period by VimpelCom and/or inducing breach of the exclusivity period and misuse of confidential information by other members of the Consortium **would not** form part of the expedited trial of this proceeding. Despite making this ruling, in his reasons for judgment the trial judge made factual findings on these very issues. These findings tainted the trial judge's reasons and denied Catalyst a fair trial.

(i) Trial Judge Bars Catalyst from Amending Statement of Claim

148. After West Face and the Consortium purchased Wind in August 2014, they were able to sell it to Shaw at the end of 2015 via a plan of arrangement.[118] Catalyst opposed the proposed plan of arrangement on the basis that it originally sought to compromise its still-pending claim for a constructive trust over the interest in Wind owned by West Face.[119]

149. In January 2016, the trial judge heard the application for the plan of arrangement. During the application, after reviewing affidavits from 64NM and Tenenbaum Partners, Catalyst evidenced its intent to amend the existing claim to add, *inter alia*, a claim for inducing breach of contract against the parties that participated in the bid to VimpelCom made during the exclusive negotiating period between Catalyst and VimpelCom.[120]

150. The trial judge barred Catalyst from adding its claim for inducing breach of contract to the Moyse/West Face action. He ruled that Catalyst had been "lying in the weeds", when the full details of the Consortium's conduct only came to light via affidavits sworn in support of the plan

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[118] Mid-Bowline Decision at ¶3 and 4 **(CPM Tab 7, page 87)**.
[119] Mid-Bowline Decision at ¶4 **(CPM Tab 7, page 87)**.
[120] Mid-Bowline Decision at ¶52 **(CPM Tab 7, page 100)**.

of arrangement. The trial judge refused to permit the trial of the claim against Moyse and West Face to consider "any such claim".[121]

(ii) West Face Objects at Trial to Evidence that Might Affect Another Proceeding

151. Given this ruling, Catalyst was forced to and did commence a separate action against VimpelCom, UBS Securities, and the Consortium. The "VimpelCom Action" was commenced on May 31, 2016, prior to the commencement of the trial against Moyse and West Face.[122]

152. In the VimpelCom Action, Catalyst alleges, *inter alia,* that West Face and the other members of the Consortium (who were not parties in the Moyse Litigation) induced VimpelCom to breach the Exclusivity Agreement and that VimpelCom did breach the Exclusivity Agreement. Moyse is not a party to the VimpelCom Action.

153. West Face brought the VimpelCom Action to the attention of the trial judge during the trial. It strenuously objected to certain testimony being led during the trial on the basis that the testimony might impact the VimpelCom Action. The trial judge took West Face's objection under advisement.[123]

(iii) Trial Judge Makes Unnecessary and Unfair Findings Concerning VimpelCom

154. Despite his ruling and West Face's objection at trial, the trial judge made the following findings concerning VimpelCom:

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[121] Mid Bowline Decision at ¶61 **(CPM Tab 7, page 102).**
[122] Statement of Claim in VimpelCom **(CPM Tab 12, pages 760-783).**
[123] Trial Transcript June 9, 2016 at pp. 1049-1054 **(CPM Tab 11, pages 245-250).**

(a) The trial judge held that VimpelCom had no substantive communication with the members of the Consortium during the exclusivity period;[124] and

(b) The trial judge concluded that there was no evidence that VimpelCom's directors looked at the August Proposal during the exclusivity period or that the proposal played any part in VimpelCom's decision to change the deal terms and demand a break fee from Catalyst.[125]

155. The trial judge never heard **any evidence** from VimpelCom on these issues. The findings concerning VimpelCom were made in a factual vacuum. Neither Catalyst nor West Face led any evidence from VimpelCom. Nor did VimpelCom make any production in the proceeding because it was not a party (by the trial judge's own order). Respectfully, the trial judge's findings amounted to no more than speculation and fell far beyond the scope of the issues before him.

156. No party requested that the trial judge make these findings. In its opening statement, West Face's counsel asked the trial judge to make nine separate findings of fact – none of which related to VimpelCom's communications with the Consortium or whether VimpelCom's board of directors considered the August Proposal.[126] Moreover, West Face **objected** to the making of such findings during the trial.

157. These findings were not relevant to the issues in the trial below, which concerned West Face's knowledge and use of Catalyst's confidential information imparted to it by Moyse. Findings concerning VimpelCom were unnecessary and irrelevant to the issues in the action.

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[124] TJ at ¶145 **(CPM Tab 4, page 67).**
[125] TJ at ¶105 **(CPM Tab 4, pages 55-56).**
[126] West Face Opening Presentation – Slides 83-87 **(CPM Tab 12, pages 784-788).**

158. These findings led to an unfair trial. Neither party sought findings concerning VimpelCom, but, with full knowledge of the VimpelCom Action, the trial judge made findings based on speculation and in the absence of evidence.

ISSUE 4: ERRORS OF FACT

159. As set out in the notice of appeal, the trial judge made several errors of fact in the reasons for judgment. What Catalyst submits are the three most egregious errors are explained in detail below; the remainder are briefly summarized in Schedule "C" to this factum.

A. OVERVIEW OF FACTUAL ERRORS COMMITTED BY THE TRIAL JUDGE

160. The trial judge made the following key factual findings in dismissing Catalyst's action, all of which Catalyst submits were palpable and overriding errors of fact:

(a) **Moyse Knew Nothing Confidential:** The trial judge erroneously held that Moyse's role on the Wind transaction was largely "administrative" and that Moyse was not aware of Catalyst's negotiating strategy with the government on regulatory matters or with VimpelCom on the purchase of Wind;

(b) **Moyse Never Communicated Any Information About Wind to West Face**: The trial judge erroneously held that West Face and the members of the Consortium never knew "with certainty" that Catalyst was a bidder for Wind or the content of Catalyst's negotiations concerning regulatory matters; and

(c) **West Face Did Not Use Catalyst's Confidential Information:** The trial judge erroneously held that the Consortium's decision to waive any regulatory conditions associated with the purchase of Wind was unconnected to Catalyst's own bid or any knowledge of Catalyst's regulatory strategy.

161. Each of these findings constitutes a palpable and overriding error. The effect of these findings was to cause the trial judge to erroneously find that Moyse had not breached his duty of confidence to Catalyst and that West Face did not misuse Catalyst's confidential information.

B. STANDARD OF REVIEW

162. This Court will intervene on findings of fact where a trial judge commits a palpable and overriding error. A palpable error is one that is "clear to the mind or plain to see" and the errors must be so overriding as to discredit the result reached by the trial judge.[127] While the burden is high, it is not impossible to prove a palpable and overriding error has been made.[128]

C. FACTUAL ERROR 1: MOYSE KNEW NOTHING CONFIDENTIAL

163. At trial, Catalyst's proved that Moyse was privy to a significant volume of confidential information about Catalyst's bid for Wind. The critical information that Moyse possessed included Catalyst's regulatory strategy with respect to Wind. The trial judge held that Moyse was not privy to Catalyst's negotiating or regulatory strategy with respect to Wind.[129] This was a clear and overriding error.

164. In his reasons for decision, the trial judge found that:

(a) Moyse's role in preparing the March 2014 presentation was "largely administrative";[130]

(b) Moyse was not aware from meetings he attended at Catalyst of the negotiating strategy of Catalyst;[131] and

(c) Moyse's role in preparing the May 2014 presentation was "largely administrative".[132]

165. All three of these findings led the trial judge to conclude that Moyse had no knowledge of Catalyst's confidential regulatory strategy or negotiations with federal government officials and

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[127] *MacDonald v. Huisman,* 2007 ONCA 391 at ¶56.
[128] *Santos v. Sangwan,* 2015 ONCA 822; *Canaccord Genuity Corp. v. Pilot,* 2015 ONCA 716 at ¶60; *Andrade v. Andrade,* 2016 ONCA 368 at ¶5.
[129] TJ at ¶43, 45, 51 and 120 **(CPM Tab 4, pages 36-37, 40 and 60).**
[130] TJ at ¶44 **(CPM Tab 4, page 37).**
[131] TJ at ¶47 **(CPM Tab 4, page 38).**
[132] TJ at ¶51 **(CPM Tab 4, page 40).**

representatives of VimpelCom, and therefore he could not communicate this confidential information to West Face. These findings are not supportable on the record.

166. First, the evidence at trial established that Moyse himself created the PowerPoint presentations that contained Catalyst's regulatory strategy and its pitch to the government. The presentations were not long and set out in detail Catalyst's regulatory strategy: Catalyst proposed three options for Wind, each of which required certain regulatory concessions from the government:[133]

(a) Under option 1, the fourth carrier would focus on the retail market. In order to effect this scenario, Catalyst required the government to grant specific concessions, including an unrestricted ability to sell to an incumbent in five years (after trying to sell to a strategic buyer or exploring an initial public offering);[134]

(b) Under option 2, the fourth carrier would focus on the wholesale market and would rent its spectrum to incumbents. In order to effect this scenario, Catalyst required the government to grant fewer concessions than under option 1, but still required an unrestricted ability to sell to an incumbent in five years;[135] and

(c) Under option 3, the government would face litigation from the purchaser of Wind (or the estate of Mobilicity) over the retroactive and unilateral conditions imposed on the independent operators, which would: (i) likely be successful; (ii) likely embarrass the federal government; and (iii) if successful, allow the purchaser of Wind to sell the spectrum to the incumbents without restriction.[136]

167. Moyse was aware that Catalyst presented its three options to the government in the March and May 2014 presentations. He knew the content of each of the options because he had created the presentations himself on the basis of notes given to him by the Catalyst partners. Moyse was

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[133] CCG0011565 - Exhibit 1 to Glassman May 27, 2016 Affidavit **(CPM Tab 12, pages 789-803)**.
[134] CCG0011564 - Exhibit 1 to Glassman May 27, 2016 Affidavit **(CPM Tab 12, page 804)**.
[135] CCG0011564 - Exhibit 1 to Glassman May 27, 2016 Affidavit **(CPM Tab 12, page 805)**.
[136] CCG0028711 - Glassman May 27, 2016 Affidavit at ¶27 **(CPM Tab 12, page 806)**.

privy to the knowledge that any transaction between Catalyst and VimpelCom would require a condition of governmental approval and that Catalyst could never waive that condition given its investments in regulated industries.[137]

168. Moyse was also privy to the internal strategy discussions at Catalyst about Wind. For example, by May 7, 2014, Mr. Glassman had stated in an email to the Catalyst team, **including Moyse**, that "option 1" was no longer a possibility because the federal government told Catalyst it would not allow the unrestricted ability to sell to an incumbent in five years;[138]

169. Even assuming that Moyse's role in preparing the presentation was "largely administrative" (as the trial judge found), this is irrelevant to whether Moyse possessed confidential information about Catalyst's regulatory strategy and its discussions with government. Moyse **had** to know Catalyst's strategy. He is highly intelligent (an Ivy League graduate with a math degree) and the presentations were self-explanatory.[139]

170. The relative importance of Moyse's role on Catalyst's Wind deal team, though it can be debated, is irrelevant to the question of whether he possessed confidential information that he could pass along to West Face. It is undisputed that Moyse had liberal and unfettered **access** to the confidential information in question. The trial judge's conclusions otherwise are palpably wrong in the face of the evidence on the record.[140]

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[137] CCG0011564 - Exhibit 1 to Glassman May 27, 2016 Affidavit **(CPM Tab 12, page 807).**
[138] CCG0009482 - Exhibit 23 to de Alba May 27, 2016 Affidavit **(CPM Tab 12, pages 808-810).**
[139] Moyse July 31, 2014 Cross-examination at pp. 81:12 – 83:2 **(CPM Tab 11, pages 251-253).**
[140] Exhibit 2 (CCG0009482), Exhibit 4 (CCG0025842) and Exhibit 5 (CCG0024609) to the Glassman May 27, 2016 Affidavit **(CPM Tab 12, pages 811-826)** (emails between Glassman and Catalyst team, Glassman re: the change in the gov't attitude); Moyse July 31, 2014 Cross-examination at pp. 15:10 – 16:13 and 19:6 - 23:8 **(CPM Tab 11, pages 254-260).**

(i) The Trial Judge's Error Had an Overriding Effect on the Judgment

171. The trial judge's finding that Moyse had no knowledge of Catalyst's regulatory strategy effectively made Catalyst's claim for breach of confidence impossible to prove.

172. Catalyst's position at trial was that Moyse transmitted its confidential information to West Face regarding Catalyst's negotiating position with VimpelCom and the fact that it was confident that the government would relax the restrictions on spectrum transfer in the face of litigation risk.

173. In 2012 or 2013, Industry Canada imposed new restrictions on the spectrum licences (the "2008 Licenses") held by the new entrants, including Wind. Catalyst did not believe that a fourth wireless carrier was viable without changes to the regulatory environment, including changing or reversing these restrictions.

174. Catalyst believed that an industry participant who sued the government in connection with its new restrictions on the 2008 Licenses would succeed, and that a court would rule that the 2008 Licenses were properly viewed as "property" that could be sold to an incumbent in an insolvency proceeding.[141] Mr. Glassman testified that he had unique knowledge arising out of his telecom experience in the United States of the *NextWave* case, which dealt with a very similar issue, and that he shared this knowledge with his deal team, including Moyse.[142]

175. However, Catalyst itself could not lead that litigation. Catalyst's investments in other regulated businesses, which Moyse was familiar with, prevented it from leading any litigation against the federal government in relation to the 2008 Licenses. Instead, in order to successfully create and operate the fourth wireless carrier, Catalyst had to seek concessions from the federal

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[141] CCG0028711 - Glassman May 27, 2016 Affidavit at ¶11-13 **(CPM Tab 12, pages 827-828).**
[142] Trial Transcript June 7, 2016 - Glassman In-Chief at pp. 330:4-17 and 331:15 - 332:3 **(CPM Tab 11, pages 261-263).**

government.[143] However, another potential bidder that did not have the same concerns about leading litigation involving the federal government could make use of this information in developing its own investment thesis (as West Face ultimately did).

176. Moyse was clearly privy to this confidential information. The trial judge's conclusion that Moyse did not have knowledge of Catalyst's regulatory strategy or its negotiating position with VimpelCom was an overriding error because it ended the analysis of whether there was a breach of confidence. It was not a minor finding, but rather directly impacted the result.

D. FACTUAL ERROR 2: NO DIRECT EVIDENCE THAT WEST FACE KNEW THAT CATALYST WAS A BIDDER FOR WIND

177. At trial, Catalyst's position was that West Face's contemporaneous documents and its behaviour in the bidding process demonstrated that it was aware of Catalyst's confidential regulatory strategy and its negotiating positions. Catalyst alleged that Moyse was the source of this information.

178. The trial judge found that Moyse never communicated *any* information about Wind to West Face. He based this conclusion largely on the following findings:

(a) The West Face witnesses, including Griffin, had no communications or discussions with Moyse about Wind;[144] and

(b) There was no direct evidence that West Face (or the Consortium) knew that Catalyst was a bidder for Wind;[145]

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[143] CCG0028711 - Glassman May 27, 2016 Affidavit at ¶13 **(CPM Tab 12, pages 829)**.
[144] TJ at ¶82 **(CPM Tab 4, page 48)**.
[145] TJ at ¶89 **(CPM Tab 4, page 50)**.

179. The trial judge's finding that West Face had no knowledge that Catalyst was a bidder for Wind was a palpable error. The evidence in the trial record established that key members of West Face's team knew that Catalyst was a bidder and had knowledge of its bid.

180. For example, on June 4, 2014, after Moyse had interviewed with and been hired by West Face, Griffin exchanged emails with Anthony Lacavera, the principal of Globalive, Wind's majority equity owner.[146] The exchange begins with Griffin asking Lacavera for information about Catalyst's bid for Wind:

> **What is your change of control payment under a catalyst** or tennenbaum **deal** – ie. What do we have to work with in our bid. Is it a fixed number [or] you have a negotiated deal?[147]

181. This email demonstrates that Griffin knew by June 4, 2014 that Catalyst was bidding on Wind. Griffin's evidence on cross-examination was that he did not "know" Catalyst was a bidder for Wind, but rather that he "surmised" as much:

> Q. And, Mr. Griffin, I suggest to you that you well understood at that time that Catalyst had negotiations ongoing with VimpelCom, which is why you referred to a Catalyst deal?
>
> A. We had certainly read in the press that they would have potentially been involved, and then in May, before Brandon joining, **there was this reference in some correspondence between counsels about concern on the telecom deal that Brandon had been working on, and by process of elimination, we only had one telecom file ongoing.**
>
> And so we had always assumed that Catalyst was a potential participant.
>
> Q. I think you are referring there, Mr. Griffin, to a telephone call that occurred, but I can tell you that that telephone call occurred on June 18th.
>
> A. I wasn't party to it, so --
>
> Q. I understand you weren't a party to it, but I'm suggesting to you that what you've just said, i.e., that there was a telecom deal which therefore alerted

[146] WFC0068142 - Emails between Griffin and Lacavera dated June 4, 2014 **(CPM Tab 12, pages 832-833)**.
[147] WFC0068142 – Emails between Griffin and Lacavera dated June 4, 2014 **(CPM Tab 12, pages 834-835)**.

you to the fact that Catalyst might be submitting a bid or was in the process of submitting a bid, didn't occur until well after this email chain.

A. That could be.

Q. Okay. So what I am suggesting to you is whatever you say about a telephone call that alerted you to a telecom deal, you had knowledge before then, as of June 4th, that Catalyst had submitted a proposal?

A. No, I didn't know that they had submitted a proposal.

Q. So it is purely --

A. We had assumed that they were involved in looking at Wind and we knew that Tennenbaum was involved in looking at Wind.

Q. Well, there were any number of companies looking at Wind at that period of time, Mr. Griffin.

A. Well, these had been ones that had been specifically reported in the press.

Q. No, but there were others that were reported in the press as well?

A. Yes, and they could have also been involved.

Q. Right, but you specifically mentioned Catalyst or Tennenbaum, and I am suggesting to you the reason you specifically mentioned Catalyst is not because it is purely coincidental or you are an imprecise person, but because you knew at that time that Catalyst had submitted a proposal?

A. No, that is not factually correct.

Q. And I am going to further suggest to you that the reason you knew it is because you were told it by Mr. Moyse?

A. No, that is categorically incorrect.[148]

182. A trial, Griffin's explanation as to how he knew that Catalyst was a bidder for Wind relied on correspondence between counsel concerning a "telecom deal". However, Griffin's email was

[148] Griffin Trial Cross-examination – June 9, 2016 at pp. 1007:25 – 1010:8 **(CPM Tab 11, pages 264-267)** [emphasis added].

written **two weeks before** the correspondence he referred to.[149] His primary excuse, which was quite detailed in its reasoning ("by process of elimination"), was a contrivance.[150]

183. In the same email chain quoted above, Griffin commented not only on the fact that Catalyst was a bidder, but also on the quality of Catalyst's bid:

> I think it might make the most sense for us to pick up the conversation with the Tennenbaum group and discuss the possibility of joining the syndicate. We're not going to be able to better them on value and **I think theirs is the only real proposal in front of the company outside of ours – Catalyst seems to be a lot of air.**[151]

184. Griffin downplayed this statement at trial, leading to an incredible explanation in direct examination:

> Q. What did you mean by that, "Catalyst seems to be a lot of air"?
>
> A. Well, I guess to put it in layman's terms, for all the smoke and discussion about their potential involvement, we had nothing to substantiate that they were there, that they were serious or credible. I didn't know.[152]

185. Griffin suggested that his comment "Catalyst seems to be a lot of air" referred to the fact that he did not know Catalyst was a "serious" bidder", as if this was something he expected to know **in a blind bidding situation**. Griffin's explanation is logically incoherent and also reveals that he knew Catalyst was a bidder.

186. Nevertheless, the trial judge accepted Griffin's impossible explanation, repeating Griffin's vague assertion that there was media speculation regarding Catalyst's interest in Wind (of which no evidence was adduced):

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[149] Exhibit K (CCG0018694), Exhibit L (CCG0018695), Exhibit M (CCG0018696), Exhibit N (CCG0018697) and Exhibit O (CCG0018698) to Riley June 26, 2014 Affidavit **(CPM Tab 12, pages 836-843)**; WFC0068142 **(CPM Tab 12, pages 844-845).**

[150] Notably, this "mistake" did not undermine the trial judge's assessment of Griffin's credibility.

[151] WFC0068142 - Emails between Griffin and Lacavera dated June 4, 2014 **(CPM Tab 12, pages 846-847)**.

[152] Griffin Trial Examination-In-Chief June 8, 2016 at p. 756:13-19 **(CPM Tab 11, page 268)**.

> Mr. Griffin of West Face had seen press discussion in 2013 of an interest of Catalyst in Mobilicity and WIND and of combining them and Mr. Dc Alba acknowledged that by 2013 at the latest, there was public discussion of Catalyst's interest in merging Mobilicity and WIND. Mr. Griffin's evidence was that he assumed through a process of elimination that it was probable that Catalyst was the party but that he did not know for sure. I accept that evidence. Mr. Griffin's e-mail of June 4, 2014 to Mr. Lacavera makes clear that at that point Mr. Griffin was by no means certain that Catalyst was a real bidder for WIND.[153]

187. Notably, the trial judge **completely ignored** Griffin's comment that the Catalyst bid seemed to be a "lot of air". That statement could not be derived from press reports. It confirms that not only did Griffin **know for certain** that Catalyst was a bidder for Wind, but that he was privy to the details of the Catalyst bid.

188. Leitner also refused to agree that he knew with certainty that Catalyst was a bidder for Wind despite having authored emails in which he described in detail Catalyst's bid and the timing of its delivery to VimpelCom's directors. On cross-examination, Leitner refused to accept that he knew Catalyst was a bidder, but claimed that he "surmised" it was Catalyst and used Catalyst as a "placeholder" in his emails. Leitner's denials were absurd when compared to the language used in his emails, which gave no hint of "surmising".[154] Yet the trial judge accepted this evidence despite the fact it was directly contradicted by contemporaneous documents.

(i) The Trial Judge's Error Was Overriding

189. Like the finding that Moyse did not know Catalyst's confidential negotiating positions and regulatory strategy, the finding that West Face did not know Catalyst was a bidder for Wind ends the analysis as to whether Moyse committed a breach of confidence or whether West Face misused

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[153] TJ at ¶90 **(CPM Tab 4, pages 50-51)**.

[154] WFC0069995 – Emails between Leitner and Boland dated July 21, 2014 **(CPM Tab 12, pages 848)**; WFC0059172 – Emails between Leitner, Griffin and Boland dated July 22, 2014 **(CPM Tab 12, pages 849-850)**; WFC0048724 – Emails dated July 23, 2014 **(CPM Tab 12, page 851)**; WFC0047832 – Emails dated August 1, 2014 between Leitner and others **(CPM Tab 12, pages 852-854)**; Trial Transcript June 9, 2016 at pp. 923:19 - 925:19 **(CPM Tab 11, pages 269-271)**.

confidential information. The implication is that West Face did not possess any of Catalyst's confidential information. If this finding is palpably wrong, as Catalyst submits, it follows that West Face **did** know that Catalyst was a bidder and had information about Catalyst's bid. Consideration must then be had as to the source of this information. The trial judge did not properly engage in this analysis due to his finding that West Face did not know Catalyst was a bidder, thereby resulting in an overriding error.

E. ERROR 3: WEST FACE DID NOT USE CATALYST'S CONFIDENTIAL INFORMATION

190. The trial judge found that West Face never used Catalyst's confidential information. In support for this conclusion, the trial judge made two findings that Catalyst submits were in error:

(a) The August Proposal's reference to a "superior proposal" was a reference to prior offers made by the Consortium;[155] and

(b) The lack of a need for regulatory concessions, and the lack of a need for a condition in the offer relating to regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies.[156]

(i) The Finding that the Proposal as Superior to Prior Consortium Proposals was a Palpable Error

191. When West Face and the Consortium delivered the August Proposal, it was described as a "superior" proposal. The August Proposal differed from Catalyst's offer in one critical manner: under the terms of the August Proposal, the Consortium waived regulatory approval as a condition of the deal.[157]

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[155] TJ at ¶114 **(CPM Tab 4, page 59)**.
[156] TJ at ¶114 **(CPM Tab 4, page 59)**.
[157] WFC0075054 - Superior Proposal **(CPM Tab 12, pages 855-856).**

192. Labelling the August Proposal as "superior" infers it is better than another proposal. The only other proposal before VimpelCom at that time was Catalyst's offer, which the Consortium knew was about to be presented to VimpelCom's directors for final approval.

193. The trial judge's finding that there was an innocent explanation for the August Proposal and the Consortium's behaviour relied on a palpable error of fact:

> The email of August 6, 2014 written by Mr. Leitner was put to Mr. Griffin on cross-examination. He testified that he and West Face had no role in drafting the email. He stated that the proposal was unique and not West Face's idea and **agreed that the proposal was certainly superior to any proposal that West Face had submitted previously on its own behalf because of the structure that permitted VimpelCom a clean exit without the worry of a requirement for regulatory approval.** He denied that West Face's view was based at all on information regarding Catalyst's offer to VimpelCom. I cannot find from the language in the email that West Face knew the terms of the offer from Catalyst to VimpelCom.[158]

194. The explanation that the reference to a "superior" proposal was in relation to prior offers from West Face does not accord with the language used to describe why the proposal was superior. The August Proposal itself explains the nature of its superiority:

> Our proposal will be superior **to any other offer** as our proposal will not require regulatory approval…[159]

195. The trial judge ignored the plain wording of the Consortium's email and proposal, which, when read together, clearly stated that the superiority of the proposal as compared to "any other offer" was based on the waiver of the regulatory approval condition. The trial judge's finding ignores the fact that the Consortium never made any prior offers as a consortium, and its proposal did not refer to any of its members' past offers. The email and proposal wording support only one logical inference: that the proposal was intended to be superior to any other proposal that

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[158] TJ at ¶114 and 115 **(CPM Tab 4, page 59)**.
[159] WFC0075054 - August Proposal **(CPM Tab 12, pages 857-858).**

VimpelCom was considering at the time. And, at that time, it is undeniable that the Consortium knew that the VimpelCom board was about to consider approval of the Catalyst deal.

196. The trial judge's conclusion that the Consortium was not comparing its proposal to Catalyst's proposal is palpably wrong. The key difference between the August Proposal and Catalyst's proposal was the waiver of the regulatory approval condition by the Consortium. Unless it knew the details of Catalyst's offer, the Consortium could not bill its offer as "superior".

(ii) The Finding that The Superior Proposal was Not Based on Catalyst's Offer is Overriding

197. A fundamental issue at trial was whether West Face misused Catalyst's confidential information. If it used Catalyst's offer to shape the August Proposal, Catalyst submits that this would constitute misuse of Catalyst's confidential information. The trial judge's finding that the August Proposal was made independent of Catalyst's offer strikes at the core of this argument. The finding has a direct effect on the result in the trial judgment.

198. In addition to the three key findings discussed above, Catalyst submits that the trial judge made a number of other factual errors that, taken together, amount to palpable and overriding errors. Schedule "C" discusses each error in turn and its effect on the trial judgment.

ISSUE 5: THE COSTS APPEAL

199. Catalyst seeks leave to appeal the trial judge's costs award. Although a deferential standard of review applies to costs appeals and leave to appeal a costs order will be granted sparingly, leave will be granted where there are grounds upon which the appellate court can find that the trial judge erred in principle.[160]

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[160] *Van Damme v. Gelber*, 2013 ONCA 388 at ¶32.

200. Here, the trial judge awarded West Face costs on a substantial indemnity basis despite the fact that there was no suggestion of improper conduct on the part of Catalyst during the proceeding that would normally ground an award of costs on a higher scale. Moreover, the trial judge's award of any costs to Moyse ignored the fact that Moyse engaged in questionable conduct, both before and after the litigation commenced. This conduct included transferring confidential investor memos to West Face, refusing to admit the investor memos were confidential, wiping his Blackberry and deleting his web browser history, and launching scrubber software the night before his computer was imaged.

201. The trial judge awarded the defendants substantial indemnity costs to "punish" Catalyst for pursuing its claim, even though Catalyst had successfully proven at the interlocutory stage that Moyse and West Face misled Catalyst in pre-litigation correspondence and the ISS later discovered that Moyse downloaded and launched a scrubber the night before his computer was imaged. Respectfully, this is not a case where allegations were based on nothing more than speculation. There was credible evidence of questionable conduct by the defendants.

202. It is an acceptable principle of costs, long ago established by this Court, that where a claim turns on questions of credibility, an unsuccessful plaintiff should not be punished for pursuing its claim through an award of substantial indemnity costs. As this Court held in *Toronto-Dominion Bank v. Grande Caledon Developments Inc.*, "the appellant had the right to put the respondent's credibility in issue and test it without fear of a cost sanction."[161]

203. In the event that the appeal is not granted, Catalyst submits that the trial judge's costs award cannot stand and should be reversed: West Face should be entitled to no more than its partial

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[161] *Toronto-Dominion Bank v. Grande Caledon Developments Inc.*, 1998 CarswellOnt 2094 (CA) at ¶11.

indemnity costs and Moyse should not have been awarded any costs based on his conduct, that understandably led to this proceeding.

PART IV - ORDER REQUESTED

204. Catalyst submits that, as discussed above, this Court should vacate the trial judge's judgment, make a finding of spoliation as against Moyse and, given the factual errors and legal errors discussed above, order a new trial on all other issues.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of February, 2017.

for: Rocco DiPucchio

for: Andrew Winton

Bradley Vermeersch

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Court File No. C62655

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents)

CERTIFICATE

I estimate that one day will be needed for my oral argument of the appeal, not including reply. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT the City of Toronto, this 15th day of February, 2017.

BV
for: Rocco DiPucchio

BV
for: Andrew Winton

BV
Bradley Vermeersch

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271

2. *Catalyst Capital Group Inc. v. Moyse* (cost endorsement), 2016 ONSC 6285

3. *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 SCR 748

4. *Wilk v. Arbour*, 2017 ONCA 21

5. *Nova Growth Corp. et al v. Andrezej Roman Kepinski*, 2014 ONSC 2763

6. *McDougall v. Black & Decker Canada Inc.* (2008), 440 AR 253 (CA)

7. *R v. Tatton*, 2015 SCC 33

8. *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 OR (3d) 699 (CA)

9. *Cheung (Litigation Guardian of) v. Toyota Canada Inc* (2003), 29 CPC (5th) 267 (SCJ)

10. *Dickson v. Broan-Nuton Canada Inc.*, 2007 CarswellOnt 9931 (SCJ)

11. *Zubulake v. UBS Warburg LLC:* 229 FRD 422 (SDNY, 2004)

12. *Residential Funding Co. v. DeGeorge Financial Corp*: 306 F.3d 99 (USCA, 2nd Circuit 2002)

13. *Turner v. Hudson Transit Lines Inc.*: 142 FRD 68, 75 (SDNY, 1991)

14. *Bagley v. Yale University*: 2016 WL 7407707 (Dis Crt D. Connecticut, 2016)

15. *The Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities LLC et al*: 685 F. Supp. 2d 456 (SDNY, 2010)

16. *Carey v. Laiken*, 2015 SCC 17

17. *St. Louis v. R.* (1895), 25 SCR 649

18. *R v. Gravesande*, 2015 ONCA 774

19. *Noriega v. College of Physicians and Surgeons of Ontario*, 2016 ONSC 924

20. *R. v. Owen* (2001), 150 O.A.C. 378 (CA)

21. *R. v. H.C.*, 2009 ONCA 56

22. *R. v. Phan*, 2013 ONCA 787

23. *Mid-Bowline Group Corp.*, 2016 ONSC 669

24. *MacDonald v. Huisman*, 2007 ONCA 391

25. *Santos v. Sangwan*, 2015 ONCA 822

26. *Canaccord Genuity Corp. v. Pilot*, 2015 ONCA 716

27. *Andrade v. Andrade*, 2016 ONCA 368

28. *Toronto-Dominion Bank v. Grande Caledon Developments Inc.*, 1998 CarswellOnt 2094 (CA)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. ***US Federal Rules of Civil Procedure***

RULE 37: FAILURE TO MAKE DISCLOSURES OR TO COOPERATE IN DISCOVERY; SANCTIONS

FAILURE TO PRESERVE ELECTRONICALLY STORED INFORMATION

37(e): If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
   a) presume that the lost information was unfavorable to the party;
   b) instruct the jury that it may or must presume the information was unfavorable to the party; or
   c) dismiss the action or enter a default judgment.

2. ***US Federal Rules of Civil Procedure***, Rule 37

ADVISORY COMMITTEE'S NOTES (2015)

…Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the information acted with the intent to deprive another

party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as Residential Funding Corp. v. DeGeorge Financial Corp., 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction…

SCHEDULE "C"

Error of Fact	Trial Judge's Finding	Trial Evidence Contradicting This Finding
The trial judge found that Catalyst's witnesses' explanation for why drafts of the PowerPoint presentations and notes from the meetings with the Government of Canada were destroyed differed from witness to witness and "made little sense".	Footnote 3.	Mr. Glassman's evidence was that the Government of Canada instructed Catalyst to destroy the drafts of the PowerPoint: Glassman Trial Cross-Examination at p. 387, l. 3 – p. 388, l. 13. Mr. Riley testified that he ordered that Catalyst employees destroy the PowerPoint, all drafts and notes because of the sensitivity of the information in it: Riley Trial Direct Examination at p. 578:15 – 579:2. These are not inconsistent explanations. Mr. Glassman states the Government of Canada asked Catalyst to destroy the presentation and its drafts. Mr. Riley's evidence that he ordered the material to be destroyed is carrying out the Government of Canada's desired outcome.
The trial judge found that Moyse decided to leave Catalyst because of a "[lack of]	Paragraph 54.	There was no evidence in the record to support suggestions that Catalyst was oppressive or

common decency or respect for individuals at [Catalyst]" and called these alleged facts "not surprising", without any contemporaneous documentary evidence to support these spurious allegations		lacked common decency or respect for the individuals working at Catalyst. The trial judge erroneously states that it is "not surprising" given how Mr. Glassman treated "everyone at Catalyst". Mr. Glassman's testimony was that he applied pressure to his deal team members and often would not relieve that pressure: Glassman Trial Cross-examination at p. 482, l.20 – p. 483, l. 13. Refusing to relieve pressure on his deal team in the face of a multi-million dollar deal is a far cry from creating an oppressive environment that lacks all decency or respect for its employees.
The trial judge found that West Face had a "critical need" for an analyst in March 2014 when it interviewed Moyse.	Paragraph 55.	Moyse's evidence throughout the proceeding was that he did not do any work at West Face for the first two weeks of his employment, before he was enjoined from continuing his employment: Moyse 2014 Cross, p. 171, q. 794. It is impossible that West Face could have a critical need for an analyst but did not have any work for him to do when he commenced his

		employment.
The trial judge speculated that that Moyse "had to be tired" when he emailed Catalyst's confidential deal sheet and deal memos to West Face in March 2014	Paragraph 57.	There was no evidence that Moyse was tired when he sent Catalyst's confidential deal memos to West Face in March 2014. In fact, Moyse's evidence prior to trial was that it was not unusual for him to work late: Q. Do you remember why you were up at 1:46 in the morning sending this to Mr. Dea? A. I don't. I work late. I've worked until midnight, one, two, three in the morning before. Maybe I sent it after work. I don't remember. Q. Do you know whether you were at the office when you sent this or whether you were at home? A. Don't remember. Moyse never tried to excuse his sending the confidential memorandum as a product of tiredness. Instead, Moyse maintained that he did not believe the information was confidential. He admitted that he deliberately sent the memos. He

		justified that decision by claiming the memoranda were public information. He never tried to excuse it, like the trial judge did: Moyse July 2014 Cross-examination: p. 138, q. 648 - p. 146, q. 698; p. 150, q. 709 – p. 153, q. 726.
The trial judge found that Wind was the only telecom investment West Face was working on in spring 2014 and that the confidentiality wall was established in respect of Wind because it was the only telecom investment West Face was working on.	Paragraph 63.	West Face's witness, Tom Dea, testified at length that any confidentiality wall would include both Wind and Mobilicity because the two were interrelated: Dea Trial Cross-examination at p. 1273, l. 15 – p. 1282, l. 3.
The trial judge found that Catalyst required the ability to sell spectrum to an incumbent in order for Wind to survive.	Paragraph 122.	Catalyst's thesis was that it requires concessions from the Federal Government, including the ability to sell spectrum to an incumbent, to make Wind viable, not for its survival. The concession regarding selling spectrum to an incumbent was to monetize Wind's assets in the event that it **did not** survive. The trial judge misapprehended the nuances of Catalyst's investment thesis and its request for concessions: Glassman Affidavit at

		paragraphs 25-26, 29.

THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

BRANDON MOYSE et al.
Defendants (Respondents)

Court File No. C62655

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE PLAINTIFF (APPELLANT)

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