

In the Matter Of:
The Catalyst Capital Group Inc. v.
Brandon Moyse, et al.

VOL 3
June 08, 2016

neesons

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Court File No. CV-14-507120

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

--- This is Day 3/Volume 3 of the transcript of
proceedings in the above matter held at the
Superior Court of Ontario, Courtroom 8-1, 330
University Avenue, Toronto, Ontario, on the 8th day
of June, 2016, commencing at 9:00 a.m.

B E F O R E: The Honourable Justice F. Newbould

1 REPORTED BY: Kimberley A. Neeson

2 RPR, CRR, CSR, CCP, CBC

3 Realtime Systems Administrator

4
5 A P P E A R A N C E S :

6
7 Rocco DiPucchio, Esq.,

8 & Andrew Winton, Esq., for the Plaintiff.

9 & Brad Vermeersch, Esq.

10
11 Robert A. Centa, Esq., for the Defendant,

12 & Kris Borg-Olivier, Esq., Brandon Moyse.

13 & Denise Cooney, Esq.

14
15 Kent Thomson, Esq.,

16 & Matthew Milne-Smith, Esq.,

17 & Andrew Carlson, Esq., for the Defendant,

18 West Face Capital Inc.

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WITNESS

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1 -- Upon commencing at 9:10 a.m.

2 THE REGISTRAR: Good morning,
3 Mr. Glassman. Just to remind you, you are still
4 under oath.

5 NEWTON GLASSMAN: PREVIOUSLY AFFIRMED

6 THE COURT: Mr. Centa?

7 MR. CENTA: Good morning, Justice
8 Newbould. You will find the documents that I
9 intend to refer to this morning in the folder
10 Evidence at Trial, and then Mr. Glassman's folder.

11 THE COURT: I have it.

12 MR. CENTA: You've got it? Terrific.

13 THE COURT: I notice you've got an iPad
14 as opposed to Mr. Thomson had a great big thick
15 binder of paper.

16 MR. THOMSON: We call that old school.

17 THE COURT: Me too.

18 CROSS-EXAMINATION BY MR. CENTA:

19 Q. Good morning, Mr. Glassman, my
20 name is Rob Centa, I am counsel for Brandon Moyse
21 in this proceeding.

22 Mr. Glassman, you've worked with Mr. de
23 Alba for approximately 14 years?

24 A. Approximately.

25 Q. And you know him very well?

1 A. I think so.

2 Q. And as you said yesterday about
3 him, he knows exactly who you are?

4 A. I hope so.

5 Q. Mr. de Alba has extensive and
6 impressive experience in the telecommunications
7 industry?

8 A. Yes.

9 Q. And as you explained yesterday,
10 that includes leading the restructuring of AT&T
11 Latin America which was eventually sold for 14
12 billion dollars?

13 A. Something like that.

14 Q. And that predates his arrival at
15 Catalyst?

16 A. It does.

17 Q. And since Mr. de Alba arrived at
18 Catalyst, he has continued to develop extensive
19 telecommunications and wireless telecommunications
20 experience through his work at Catalyst?

21 A. The whole firm has.

22 Q. Including Mr. de Alba?

23 A. Yeah.

24 Q. And as of March 2014, Mr. de Alba
25 had accumulated more experience in the

1 telecommunication sector and the wireless
2 telecommunication sector than had Mr. Moyse?

3 A. For sure.

4 Q. Mr. de Alba was the principal
5 person negotiating with VimpelCom and other parties
6 on the Wind transaction?

7 A. The business issues, yes.

8 Q. The business issues.

9 A. Yes.

10 Q. And in terms of the negotiations
11 with VimpelCom on the Wind transaction, what other
12 issues were being negotiated other than -- other
13 than the business issues you just described?

14 A. Well, there were other parties so
15 there was regulatory issues, there was timing
16 issues, there was -- within Mobilicity there were
17 creditor right issues, there was a whole bunch of
18 other things going on at the same time.

19 Q. And among those other issues, you
20 would have been the principal person responsible
21 for some of them, like the regulatory issues
22 dealing with the government?

23 A. Yes. Some.

24 Q. Some. Not all, some. Would
25 Mr. Riley have been the principal person

1 responsible for some other issues related to the
2 constellation of concerns you just described?

3 A. Some.

4 Q. And as of March through May, would
5 you agree with me that Mr. de Alba had more
6 knowledge on the Wind file than did Mr. Moyse?

7 A. Yeah.

8 Q. You described yourself yesterday,
9 I believe, as the chief architect of Catalyst's
10 regulatory strategy?

11 A. Amongst other things, yeah.

12 Q. Sorry, not to suggest that's your
13 only role, but that was one of your roles?

14 A. Yes.

15 Q. And you had more knowledge about
16 that component, Catalyst's regulatory strategy,
17 than did Mr. Moyse?

18 A. That's why we made sure the rest
19 of the team was informed, yes.

20 Q. Absolutely. And you were doing
21 the informing because that was one of your areas of
22 principal responsibility?

23 A. I was doing part of the informing.

24 Q. Correct. But take it one step at
25 a time. You were the chief architect of the

1 regulatory strategy?

2 A. Yes.

3 Q. And you took the lead in the
4 formal negotiations with the government and the
5 government's officials?

6 A. Sure.

7 Q. And you often took the lead in the
8 informal negotiations with the government
9 officials?

10 A. Sure.

11 Q. And in that role you were
12 augmented by Mr. Drysdale in some of the informal
13 discussions with government?

14 A. Sure. I was augmented by the
15 whole team, including Mr. Moyse. We got feedback
16 from everybody on the team.

17 Q. In terms of negotiations or
18 discussions with government, you don't suggest that
19 Mr. Moyse was having even informal discussions?

20 A. No, no, of course not.

21 Q. You were having those discussions,
22 correct?

23 A. I was one of the parties having
24 the discussions.

25 Q. And Mr. Drysdale was one of the

1 parties having those discussions?

2 A. The informal part of the
3 discussions.

4 Q. And Mr. Riley was having some of
5 those discussions?

6 A. Some of the indirect
7 conversations, so he would have been involved in
8 the process.

9 Q. Okay. And then you and
10 Mr. Drysdale and Mr. Riley, to the extent he was
11 having indirect conversations, would then be
12 responsible for conveying that information back to
13 the other members of the deal team who were not
14 having those conversations?

15 A. Correct.

16 Q. And one of the things that Mr. de
17 Alba would know about you is, as you said
18 yesterday, you would never relieve the tension on
19 any deal member on any deal at any point in time?

20 A. Not unless there was a strategic
21 or tactical reason to do so.

22 Q. And Mr. de Alba would know that
23 about you?

24 A. He would.

25 Q. And as you said, you would never

1 let up the pressure on a deal team member?

2 A. Not unless there was a tactical or
3 strategic reason to do so.

4 Q. You described yourself yesterday
5 as an instigator of pressure?

6 A. At times.

7 Q. And that's because putting
8 pressure on your advisors and your deal team
9 members, putting pressure on the other side,
10 putting pressure on the other stakeholders, is one
11 of the things, not the only thing, but one of the
12 things that has made Catalyst exceptionally
13 successful over its life?

14 A. I think so, given what we do for a
15 living.

16 Q. Given what you do for a living --

17 A. Yeah.

18 Q. -- placing that pressure is an
19 important element in your success?

20 A. I think it's been helpful to our
21 success.

22 Q. And as you said, absent a
23 strategic or tactical reason to do otherwise,
24 Mr. de Alba would know that?

25 A. Sure.

1 Q. And as you said yesterday, we
2 could ask him that?

3 A. Sure.

4 Q. And you would never not ask a
5 question of an analyst, an important question you
6 wanted answered, just to avoid putting pressure on
7 an analyst?

8 A. No, that I would do. It might
9 have a tactical reason.

10 Q. To not ask a question of an
11 analyst?

12 A. That's not how I heard your
13 question. I'm sorry, can you repeat it?

14 Q. If you wanted an important
15 question answered by an analyst, if you had an
16 important question for an analyst, you would ask
17 it?

18 A. Well, I may not ask it but it
19 would be asked. It would be done in a manner that
20 we thought got the best result. So if my asking it
21 would potentially obscure or frustrate the outcome,
22 then we would have somebody else ask the question.
23 But it would be discussed.

24 Q. And the question would be asked
25 and answered?

1 A. We hoped it would be answered.

2 Q. Mr. Riley is the chief operating
3 officer at Catalyst?

4 A. He is.

5 Q. He is also a partner?

6 A. He is.

7 Q. He accompanied you to meetings in
8 Ottawa on March 26th and May 12th?

9 A. Yes, he did.

10 Q. And through attendance at those
11 meetings and his other involvement at Catalyst he
12 had extensive knowledge of the Wind file?

13 A. He did.

14 Q. This was not the first time that
15 Mr. Riley had a role in government relations on a
16 file in Catalyst?

17 A. I don't know if it was the first
18 but it's not the only.

19 Q. It's not the only. He had
20 attended meetings with government officials on
21 behalf of Catalyst on other occasions?

22 A. That I don't know.

23 Q. You told us yesterday that
24 Industry Canada had no problem with Catalyst
25 keeping a copy of the final PowerPoint presentation

1 that you delivered to them on March 26th?

2 A. That was my understanding.

3 Q. That was what they told you?

4 A. Yes, that doesn't mean that they
5 didn't internally have a problem with it. The
6 question was, they had no problem with it. I don't
7 know. They articulated that to us. I don't know
8 what they were thinking.

9 Q. Right. But Industry Canada told
10 you --

11 A. Yeah.

12 Q. -- that you could keep a copy of
13 the final PowerPoint presentation, correct?

14 A. Yes.

15 Q. But they requested that you
16 destroy the draft presentations?

17 A. All the drafts leading up to it.

18 Q. You testified that you kept a
19 master file with the final presentation in it?

20 A. I didn't say I kept it. I said
21 the firm kept it.

22 Q. The firm kept --

23 A. Yes.

24 Q. -- a master file with the final
25 presentation in it?

1 A. That was their instructions.

2 Q. And the team members were asked to
3 destroy their draft presentations?

4 A. Correct.

5 Q. And Catalyst does not have a
6 general practice of destroying copies of
7 presentations made to government?

8 A. I don't know if we've ever made
9 another presentation to government.

10 Q. Catalyst does not have a general
11 practice, though, there's no policy, no practice,
12 of destroying presentations to government?

13 A. I think this was the first
14 presentation we've ever actually made formally to
15 any government official. So I don't know what that
16 means to say we have a practice or not have a
17 practice. We were asked to do something; we did as
18 we were asked. If in the future they asked us to
19 do something that was improper, we would have a
20 discussion about it.

21 Q. So having -- if it's true that you
22 had never made a presentation to government before,
23 then you wouldn't have had a practice of destroying
24 those presentations because you hadn't made
25 presentations before that, correct?

1 A. I can only give you the testimony
2 that we would do as we were asked so long as it was
3 legal and we considered it appropriate.

4 Q. Can you turn up tab 13, please, in
5 the cross-examination binder. This is the
6 examination for discovery of Mr. de Alba and these
7 are questions regarding the destruction of the --

8 THE COURT: Not in my copy. Tab 13 is
9 not that.

10 MR. CENTA: This is my
11 cross-examination binder, the Paliare Roland.

12 THE COURT: Yes, I have your
13 cross-examination. Tab 13 is an email.

14 MR. CENTA: Perhaps, Justice Newbould,
15 if I could direct you -- we'll try and sort that
16 out for you. If you could look at the big screen,
17 I can call up the very short question I'm going to
18 refer to and we will provide you with whatever
19 cross-references we need to. So I am referring to
20 tab --

21 THE COURT: Hang on, hang on.

22 MR. CENTA: Mr. Thomson advises me you
23 might find this at tab 41 of his cross-examination
24 folder, if that would be easier.

25 THE COURT: Anyway, you go ahead, I'll

1 just do it here.

2 MR. CENTA: Thank you.

3 BY MR. CENTA:

4 Q. So I'm referring to document
5 WFC011936, it's page 39 of the transcript, page 40
6 of the document, and these are questions being
7 asked by Mr. Milne-Smith of Mr. de Alba in regard
8 to the March 26th PowerPoint presentation.

9 And Mr. Milne-Smith asks of Mr. de
10 Alba:

11 "Question: Is it Catalyst's
12 general practice to destroy copies
13 of presentations made to
14 government?"

15 Mr. de Alba's answer:

16 "Answer: It is. It is also
17 industry practice to keep
18 information that is critical
19 confidential."

20 That was question 143. And,
21 Mr. Glassman, I take it you're not aware of any
22 general practice at Catalyst to destroy copies of
23 presentations made to government?

24 A. You can't have a general practice
25 if it was the first time that we made a

1 presentation.

2 MR. CENTA: Thank you. Those are my
3 questions.

4 MR. DIPUCCHIO: No re-examination, Your
5 Honour.

6 THE COURT: I've got a couple of
7 questions for you, Mr. Glassman.

8 You said yesterday that Catalyst
9 perhaps not de jure but de facto controlled
10 Mobilicity, and I think you were talking about
11 around the time it went into CCAA.

12 I just want to understand when you say
13 de facto you controlled Mobilicity, why did you say
14 that was the situation?

15 THE WITNESS: We owned just under a
16 negative control blocking position. We owned 32.6
17 percent or 32.4 percent, I forget the exact number.
18 We had verbal support from a couple of the minority
19 bondholders who had this very strange lockup that
20 had been manufactured to support us.

21 So at our own 32 and change percent it
22 would be mathematically difficult but not
23 impossible to overrule us in a plan, but with the
24 support of even a small piece, we had effectively
25 negative control. We eventually did get negative

1 control. One of the holders did sell the block to
2 us eventually and we had over 34 percent.

3 The other reason -- that's number one.

4 THE COURT: What you call negative
5 control, you mean a blocking position?

6 THE WITNESS: A blocking position.
7 That was the first reason.

8 The second reason was because there
9 was, and you presided over the case so you and I
10 may have different views of certain issues, but
11 there was this attempt through the holding company
12 to control how the actual collateral was being
13 treated because the holding company was out of the
14 money.

15 Our position in the holding company had
16 structural and legal seniority. That also provided
17 us with a certain amount of de facto control over
18 what would happen. So I meant both issues.

19 THE COURT: Again, the holding company,
20 was that a blocking position?

21 THE WITNESS: No, our blocking position
22 was at OpCo, so we were structurally senior and
23 legally senior. It would be very difficult to get
24 a plan through, but aside from even the mathematics
25 of the negative control, there was this issue, if

1 one spent enough time thinking about it, there was
2 this issue of trying to do what would otherwise
3 look like a substantive consolidation in order to
4 move money and value up to the HoldCo. That would
5 never happen because we would have kept contesting
6 it and I believe that we eventually would have won
7 it because I think you knew what was going on.

8 THE COURT: The other question has to
9 do with a statement you made yesterday, I think in
10 your affidavit as well, that you were shocked when
11 you finally saw what the West Face, or the
12 consortium deal was, that I think you said you
13 didn't think any fiduciary could just ignore or
14 waive the problem of the government regulation.

15 Was that a view held generally in the
16 industry?

17 THE WITNESS: Yes.

18 THE COURT: That the government
19 regulations would have to change for something to
20 work?

21 THE WITNESS: Yes.

22 THE COURT: And would you assume or not
23 that any other player bidding for Wind would have
24 the same concern? I take it from being shocked,
25 you would have?

1 THE WITNESS: Two things. I can't
2 remember if I used the phrase shocked or
3 gob-smacked, but shocked.

4 THE COURT: I wrote down the word
5 "shocked" so I assume you used it.

6 THE WITNESS: It would be in my style
7 to say gob-smacked too, so I just wanted to be
8 clear but I do mean shocked if I said gob-smacked.

9 In the context of at that time of what
10 was going on, you had a situation where the
11 government had unilaterally changed rules, likely
12 illegally, related to a contract, to contracts and
13 to spectrum. You had everybody losing money. You
14 had the government pushing for something that
15 nobody could make sense of either in the industry
16 or, frankly, in the press.

17 So for somebody to take the risk
18 related to regulatory approval had to have meant
19 that they were either disregarding or denigrating
20 their duty over other people's money or they had a
21 piece of information that allowed them to view it
22 in a way that they didn't think it was a risk.

23 THE COURT: But you assume that another
24 bidder -- would you assume that another bidder
25 would think you were trying to do something so you

1 wouldn't have to face that risk?

2 THE WITNESS: So VimpelCom itself was
3 terrified of the regulatory risk and they said that
4 because -- and we've seen the testimony where they
5 said that because of their own experience with the
6 government, the government had turned down other
7 deals, the environment had gotten worse, so for
8 example, the original founder of Orascom, and
9 Orascom was sold to VimpelCom, was turned down on
10 his attempt to purchase ManitobaTel, so here is
11 somebody who in the past was acceptable, now wasn't
12 acceptable.

13 The business was losing a lot of money.
14 I suspect -- people that we had talked to, plus
15 common sense, would tell one that it would be
16 expected, notwithstanding the posturing and the
17 positioning by the seller, who didn't want to
18 accept the risk, that no one would take that risk,
19 which is one of the reasons why we were talking
20 about the lawsuit with the government, because the
21 government had a problem.

22 THE COURT: All right. So --

23 THE WITNESS: And that was the way out.

24 THE COURT: Would it be fair to assume
25 that another bidder such as West Face or the

1 consortium, would it be fair to assume that they
2 would think that you were putting some condition to
3 the government or putting some position to the
4 government that they had to waive their position?

5 THE WITNESS: It's my view that they
6 were told.

7 THE COURT: That's what you had --

8 THE WITNESS: It's my personal view.

9 THE COURT: I understand that. But
10 apart from your personal view, would it be fair to
11 assume that in view of what the industry knew, they
12 would think you were doing something like that with
13 the government?

14 THE WITNESS: Well, as you can see from
15 the testimony about Quebecor, they also had
16 conditions. So I think anybody in the business
17 would have thought about what conditions they want.
18 They may not all be the same, but there would have
19 been some regulatory conditions around what they
20 were doing unless somebody understood the legal
21 ramifications of the lawsuit.

22 THE COURT: What I was asking you was,
23 would it be fair to assume that they would think
24 that you, Catalyst --

25 THE WITNESS: I think so.

1 THE COURT: -- was making that kind of
2 presentation to the government?

3 THE WITNESS: Yeah, they either would
4 assume or know.

5 THE COURT: Thanks.

6 THE WITNESS: Sorry, I didn't
7 understand the question.

8 THE COURT: That's okay. Are there any
9 questions arising from my questions?

10 MR. THOMSON: I have none.

11 MR. DIPUCCHIO: No.

12 THE COURT: Thank you very much.

13 -- WITNESS EXCUSED --

14 THE COURT: Yes?

15 MR. WINTON: Good morning, Your Honour.
16 Our next witness is Mr. Riley.

17 JAMES RILEY: SWORN.

18 MR. WINTON: Your Honour, Mr. Thomson
19 has just informed me that there is something he
20 wishes to say to the court before Mr. Riley begins
21 his testimony.

22 MR. THOMSON: Your Honour, you may
23 recall from my opening that I raised an objection
24 concerning the contents of Mr. Riley's affidavits.
25 I am assuming we can proceed on the same basis as

1 we did in the Athena trial, which is my objection
2 stands, you'll deal with the evidence as you see
3 fit and you'll sort out the admissible evidence
4 from the inadmissible evidence?

5 THE COURT: That's fine. Mr. Winton?

6 EXAMINATION IN-CHIEF BY MR. WINTON:

7 Q. Good morning, Mr. Riley.

8 A. Good morning.

9 Q. Do you recall in this proceeding
10 you have sworn five affidavits?

11 A. I do.

12 Q. And specifically those were dated
13 June 26, 2014?

14 A. Yes.

15 Q. And July 14th, 2014?

16 A. Yes.

17 Q. July 28th, 2014?

18 A. Yes.

19 Q. February 15th, 2015?

20 A. Yes.

21 Q. And May 1st, 2015?

22 A. Yes.

23 Q. And you understand that those
24 affidavits constitute your evidence in-chief in
25 this trial?

1 A. They do.

2 Q. And you adopt the contents of
3 those affidavits as your evidence in-chief?

4 A. I do.

5 Q. You were cross-examined on two
6 occasions prior to today, correct?

7 A. Yes.

8 Q. You reviewed the transcripts of
9 those cross-examinations prior to today?

10 A. Yes, I have.

11 Q. Do you adopt the evidence that you
12 gave in those cross-examinations as part of your
13 evidence as well?

14 A. I do.

15 Q. So we're just going to go through
16 some highlights of your evidence today, but before
17 I do that, just perhaps to get your background into
18 the record, what is your position at Catalyst?

19 A. I am a managing director and chief
20 operating officer. I am also a partner.

21 Q. When did you join Catalyst?

22 A. 2011.

23 Q. What are your primary
24 responsibilities as the chief operating officer and
25 managing director?

1 A. I manage day-to-day operations
2 which includes management of the office, I
3 interface with the finance group, I manage our
4 borrowings with the banks, I am also involved in
5 fundraising including participating in meetings. I
6 also manage day to day certain litigation files
7 like this, and when things -- when things are not
8 otherwise in a specific task, I will take over
9 those tasks.

10 Q. So just to put your affidavits
11 into some context, the first affidavit sworn on
12 June 26th, 2014, which is one day after this action
13 was commenced, if we can just have available. Now,
14 in this affidavit...

15 Your Honour, you have a folder. Do you
16 have that open for Mr. Riley?

17 THE COURT: I do. I have the
18 affidavit.

19 MR. WINTON: Thank you.

20 BY MR. WINTON:

21 Q. Now, in this affidavit you had
22 referred to the forensic review of Mr. Moyse's work
23 computer that was performed at Catalyst which was
24 conducted June 2014. What led Catalyst to engage a
25 forensic investigator to review Mr. Moyse's

1 computer?

2 A. Mr. Moyse indicated that he was
3 going to a competitor, West Face, and he was not
4 going to honour his non-compete.

5 Q. When did you retain the expert?

6 A. It would have been in around that
7 time. I think he imaged the computer on that
8 weekend, I think June 26/27, approximately.

9 Q. Okay.

10 A. Actually, prior to that, sorry.

11 Q. Okay. Let's turn up -- if you
12 scroll down in the affidavit, please, a few pages
13 down.

14 THE COURT: Which paragraph do you
15 want?

16 MR. WINTON: Sorry, I'm trying to find
17 it, Your Honour. Stop there. Okay.

18 BY MR. WINTON:

19 Q. So now looking at paragraph 45,
20 you see there is an excerpt of the email from
21 Mr. DiPucchio to counsel for -- previous counsel
22 for Mr. Moyse and West Face dated June 19th, 2014.
23 Do you see that, Mr. Riley, paragraph 45?

24 A. Yes, I do.

25 Q. Does that refresh your memory as

1 to approximately the date when you engaged
2 Mr. Musters?

3 A. That is correct. That was
4 primarily because the defendant was not prepared to
5 maintain the status quo.

6 Q. Now, paragraph 55 of this
7 affidavit on page 15, there is reference to
8 investment letters that you describe. What kind of
9 information is contained in the investment letters?

10 A. This would be confidential
11 information reported to investors in the funds, our
12 limited partners, to give them a status on a
13 quarterly basis -- typically on a quarterly basis
14 as to the status of the investments made by that
15 particular fund, in this case fund 2.

16 Q. In 2014 was fund 2 still an open
17 fund?

18 A. No, it was not.

19 Q. So what is the significance to the
20 fact that a fund is no longer an open fund?

21 A. It means that it is in the course
22 of realization and will be making no further
23 investments.

24 Q. Would an analyst at Catalyst have
25 a legitimate business reason to review the

1 investment letters relating to fund 2?

2 A. No.

3 Q. Are analysts allowed to view old
4 investment letters without authorization from the
5 partners?

6 A. No.

7 Q. What would be the consequences for
8 them if they did so?

9 A. Depending on the circumstances, it
10 could be grounds for termination.

11 Q. Okay. If we can go to the next
12 affidavit, the one sworn July 14, 2014. Sorry,
13 just to go back to one question about what you said
14 about -- you don't need to go to the affidavit.
15 Were the analysts aware of this policy concerning
16 the confidentiality of the investment letters?

17 A. I believe they're aware of our
18 general confidentiality restrictions, so it would
19 be included in this.

20 Q. So in the July 14th affidavit, and
21 just if you go to the first page of that, to put
22 this into context, paragraph 2 indicates you swore
23 this in response to the affidavits filed by
24 Mr. Moyse and West Face?

25 A. I believe it was particularly in

1 response to an affidavit filed by Mr. Dea in which
2 he enclosed four of our confidential deal memos
3 which had been provided to him by Mr. Moyse.

4 Q. Okay. So if we turn to paragraph
5 12 beginning at the bottom of page 3 and then it's
6 going to go to the top of page 4, you refer to the
7 evidence that West Face filed in its record. What
8 was -- you were referring to those four
9 confidential memos. Prior to seeing them in the
10 affidavit, were you aware that West Face had
11 possession of those memos?

12 A. I was not aware of that.

13 Q. So when was the first time you
14 became aware that they possessed those memos?

15 A. As I think I said previously,
16 Mr. Dea's affidavit.

17 Q. The next affidavit sworn is two
18 weeks later, July 28th, 2014, if you'd turn that
19 up. What were the circumstances that led to you
20 swearing this third affidavit?

21 A. It was as a result of disclosure
22 by Mr. Moyse that he had more than 800 -- more than
23 800 files representing confidential information,
24 and we had reviewed those, Zach Michaud and I had
25 reviewed them and identified at least 200.

1 Q. Sorry, I just want to make sure
2 we're clear for the record. How many of the 800
3 documents did you review and consider to be
4 confidential?

5 A. We reviewed the whole of the list
6 and believed at least 200 of them were
7 confidential. We did not review the actual files
8 themselves.

9 Q. Your next affidavit was sworn
10 February 18th, 2015, so several months later. And
11 do you recall what were the intervening events that
12 led to you swearing this fourth affidavit?

13 A. There was a West Face transaction
14 involving Wind. The ISS review of Moyse's devices
15 had revealed that he had installed a scrubber and
16 there was some evidence relating to West Face in
17 connection with its short attack against Callidus.

18 Q. And those are the events?

19 A. Yes, those are the events.

20 Q. Your fifth affidavit was sworn May
21 1st, 2015. As you see -- just at paragraph 3, to
22 help orient you, this was the responding affidavit
23 that you swore --

24 A. Yes.

25 Q. -- at this time period?

1 A. Yes.

2 Q. I won't deal with I guess the
3 evidence concerning Callidus, but if we turn to
4 page 10 at paragraph 35, do you recall why at this
5 stage in the proceeding you're giving evidence
6 concerning Mr. Moyse's role on the Wind file?

7 A. Yes. This was in response to his
8 position that he had a minimal involvement in the
9 Wind file and, in particular, we wanted to bring
10 forward the fact that he had -- he was involved in
11 the March 26th PowerPoint presentation, preparation
12 of that presentation.

13 Q. Around the time that you swore
14 this or when you swore this affidavit, did you --
15 or were you able to review a copy of that
16 PowerPoint presentation?

17 A. No. I wish I had, but I believed
18 all copies of it had been destroyed or deleted.

19 Q. And what formed or what was the
20 basis for that belief?

21 A. I had asked that all of the people
22 that had copies of it to destroy theirs and delete
23 them.

24 Q. Why did you make that request?

25 A. I believed that given the

1 sensitivity of the information enclosed, it was
2 best to not have maintained copies.

3 MR. WINTON: Those are my questions,
4 Your Honour.

5 THE COURT: Yes, Mr. Thomson?

6 MR. THOMSON: Do you have my
7 cross-examination electronic binder, Your Honour?

8 THE COURT: Yes.

9 MR. THOMSON: Thank you.

10 CROSS-EXAMINATION BY MR. THOMSON:

11 Q. Good morning, Mr. Riley.

12 A. Good morning.

13 Q. You were not involved directly in
14 the discussions and negotiations between Catalyst
15 and VimpelCom, as I understand it?

16 A. That is correct.

17 Q. You attended no meetings with
18 VimpelCom?

19 A. No.

20 Q. Instead, as I understand the
21 evidence, Catalyst's lead negotiator was Mr. de
22 Alba?

23 A. Yes.

24 Q. Mr. de Alba directed Catalyst deal
25 team and its advisors?

1 A. Yes.

2 Q. Mr. Glassman was primarily
3 responsible for Catalyst's discussions and
4 negotiations with the Government of Canada
5 concerning regulatory issues?

6 A. Yes.

7 Q. Now, let me deal with Mr. Moyse's
8 resignation. Can you pull up tab 9, please. And,
9 sir, you'll see here Mr. Moyse's email to Mr. de
10 Alba of May 24th of 2014 telling Mr. de Alba that
11 he was resigning from Catalyst?

12 A. Yes.

13 Q. I take it that Mr. Moyse's
14 resignation was brought to your attention shortly
15 after it was given?

16 A. Yes.

17 Q. And am I correct that you met with
18 Mr. Moyse two days later on Monday, May 26th, 2014?

19 A. I did.

20 Q. During that meeting, Mr. Moyse
21 told you that he intended to join West Face?

22 A. Yes.

23 Q. And am I correct that as a result
24 you sent Mr. Moyse home?

25 A. Yes.

1 Q. You did so at least in part in
2 order to ensure that Mr. Moyse played no role in
3 and was kept isolated from any future discussions
4 regarding upcoming investment opportunities at
5 Catalyst?

6 A. Correct.

7 Q. And am I right that Mr. Moyse did
8 in fact stay home for the remainder of the 30-day
9 notice period? He did not rejoin Catalyst?

10 A. He did not come back to the
11 office.

12 Q. He no longer attended Catalyst
13 Monday meetings either in person or by phone?

14 A. No.

15 Q. He no longer performed work for or
16 on behalf of Catalyst?

17 A. I don't know for sure because
18 there were some continuing matters that he might
19 have to give help -- help in the transition.

20 Q. You're not aware of any
21 significant matters?

22 A. No.

23 Q. Am I right that on May 26th of
24 2014 Catalyst also contacted its IT provider and
25 asked that Mr. Moyse -- Moyse's permission to

1 access the Catalyst servers be revoked?

2 A. Yes.

3 Q. In the period after Monday, May
4 26th of 2014, you shared no information whatsoever
5 with Mr. Moyse concerning Catalyst's discussions
6 and negotiations with VimpelCom?

7 A. Are you asking me personally?

8 Q. Yes.

9 A. No.

10 Q. Nor to your knowledge did
11 Mr. Glassman or Mr. de Alba?

12 A. To my knowledge, no.

13 Q. In the period after Monday, May
14 26th, 2014 you shared no information whatsoever
15 with Mr. Moyse concerning Catalyst's discussions
16 and negotiations with the Government of Canada,
17 correct?

18 A. No.

19 Q. Nor to your knowledge did
20 Mr. Glassman or Mr. de Alba?

21 A. To my knowledge, no.

22 Q. Now, am I right that you have been
23 the person at Catalyst primarily responsible for
24 managing what I'll call the Moyse litigation in the
25 period since it was commenced in June of 2014?

1 A. That is correct.

2 Q. We've already established that in
3 the course of the litigation, you have prepared and
4 sworn five affidavits?

5 A. Yes.

6 Q. And you spent a considerable
7 amount of time reviewing Mr. Moyse's documents as
8 well as productions of Catalyst and West Face?

9 A. Yes.

10 Q. And am I right in saying this, Mr.
11 Riley, you've certainly reviewed all of the
12 particularly relevant or important documents that
13 have been brought to your attention from time to
14 time by Catalyst counsel?

15 A. Yes.

16 Q. Now, can we agree that you were
17 not present during any meetings or discussions
18 Mr. Moyse may have had with representatives of West
19 Face?

20 A. No.

21 Q. And that is so either before he
22 joined West Face on June 23, 2014 or after,
23 correct?

24 A. That is correct.

25 Q. And therefore you can't testify

1 under oath as to what happened during any of those
2 meetings or discussions, correct? You weren't
3 there?

4 A. No, I wasn't there. Sorry, I'm
5 just trying to think of what I learned through
6 affidavits.

7 Q. Now, am I correct as well, having
8 read in some detail all of your five affidavits,
9 that you have not attached to any of your five
10 affidavits even one document in which Mr. Moyse
11 conveys to West Face confidential information of
12 Catalyst concerning either Wind or VimpelCom?

13 A. No.

14 THE COURT: I think the answer is yes.
15 These questions that Mr. Thomson asks, "Now am I
16 correct that," that's his modus operandi. So I
17 think he meant the answer to be yes.

18 THE WITNESS: The answer is yes. Thank
19 you for that.

20 MR. THOMSON: Thank you.

21 THE WITNESS: So don't be so tricky.

22 THE COURT: He will be if he can get
23 away with it.

24 MR. THOMSON: Yeah, yeah. I wish I was
25 that smart.

1 BY MR. THOMSON:

2 Q. Let me turn to the issue of the
3 writing samples.

4 A. Yes.

5 Q. By writing samples, I mean the
6 samples that Mr. Moyse sent to Mr. Dea of West Face
7 on March 27. You are aware of those?

8 A. I am.

9 Q. And if we pull up, please, tab 8
10 of the cross-examination binder. Just so we have
11 it for the record, Your Honour, this is WFC0075126,
12 which is the email at the bottom, half-way down the
13 page, an email from Mr. Moyse to Mr. Dea of March
14 27 of 2014 at 1:47 a.m. attaching his CV, his deal
15 sheet and what he calls a few investment write-ups
16 that he had done at Catalyst.

17 I take it you've reviewed the email and
18 its attachments before testifying today?

19 A. I have.

20 Q. And the writing samples pertained
21 to, as I understand it, four companies, so Homburg,
22 NSI, Rona and Arcan Resources?

23 A. Yes.

24 Q. And you would concede, in
25 fairness, I'm sure, Mr. Riley, that none of those

1 samples concern Wind Mobile?

2 A. I agree.

3 Q. To your knowledge Catalyst never
4 made an investment in Arcan?

5 A. No, it did not.

6 Q. To your knowledge Catalyst never
7 made an investment in NSI?

8 A. We did not.

9 Q. To your knowledge Catalyst never
10 made an investment in Rona?

11 A. We did not.

12 Q. And to your knowledge West Face
13 made no investment in Homburg?

14 A. Oh, yes, we did.

15 Q. No, West Face?

16 A. Oh, sorry, I apologize. To my
17 knowledge, no.

18 Q. To your knowledge West Face made
19 no investment in NSI?

20 A. Not to my knowledge.

21 Q. And to your knowledge West Face
22 made no investment in Rona?

23 A. To my knowledge, no.

24 Q. And if we -- with respect to
25 Arcan, if we can pull up, please, tab 21. So tab

1 21, Your Honour, is WFC0080746, which is an
2 affidavit of Mr. Griffin sworn on March 7 of 2015.

3 Mr. Riley, am I right that you have
4 reviewed Mr. Griffin's affidavit before testifying
5 today?

6 A. Yes, I have.

7 Q. And can we please turn in the
8 affidavit to paragraph 52. Stop there. So at 52
9 of his affidavit, Mr. Griffin says:

10 "Of the four writing samples,
11 only one - concerning Arcan
12 Resources - addressed a company that
13 was being followed by West Face and
14 ultimately became the subject of a
15 transaction by West Face."

16 He says the transaction was directed by
17 him and was independent of Moyse's analysis for
18 Catalyst.

19 It refers to following Arcan for
20 several years. It says at his direction West Face
21 had taken a position in two different series of
22 Arcan's unsecured debentures between September 2012
23 and July of 2013.

24 And then go to paragraph 53. You'll
25 see he says on June 23 of 2014 at 4:22 p.m.:

1 "Arcan announced a strategic
2 transaction with Aspenleaf Energy
3 Limited pursuant to which Aspenleaf
4 and Arcan would complete a Plan of
5 Arrangement. I concluded that the
6 debenture holders should be able to
7 negotiate a better deal for
8 themselves than had been proposed
9 under the Plan of Arrangement, and
10 that if they could do so, the
11 debentures would rise in value."

12 He then goes on, as you'll recall, to
13 explain in the affidavit that they then made the
14 investment in those debentures and that they
15 actually lost money as a result of having done so.

16 So here's my question for you. Am I
17 right that Catalyst made no investment in relation
18 to that Plan of Arrangement proceeding?

19 A. To my knowledge, no.

20 Q. Of course Mr. Moyse's writing
21 sample concerning Arcan, which I'm happy to take
22 you to, was dated January 2014?

23 A. I don't know the date of that.

24 Q. Can you pull up, please, tab 8,
25 and turn to page 123 of tab 8. So you'll see this

1 is - just pause there - this is the writing sample?

2 A. I see the date at the top is Jan
3 2014.

4 Q. Right. That's my point. So the
5 writing sample was prepared and dated well before
6 the Plan of Arrangement that led to the West Face
7 investment was announced on June 23 of 2014; fair
8 enough?

9 A. Yes.

10 Q. Now, let me turn to an issue that
11 was raised with you during the course of your
12 examination in-chief. Am I right that on July 16
13 of 2014 Catalyst obtained a consent order from
14 Justice Firestone?

15 A. Yes.

16 Q. Pull up, please, tab 10 of the
17 cross-examination binder. Here is the order of
18 Justice Firestone of July 16 of 2014, and if you
19 turn, please, to paragraph 10 of the order, you'll
20 see that the court on consent made an order sealing
21 the court file?

22 A. Yes.

23 Q. And one of the reasons that the
24 sealing order was sought was because the writing
25 samples we just looked at a moment ago were in the

1 court file and had been attached to a responding
2 affidavit of West Face?

3 A. Yes.

4 Q. Now, am I right that on January
5 13th of 2015 Catalyst commenced a motion against
6 West Face in relation to its acquisition of Wind
7 Mobile?

8 A. Without being able to confirm, is
9 that the date? I can't remember the date.

10 Q. Okay. That's fine. Pull up tab
11 13, please. So, Your Honour, this is CAT000917.
12 And you'll find a Notice of Motion of Catalyst, and
13 if we flip to page 16 of the document, you'll find
14 the date of January 13, 2015?

15 A. I see that date and adopt that
16 date.

17 Q. So that's the date on which
18 Catalyst commenced this motion against West Face,
19 correct?

20 A. Correct.

21 Q. If we go back to the first page of
22 the Notice of Motion and look at the relief sought,
23 briefly scroll down, please, look at paragraph B,
24 so Catalyst sought injunctive relief restraining
25 West Face, its officers, directors, employees,

1 agents and so on from, and then skip to the next
2 page, please, from participating in the management
3 and/or strategic direction of Wind Mobile and any
4 affiliated or related corporations and
5 participating in the upcoming spectrum auction.
6 Fair enough?

7 A. Yes.

8 Q. And then also sought, in paragraph
9 C, an order authorizing an independent supervising
10 solicitor to attend at West Face's premises to
11 create forensic images of all electronic devices,
12 including computers and mobile devices of West Face
13 and so on. So that was the nature of the relief
14 sought by Catalyst against West Face as of January
15 2015?

16 A. Yes.

17 Q. Now, am I right that two days
18 after that motion was brought, Catalyst took the
19 necessary steps to unseal the court file?

20 MR. DIPUCCHIO: Your Honour, that's
21 actually not correct. I have to rise. We didn't
22 take any steps to unseal the court file. The court
23 file was only sealed pending the outcome of the
24 interlocutory injunction. That's what the order
25 says.

1 BY MR. THOMSON:

2 Q. All right. Let's then deal with
3 it one step at a time. Pull up tab -- pull up tab
4 19, please. Mr. Riley, here you'll see a
5 transcript of your cross-examination conducted on
6 May 13th of 2015?

7 A. Yes.

8 Q. And will you please turn to page
9 62 of the transcript or page 63 of the document.
10 And you'll see at question 259, Mr. Riley, the
11 question that was put was:

12 "Catalyst alleges that
13 Mr. Moyse disclosed the confidential
14 information to West Face in the
15 March 27, 2014 email which attached
16 the writing samples?

17 Answer: Yes.

18 Question: And Catalyst has, in
19 fact, consented to unsealing the
20 court record that contained those
21 documents, correct?

22 Answer: Yes."

23 And then 261:

24 "Question: So it no longer
25 treats that information as

1 confidential?

2 Answer: Yes."

3 I take it you were asked those
4 questions and gave those answers?

5 A. I did, but if I review 260 again,
6 I adopt my counsel's interpretation that the
7 sealing order was functus once the hearing was
8 over.

9 Q. Pull up tab 14, please, of the
10 cross-examination binder.

11 THE COURT: Just before you do that,
12 Mr. Riley, so the answer to question 261, do you
13 have that in front of you?

14 THE WITNESS: Yes, I do.

15 THE COURT: The question:

16 "Question: So it no longer
17 treats that information as
18 confidential?

19 Answer. Yes."

20 THE WITNESS: We had no choice.

21 THE COURT: You're saying that Catalyst
22 no longer treated the information as confidential?

23 THE WITNESS: Correct. Sorry, is there
24 another document you want to look at?

25 BY MR. THOMSON:

1 Q. Yes. Right here, it should be on
2 the screen. So, Your Honour, this is WFC0081342.

3 A. Yes.

4 Q. It's part of the court record
5 concerning this matter. And you'll see a series of
6 different dates. So per order of Firestone, J.
7 dated July 16, 2014, file sealed pending the
8 outcome of interlocutory relief motion. The second
9 reference says the same thing. Below that, sealed
10 material sent to Divisional Court per requisition
11 dated December 22, 2014. Below that, partial file
12 sealed by order of Firestone, J. on October 21,
13 2014. Below that, January 15, obviously of 2015,
14 file unsealed?

15 A. Yes.

16 Q. Re counsel Andrew Winton, lawyer,
17 and so on.

18 So my question for you is this. What
19 steps, if any, did Catalyst take in January 2015 --
20 and you'll note January 15 is two days after the
21 motion we just looked at a moment ago was brought.

22 A. Yes.

23 Q. What steps, if any, did Catalyst
24 take to make sure the court file was in fact
25 unsealed in January of 2015?

1 MR. DIPUCCHIO: I have to rise again,
2 Your Honour, because this is really a question
3 directed to us, I assume. There were no steps
4 taken to unseal the court file. The court file was
5 unsealed as a result of Justice Firestone's order.

6 THE COURT: I saw the order before,
7 Mr. DiPucchio. I would have thought counsel would
8 agree on this. When I saw the order at tab 10 I
9 did see that it was pending or until the motion for
10 interlocutory relief was heard.

11 MR. DIPUCCHIO: Yes.

12 THE COURT: When was that motion heard?

13 MR. DIPUCCHIO: That was heard in
14 October of 2014.

15 THE COURT: Right.

16 MR. DIPUCCHIO: And then there was a
17 decision rendered in November, and our
18 understanding was the file was unsealed thereafter
19 because the order no longer applied. That was our
20 understanding. We didn't take any steps to unseal
21 the court file.

22 THE COURT: So --

23 MR. DIPUCCHIO: I'm not sure what turns
24 on it, Your Honour.

25 THE COURT: I'm not sure what turns on

1 it. If that's correct, then Mr. Riley's first
2 answer was incorrect on the cross because he
3 conceded he thought that there was a consent to the
4 unsealing, and you're saying, what's the --

5 MR. DIPUCCHIO: That's all I'm saying,
6 Your Honour. I understand what my friend is trying
7 to do, which is to suggest we unsealed the court
8 file, but that's categorically not true. We didn't
9 do anything to unseal the court file.

10 THE COURT: Does it matter,
11 Mr. Thomson? Mr. Riley has said they no longer
12 treated the documents as confidential.

13 MR. THOMSON: That's the point.

14 THE COURT: Well, he's already said
15 that.

16 MR. DIPUCCHIO: And just, Your Honour,
17 to close the loop on this, just to assure my
18 friends, the reference to Mr. Winton, as Mr. Winton
19 just advises me, is the court called him to confirm
20 that the file was no longer sealed. So that's the
21 reference to Mr. Winton.

22 THE COURT: Was this a Commercial List
23 matter at that time?

24 MR. DIPUCCHIO: No, it was not, Your
25 Honour.

1 THE COURT: I guess it wasn't because
2 Justice Firestone was on it.

3 MR. DIPUCCHIO: Right.

4 BY MR. THOMSON:

5 Q. Am I right in assuming this, Mr.
6 Riley, that although you were not responsible for
7 the negotiation of the Wind transaction, you were
8 certainly kept in the loop on a regular basis
9 concerning developments as they occurred?

10 A. It would depend on the importance
11 of the issue. So I would say not as -- I wouldn't
12 know on a day-to-day basis what was going on.

13 Q. You were certainly advised of
14 important developments?

15 A. Certain important developments,
16 not all.

17 Q. And I take it that Mr. Glassman
18 and Mr. de Alba would have conferred with you when
19 the Catalyst transaction ran into difficulties in
20 mid-August of 2014?

21 A. Those dialogues would have been
22 more between Newton and Gabriel.

23 Q. You heard Mr. Glassman say -- you
24 were here for his evidence, weren't you, yesterday?

25 A. Yes, I was.

1 Q. You heard Mr. Glassman testify
2 yesterday afternoon, or yesterday morning perhaps
3 it was, that you would certainly have been kept
4 apprised of VimpelCom's request for a break fee?

5 A. I actually don't think I knew
6 that. So my memory may be different than his.

7 Q. Now, let's just show His Honour
8 how that issue developed in the period leading up
9 to the trial. Am I correct that you were, in fact,
10 cross-examined in May of 2015 in the motion we just
11 looked at a moment ago concerning the issue of a
12 break fee?

13 A. Yes.

14 Q. And am I also right that
15 Mr. Milne-Smith cross-examined you concerning that
16 issue before Catalyst produced its documents in
17 this case concerning its negotiations with
18 VimpelCom?

19 A. I believe that's correct.

20 Q. And if we pull up, please, tab 19,
21 which is the transcript of your cross-examination
22 on May 13th of 2015, and scroll to page 127. I'm
23 interested, Mr. Riley, in what happened around
24 question 554. So question 554, the question was:

25 "Did VimpelCom ever ask for a

1 break fee?"

2 You said:

3 "I don't know."

4 And then at question 556

5 Mr. Milne-Smith asked you to make inquiries and to
6 advise.

7 A. Yes.

8 Q. And then question 557, the next
9 question was:

10 "I would also like to know if
11 VimpelCom did ask for a break fee, I
12 would like to know obviously its
13 precise terms and whether Catalyst
14 agreed to it."

15 Mr. Winton then took that question
16 under advisement.

17 A. Yes.

18 Q. You recall that exchange during
19 the examination?

20 A. I do.

21 Q. And if we then turn to tab 20 --

22 A. Is there a way to turn that?

23 Q. She will do that in a second.

24 Your Honour, this is UTS000020, which are the
25 answers to undertakings and advisements and so on

1 from your examination of May 13, 2015. And can I
2 ask you to scroll, please, to answers 15 and 16.

3 So the undertakings are recorded in the
4 fourth column from the left and the answers that
5 were given are on the column on the right. So
6 again, the first question was to advise whether
7 VimpelCom ever asked for a break fee. The answer
8 was:

9 "The parties never negotiated a
10 break fee."

11 The next question was if VimpelCom did
12 ask for a break fee, to provide its precise terms
13 and whether Catalyst agreed to it. And the answer
14 was "Not applicable," presumably because of the
15 answer just before that.

16 So those were the answers to
17 undertakings given arising out of your examination
18 in May of 2015?

19 A. Correct.

20 Q. And you'll note of course that the
21 answer given didn't answer the question that was
22 asked?

23 A. I now understand that because of
24 subsequent information that was -- we corrected
25 this undertaking.

1 Q. I'm going to come to that
2 momentarily.

3 THE COURT: Is there a date when this
4 was delivered?

5 MR. MILNE-SMITH: It was
6 contemporaneous with the motion before Justice
7 Glustein so we can check, but it would have been
8 around May of 2015.

9 THE COURT: So shortly after the cross?

10 MR. MILNE-SMITH: Yes, we're referring
11 to Justice Glustein I believe in June or July, so
12 it had to be before that.

13 BY MR. THOMSON:

14 Q. This was the state of the
15 record -- do we have it, Mr. Riley, this was the
16 state of the record as of the date that that motion
17 against West Face for the relief we just looked at
18 was argued?

19 A. Yes.

20 Q. And we now know, and you were here
21 for Mr. Glassman's examination yesterday, we now
22 know that VimpelCom did in fact ask for a break fee
23 in mid-August?

24 A. Yes.

25 Q. And it was the request for the

1 break fee, as Mr. Glassman says in his affidavit,
2 that ultimately caused the transaction to fail?

3 A. Yes.

4 Q. Now, if we elaborate on this just
5 a little bit, the answer to undertaking 15, again
6 the question was to advise whether VimpelCom ever
7 asked for a break fee, and the answer was the
8 parties never negotiated a break fee, one of the
9 reasons the parties never negotiated a break fee is
10 because Catalyst simply refused to accede to the
11 request of VimpelCom?

12 A. Yes.

13 Q. And then if we look at how this
14 issue then developed in the period after the
15 Glustein motion was argued and turn all the way
16 forward to Mr. de Alba's discovery about three
17 weeks ago, on May 11 of this year, pull up tab 33,
18 please.

19 THE COURT: Just a second. Just remind
20 me, Justice Glustein was asked -- what was he asked
21 to do?

22 MR. THOMSON: He was asked to issue
23 injunctive relief against West Face to prohibit it
24 from having any involvement with Wind Mobile,
25 prohibiting the spectrum auction, so it is the

1 Notice of Motion --

2 THE COURT: Is that the Notice of
3 Motion of Justice Glustein?

4 MR. THOMSON: Yes.

5 THE COURT: I thought it was -- I
6 thought he had something to do with whether or not
7 further documents should be produced.

8 MR. MILNE-SMITH: That too.

9 THE COURT: Okay.

10 MR. THOMSON: So it was --

11 MR. MILNE-SMITH: And contempt against
12 Mr. Moyse.

13 THE COURT: Pardon?

14 MR. MILNE-SMITH: And contempt against
15 Mr. Moyse.

16 MR. THOMSON: Just pull up tab 33,
17 please.

18 THE COURT: I remember that. I
19 understand. I just wasn't sure, I had not realized
20 that Justice Glustein was asked to do that, that's
21 all.

22 MR. THOMSON: Yes. So it was both
23 aspects of this, Your Honour.

24 BY MR. THOMSON:

25 Q. Now, can you pull up, please, tab

1 33. Sorry, one more reference. Hang on. Sorry,
2 tab 23. And, Mr. Riley, here you'll find the
3 discovery transcript of Mr. de Alba conducted about
4 three weeks ago on Wednesday, May 11 of 2016?

5 A. Yes.

6 Q. And if we turn to page 201,
7 please. Scroll down a bit, please. So at question
8 748, Mr. Milne-Smith is now discovering Mr. de Alba
9 and says:

10 "And so I take it from this
11 that VimpelCom had asked you for a
12 break fee?"

13 They get into a discussion about that.
14 Scroll down a bit, please.

15 A. Sorry, could I just read the
16 response?

17 Q. Sure. It raised the topic and
18 that debate --

19 A. It looks like something is broken
20 here. I take from this two things, the comment of
21 the break fee. Is there information missing? See
22 the answer?

23 Q. I see the answer. That is the
24 answer. Scroll down to question 752 is what I'm
25 really interested in.

1 "Okay. So if we go back, I
2 don't know if you have any of the
3 earlier materials in this case,
4 Mr. Winton, but if you'll recall
5 during the cross-examination of Mr.
6 Riley, I put a question to him?"

7 Mr. Winton says:

8 "Which date."

9 Mr. Milne-Smith says:

10 "The one that I did."

11 Mr. Winton:

12 "That can only be one date."

13 Mr. Milne-Smith says:

14 "I'm actually looking at the
15 answers to undertaking number 15..."

16 THE COURT: Do we have to read through
17 all this? What's the point here?

18 MR. THOMSON: Just to give the witness
19 the context, Your Honour.

20 THE COURT: Why don't you just let him
21 read it to himself.

22 BY MR. THOMSON:

23 Q. Okay. Scroll down, please.

24 A. (Witness reads document).

25 Q. Stop there. Question 754, this is

1 after Mr. Milne-Smith has now put the answer to
2 undertaking that we just reviewed and the question
3 was, this is to de Alba:

4 "Were you consulted in
5 providing this -- answering this
6 undertaking that was given on the
7 cross-examination of Mr. Riley?
8 Were you consulted?

9 Answer: No."

10 So I take it from that that when you
11 gave the answer to undertaking arising out of your
12 cross-examination in May of 2015 as to whether
13 VimpelCom requested a break fee, you did not
14 consult with Mr. de Alba in answering the question?

15 A. That is correct.

16 Q. Even though he was the lead
17 negotiator on behalf of Catalyst?

18 A. Yes.

19 Q. And even though, I take it, he
20 works right down the hall from you in relatively
21 small offices?

22 A. Yes, except the closer person was
23 Zach Michaud and I don't believe Gabriel was in the
24 office at the time I was responding to this
25 undertaking.

1 Q. Now, let me pull up then tab 27,
2 so we have a complete record of this. So you'll
3 see a letter here, which is WFC0112220, which is a
4 letter from Mr. DiPucchio of June 3 of 2016, so
5 sent last Friday just before the trial started
6 following up on several discovery issues.

7 If you scroll to the next page, you'll
8 see he says, just before the end of the letter:

9 "Additionally, below are
10 corrections to the undertaking
11 responses that have previously been
12 given."

13 And it's undertaking number 47 that I'm
14 interested in, so this is what we were told last
15 Friday:

16 "Mr. Riley recalls that, in
17 addition to his own recollection on
18 the issue of a break fee, he spoke
19 with Zach Michaud. However Mr.
20 Riley recalls that he asked
21 Mr. Michaud whether there was a
22 break fee in the transaction (not
23 whether VimpelCom asked for a break
24 fee) and Mr. Michaud advised that
25 there was not."

1 I take it that is an accurate
2 description of what happened when you were
3 compiling the answers to the undertakings in May of
4 2015?

5 A. Yes, it is.

6 Q. So you would concede, in fairness,
7 that you asked Mr. Michaud the wrong question?

8 A. Either I asked him the wrong
9 question or he gave me the wrong answer, and then
10 when I transmitted it to my counsel, it was further
11 degraded. But I stand by that correction.

12 Q. Now, let me turn to a different
13 subject, which is the call with Industry Canada
14 that was discussed with Mr. Glassman yesterday.
15 This is the call of August 11 of 2014.

16 A. Yes.

17 Q. You were present again in court
18 yesterday when Mr. Glassman was cross-examined on
19 this issue?

20 A. I was.

21 Q. And he referred to a call that
22 took place with Industry Canada on the evening of
23 August 11 of 2014?

24 A. Yes.

25 Q. Just so you have it, to make this

1 easy for you, pull up tab 26, please. Your Honour,
2 tab 26 is CCG0028711. This is the affidavit of Mr.
3 Glassman sworn May 27, 2016. And if you turn,
4 please, to paragraph 45 of the affidavit. And you
5 may recall, Mr. Riley, I put this paragraph to Mr.
6 Glassman yesterday, where he says:

7 "Despite VimpelCom's sudden
8 concerns about regulatory risk,
9 during the late evening of August
10 11, 2014, I understand from de Alba
11 that Catalyst and VimpelCom had a
12 call with Industry Canada during
13 which the parties told Industry
14 Canada that the 'deal was done'."

15 A. Yes.

16 Q. Can you please pull up tab 11-A of
17 the cross-examination binder. And, Your Honour,
18 this is CCG0024726, a series of emails of August 11
19 and 12 of 2014. And scroll to the bottom of the
20 page, please. Bennett Jones --

21 A. Sorry, can I just ask you, is this
22 the whole of the email chain? Is this the bottom
23 of the chain?

24 Q. I think that's right. Just so His
25 Honour has it, Bennett Jones acted for VimpelCom in

1 the case? Bennett Jones acted for VimpelCom in the
2 case?

3 A. Yes, yes, they did.

4 Q. And this is an email from Adam
5 Kalbfleisch of Bennett Jones. You'll see the date
6 of it is Monday, August 11?

7 A. Yes.

8 Q. At 11:23 p.m., so the very evening
9 this call with Industry Canada took place?

10 A. I would take that from that email.

11 Q. And he says to Paul Halucha of
12 Industry Canada -- is he one of the people you met
13 with?

14 A. I don't recall his name.

15 Q. He says:

16 "Paul, I understand that
17 VimpelCom and Catalyst spoke with
18 Jim Nicholson earlier this evening
19 to update him on the progress being
20 made on the transaction."

21 Mr. Nicholson was one of the people you
22 met with at Industry Canada?

23 A. Yes.

24 Q. He says:

25 "I would be available to

1 schedule a call with you tomorrow to
2 provide an update."

3 And so on. Scroll up, please, in the
4 email chain.

5 A. Sorry, can I just read all of that
6 email, please?

7 Q. The one at the bottom?

8 A. Yes.

9 Q. Sure.

10 A. (Witness reads document). Thank
11 you.

12 Q. Scroll up. It's the email above
13 that I'm interested in. So this is an email from
14 Stephen Acker at Faskens. I take it you worked
15 with Mr. Acker on the transaction?

16 A. I didn't personally.

17 Q. Certainly Catalyst did?

18 A. He was our counsel so he might be
19 one of the team.

20 Q. He writes to de Alba, copied to
21 Jon Levin and several others, and he says:

22 "Gabriel: See below. This
23 follows another email from Adam just
24 before 11 p.m. telling Yale, Anthony
25 and me that the clients and Bruce

1 Drysedale spoke today with Jim
2 Nicholson re being close to signing
3 and that he had asked him to
4 co-ordinate with Industry Canada.
5 He has in mind a joint call with us
6 essentially to repeat the same
7 message to Halucha in the Ministry's
8 office at Industry Canada."

9 And so on. And so the phrase that he
10 uses in his email, this is the very evening of this
11 call, is that the clients and Bruce Drysdale spoke
12 today with Jim Nicholson re being close to signing?

13 A. I see those words.

14 Q. As opposed to the deal being done.
15 And I take it, because you were one of the two
16 people at Catalyst most responsible for dealings
17 with the Government of Canada, you had been on the
18 call?

19 A. No, I was not on that call.

20 Q. You were not on the call?

21 A. No.

22 Q. So who was on the call?

23 A. I don't know.

24 Q. Now, can you and I agree that in
25 the business world people do, in fact, reach

1 different conclusions on the prospects of companies
2 and investments all the time?

3 A. I'm not sure I understand the
4 question.

5 Q. Let me try to put it to you one
6 more time. Can you and I agree that in the
7 business world people do in fact reach different
8 conclusions on the prospects of companies and
9 investments all the time?

10 A. Not when they're at this stage of
11 a deal.

12 Q. All right. Pull up tab 19. Go
13 back to the front cover, please. This is the
14 transcript of your cross-examination on May 13th of
15 2015?

16 A. Yes, I see that.

17 Q. Will you please turn to question
18 219. Question 219, this is a question put to you
19 by Mr. Milne-Smith on May 13. The question:

20 "But the fact of the matter is
21 that people do, in fact, reach
22 different conclusions on the
23 prospects of a company or an
24 investment all the time?"

25 Answer: Yes."

1 A. That is correct.

2 Q. I take it you were asked that
3 question and you gave that answer?

4 A. I gave that answer but that is a
5 different question than the question you just asked
6 me.

7 THE COURT: Mr. Riley --

8 THE WITNESS: I apologize, Your Honour.

9 BY MR. THOMSON:

10 Q. And I'm going to suggest to you,
11 Mr. Riley, in fairness, that it is hardly
12 surprising that companies and organizations as
13 sophisticated as West Face, Tennenbaum, people like
14 Guffey, Lacavera, Government of Canada, might well
15 have had different views and perspectives than you
16 or Mr. Glassman did in 2014 concerning the
17 prospects of Wind Mobile? That wouldn't surprise
18 you, would it?

19 A. We could have different --
20 different views.

21 Q. Now, in your affidavits you made
22 just two statements concerning the nature of the
23 arrangements between Catalyst and VimpelCom and I
24 just wanted to speak with you about it briefly.

25 They are contained in your affidavits

1 of February 18th of 2015 and May 1 of 2015 as well.
2 So let me start by pulling up, please, your
3 affidavit of February 18th which is tab 4 of the
4 cross-examination binder. This is, Your Honour,
5 CAT000066, Mr. Riley's affidavit of February 18 of
6 2015.

7 And I ask you to turn, please, to
8 paragraph 45 of the affidavit. So at paragraph 45
9 of your affidavit you say this:

10 "During the exclusivity
11 period..."

12 And that would be the period of
13 exclusivity that Catalyst had with VimpelCom? Fair
14 enough?

15 A. Yes.

16 Q. So:

17 "During the exclusivity period,
18 Catalyst and VimpelCom were able to
19 negotiate almost all of the terms of
20 the potential sale of Wind Mobile to
21 Catalyst. The only point over which
22 the parties could not agree was
23 regulatory approval risk - Catalyst
24 wanted to ensure that its purchase
25 was conditional on receiving certain

1 regulatory concessions from Industry
2 Canada, but VimpelCom would not
3 agree to the conditions Catalyst
4 sought."

5 And if we then go to the May 1, 2015
6 affidavit --

7 A. Before you do, let me just read
8 this again, please.

9 Q. Sure.

10 A. (Witness reads document). Thank
11 you.

12 Q. Go to the May 1 affidavit at tab
13 5. Your Honour, this is CAT000382, which is the
14 supplementary affidavit of Mr. Riley sworn May 1,
15 2015. And I want to take you to paragraph 42 where
16 you deal with the same issue.

17 So at paragraph 42, Mr. Riley, you say
18 -- to make sense of the first three words, you have
19 to scroll up to 41, so go back a little bit. So
20 the timeframe you're dealing with here is early
21 August of 2014?

22 A. Yes.

23 Q. So if you then, with that
24 timeframe in mind, then look at paragraph 42 where
25 you say:

1 "At the time," that's early
2 August 2014, "the anticipated deal
3 with VimpelCom was conditional," you
4 say "was conditional on Industry
5 Canada approval and the granting of
6 certain regulatory concessions to a
7 Catalyst-owned Wind that in
8 Catalyst's mind would make it easier
9 for a fourth national carrier to
10 succeed. These concessions were
11 essentially the same regulatory
12 concessions summarized in the
13 PowerPoint presentation Moyse helped
14 create in early 2014.

15 THE COURT: If you would scroll down
16 the page, so I can see both together?

17 MR. THOMSON: Yes. Will you do that?

18 THE COURT: Thank you.

19 BY MR. THOMSON:

20 Q. Mr. Riley, again in fairness to
21 you, you were here for the cross-examination of
22 Mr. de Alba?

23 A. I was.

24 Q. I am happy to do this the easy way
25 or the hard way. Can we agree that at no time was

1 the Catalyst transaction of VimpelCom conditional
2 on Catalyst obtaining the regulatory concessions
3 that had been sought from the government during the
4 meetings in March and May of 2014?

5 A. I would have to look at the
6 wording in the SPA to answer that question
7 directly.

8 Q. That's been gone through with
9 Mr. de Alba, but let me try to do this the easy
10 way. Pull up tab 24, please. This is CCG0028722,
11 which are the answers to undertakings and so on
12 given from the discovery of Mr. de Alba on May 11,
13 2016, several weeks ago.

14 If we look at number 14, please, number
15 14 was to advise if any drafts of the share
16 purchase agreement being negotiated between
17 Catalyst and VimpelCom contained a condition that
18 the deal could not close unless Catalyst obtained
19 certain regulatory concessions from the government,
20 and the answer that was given was:

21 "The drafts of the share
22 purchase agreement exchanged by
23 Catalyst and VimpelCom contained
24 certain regulatory conditions. None
25 were expressly predicated on

1 Catalyst obtaining any regulatory
2 concessions."

3 I take it you adopt that answer?

4 A. I adopt that answer.

5 Q. And then one last statement you
6 made in your affidavit of February 18 of 2015 I'd
7 like to take you to, if I may. Please pull up tab
8 4. Go to the front of it, please.

9 So, Mr. Riley, we've looked at this
10 before, this is CAT000066. This is your affidavit
11 sworn February 18?

12 A. I see that date. Can you give me
13 the context of that affidavit because we've gone
14 back and forth through so many affidavits that I
15 just want to make sure I understand which one it
16 is.

17 Q. This is your fourth affidavit.
18 This was filed in relation to the Glustein motion.

19 A. Okay, thank you.

20 Q. And if we can look, please, at
21 paragraph 46 of the affidavit. 46, pause there,
22 and you say in paragraph 46:

23 "The exclusivity period expired
24 in mid-August 2014. Very shortly
25 thereafter, Catalyst learned that a

1 syndicate of investors led by West
2 Face was negotiating with VimpelCom
3 to purchase Wind."

4 And you say:

5 "Ultimately, the consortium
6 purchased Wind from VimpelCom on
7 what I believe were essentially the
8 same terms as Catalyst had proposed,
9 with the one exception that the
10 consortium waived the regulatory
11 conditions Catalyst had been
12 seeking."

13 A. Yes.

14 Q. That was a statement made in the
15 affidavit as of February of 2015?

16 A. Yes.

17 Q. I take it that by now, regardless
18 of what you thought or what you believed at the
19 time, by now you've had a chance to review the
20 share purchase agreement -- rather, the purchase
21 agreement entered into by the West Face consortium
22 with VimpelCom on September 16th of 2014?

23 A. I do not believe I have reviewed
24 that copy.

25 Q. You've never reviewed it?

1 A. To my knowledge, no.

2 MR. THOMSON: Thank you very much, Mr.
3 Riley. Those are my questions.

4 THE COURT: You say, Mr. Riley, that
5 you never reviewed the deal between the consortium
6 and VimpelCom?

7 THE WITNESS: To the best of my
8 knowledge.

9 THE COURT: To the best of your
10 recollection?

11 THE WITNESS: Yes, to the best of my
12 recollection. Sorry. Thank you.

13 MR. BORG-OLIVIER: Your Honour, I have
14 probably half an hour to 45 minutes of questions
15 for Mr. Riley. Would now be a good time to take
16 the morning break?

17 THE COURT: No, we'll start.

18 MR. BORG-OLIVIER: Justice Newbould,
19 you'll see in Mr. Riley's folder there is a
20 cross-examination folder for Moyse defendants,
21 cross-examination by Paliare Roland.

22 THE COURT: I've got the folder.

23 MR. BORG-OLIVIER: Okay. I think
24 unless something goes wrong, every document that
25 I'll be referring to should be there. Something

1 might go wrong.

2 CROSS-EXAMINATION BY MR. BORG-OLIVIER:

3 Q. Good morning, Mr. Riley.

4 A. Good morning.

5 Q. I'd like to take you to your
6 affidavit and in particular this is the affidavit
7 at tab 6 which is the first affidavit that you
8 swore in this proceeding?

9 A. Yes.

10 Q. That's the one at tab 6. If we
11 could pull that up. And my focus is going to be in
12 particular on the section of your affidavit
13 starting at page 14, paragraph 48. This is a
14 section entitled "Catalyst learns Moyse removed its
15 confidential information." Do you see that?

16 A. Yes.

17 Q. Now, in the opening line of that
18 paragraph 48, skipping down to the third line of
19 the paragraph, you say:

20 "Prior to his resignation,
21 Moyse accessed and was capable of
22 transferring Catalyst's confidential
23 information to his personal
24 possession."

25 And, as you say in the next line, this

1 was based on the information that you got from
2 Mr. Musters, correct?

3 A. Correct. Can I just do one thing?
4 There is a defined term in there, "Catalyst
5 confidential information." In case it becomes
6 relevant, can we assume that all information that
7 was transferred was confidential? Is that what
8 that definition means?

9 Q. I think that's right. I think we
10 can assume that for these purposes.

11 A. Okay, thank you.

12 Q. Just to make sure that we
13 understand each other here, the issue was that he
14 accessed and was capable of transferring the
15 information, correct?

16 A. Yes.

17 Q. It's not actually, notwithstanding
18 what the heading says, there was no evidence of
19 removal of the confidential information certainly
20 at that point?

21 A. I think Mr. Musters' review
22 determined that he had transferred confidential
23 information.

24 Q. Well, let's pull up Mr. Musters'
25 affidavit, which is at tab 1 of this folder.

1 A. Thank you.

2 Q. And we'll go to paragraphs 17 and
3 18. So what Mr. Musters says there is:

4 "In my experience, Moyse's
5 conduct of accessing several files
6 from the same directory over a brief
7 period of time, as described above,
8 is consistent with transferring
9 files to a cloud service. It is my
10 opinion that based on the pattern of
11 conduct described above, Moyse was
12 very likely transferring the
13 documents he reviewed on May 28,
14 April 25 and May 13 from Catalyst's
15 computers to his DropBox or Box
16 accounts, although I cannot say so
17 definitively at this time. I cannot
18 conclusively determine whether
19 Catalyst's files were transferred by
20 Moyse to the cloud services and then
21 from the cloud services on to any
22 other computer or electronic device
23 such as an iPad without access to
24 those computers and/or devices that
25 potentially had the files

1 transferred from."

2 So I say to you again, Mr. Riley, the
3 issue was that Mr. Moyse, based on this evidence
4 from Mr. Musters, accessed and was capable of
5 transferring the evidence but there was in fact no
6 direct evidence of --

7 A. At this time?

8 Q. Yes.

9 A. That is correct. At the time of
10 this affidavit.

11 Q. Right. Let's go back to tab 6 and
12 to paragraph 50. You say in your affidavit here:

13 "I understand from Musters'
14 report that Moyse's conduct between
15 March 27 and May 26, 2014 is
16 consistent with uploading
17 confidential Catalyst documents from
18 Catalyst's server, which Catalyst
19 controls and can access..." --

20 THE COURT: You're going awfully
21 quickly.

22 BY MR. BORG-OLIVIER:

23 Q. Absolutely.

24 "...to Moyse's personal
25 accounts with two internet based

1 file storage services, DropBox and
2 Box, which Catalyst does not control
3 and cannot access."

4 Now, I take it any evidence as to
5 Catalyst's control or access of the DropBox and Box
6 file would have been provided to Mr. Musters by you
7 or your counsel?

8 A. I'm sorry, could you repeat the
9 question, please?

10 Q. Sure. Mr. Musters in there said
11 that Catalyst doesn't control and cannot access the
12 DropBox or Box folders. I take it he would have
13 had to get that information from Catalyst or from
14 its counsel?

15 A. I think you're getting me into an
16 area that I'm not as proficient with. I believe
17 that in subsequent evidence the DropBox was used
18 for certain shared information between Catalyst and
19 Natural Markets. The Box was Moyse's personal box.

20 Q. Let me help you with that because
21 you've got that backwards.

22 A. Do I have it backwards? There is
23 one that is shared and one that is not shared.

24 Q. Perfect. Let's just, to get some
25 clarity on that, let's pull up Mr. Moyse's

1 affidavit.

2 A. That shows you how untechnical I
3 am.

4 Q. You're close. So Mr. Moyse's
5 affidavit is at tab 2 of the folder.

6 A. If we're going back and forth this
7 much, I'm going to ask you to go a little more
8 slowly, if you could, please.

9 Q. Absolutely. And I'd like to go to
10 paragraph 38, please. This is Mr. Moyse's
11 affidavit of July 4, 2014, BM001957. So we're at
12 paragraph 38 together, Mr. Riley?

13 A. Yes. Could I just read this?

14 Q. Yes.

15 A. (Witness reads document). Yes.

16 Q. So here, Mr. Moyse, at the end of
17 paragraph 38, says that his Box account was
18 established under his Catalyst email address with
19 Catalyst's knowledge to host or have access to
20 information hosted by Catalyst portfolio companies
21 or advisors. You see that?

22 A. Yes.

23 Q. That's what you're referring to, I
24 take it?

25 A. Yes, correct.

1 Q. So let's go back, if we can, to
2 your affidavit. And at paragraph 51 of your
3 affidavit, which, to put this in time, predates the
4 affidavit that we just saw from Mr. Moyse. Yours
5 was the first affidavit in this proceeding.

6 A. Thank you, yes.

7 Q. At paragraph 51 you made a
8 statement that you spoke to Jonathan Moore who was
9 the team lead at Catalyst external IT services
10 supplier, and you learned from him that Moyse had
11 no reason to use DropBox or Box for work purposes.

12 And I take it, based on the information
13 that we've just seen and in fact you volunteered,
14 that statement, at least as it pertains to Box, was
15 incorrect?

16 A. That is correct.

17 Q. And to the extent that there are
18 statements with regard to Mr. Moyse's Box account
19 being personal, in subsequent affidavits of yours,
20 or in fact in you adopting that evidence today, I
21 take it you disavow those statements?

22 A. Sorry, which statements am I
23 disavowing, please?

24 Q. Well, this morning Mr. Winton
25 asked you if you adopt the evidence in your

1 affidavits sitting here today as your evidence at
2 the trial?

3 A. Yes.

4 Q. And what I'm suggesting is that
5 that evidence at paragraph 51 is not correct and is
6 not part of what you adopt as truth here today?

7 A. I'm not trying to quibble but
8 there is a whole series of affidavits and in the --
9 if I go on for a moment. As we learned more
10 information, our affidavits got more refined. So
11 at this stage, this is the first affidavit,
12 correct, that I swore?

13 Q. Right.

14 A. We were dealing with what seemed
15 to be general information and we didn't have
16 further information as was provided in subsequent
17 affidavits.

18 So when I adopt these, at that time
19 those were true in my -- when I swore the
20 affidavit.

21 Q. So let's go to paragraph 51 of
22 your affidavit, if we could. And what you say here
23 is:

24 "As detailed below, the breadth
25 and depth of Moyse's conduct is

1 alarming."

2 And the conduct that you're talking
3 about here is the access of Catalyst information,
4 correct?

5 A. Yes.

6 Q. And we'll go through these one by
7 one, but just to set the scene a bit, what's
8 detailed below, starting at paragraph 5, is access
9 to the investment letters that Mr. Winton asked you
10 about this morning?

11 A. Yes.

12 THE COURT: Paragraph what?

13 MR. BORG-OLIVIER: Sorry, Your Honour?

14 THE COURT: Paragraph what?

15 MR. BORG-OLIVIER: 55.

16 THE COURT: 55. You said 5.

17 BY MR. BORG-OLIVIER:

18 Q. So those are the investment
19 letters and we'll talk a little bit about those.

20 At paragraph 58, access to certain
21 files pertaining to Stelco?

22 A. Yes.

23 Q. At paragraph 60, access to certain
24 files pertaining to Masonite?

25 A. Yes.

1 Q. At paragraph 61, access to certain
2 telecom files which I think we now know refer to
3 Wind files, correct?

4 A. I think those were Wind and
5 Mobilicity but they were telecommunications files.

6 Q. Okay. And at paragraph 64, access
7 to the Monday meeting notes which we've heard a bit
8 about?

9 A. Yes.

10 Q. So when you referred at paragraph
11 51 to the breadth and depth of Mr. Moyse's conduct,
12 it was with respect to his access to those files
13 that you were referring to?

14 A. I think I said including. Could
15 we go back up to the top, please, just so I have
16 the right context? I think you have to go down a
17 little bit, please.

18 Q. Scroll down. I take it, Mr.
19 Riley, there were no files of concern other than
20 the ones that you referred to here?

21 A. If you go down, scroll down,
22 please.

23 Q. Sure. What would you like to look
24 at?

25 A. These are examples only.

1 Q. Okay. Some examples. And these
2 were the examples that you took because you viewed
3 them as the ones that were potentially sensitive,
4 correct?

5 A. Based on -- we were acting very
6 quickly, so we tried to highlight it but we did not
7 do an in-depth review of all of the files.

8 Q. But you selected these because you
9 viewed these as the sensitive files?

10 A. Yes. Well, excuse me, sensitive
11 or indicative of conduct that did not seem to be
12 consistent with the duties that he had at that
13 time.

14 Q. Let's start with the investment
15 letters, if we could. So let's go to paragraph 55
16 of your affidavit. So these are the investment
17 letters that Mr. Winton asked you some questions
18 about this morning?

19 A. Yes.

20 Q. Okay. At paragraph 57 you note
21 that Mr. Moyse accessed these files between 6:28
22 p.m. and 6:39 p.m., outside of regular office hours
23 at Catalyst?

24 A. Yes.

25 Q. And, Mr. Riley, there's nothing

1 unusual about professional staff at Catalyst being
2 in the office at around 6:30 p.m., correct?

3 A. Correct.

4 Q. And in fact, with the possible
5 exception of Mr. Glassman and Mr. de Alba, it would
6 have been common for everyone, including you, to be
7 around the office at about 6:30?

8 A. I think all three of us could be
9 around at 6:30.

10 Q. So there's nothing in particular
11 that should be drawn from the fact that this is
12 outside of regular office hours; is that fair?

13 A. There would be fewer people around
14 is the only thing I would draw from that and it was
15 past the 5:30 regular office hour.

16 Q. Okay. But quite typical for
17 plenty of the professional staff to be around?

18 A. Yes.

19 Q. Now, the investment letters that
20 were accessed that are at Exhibit R, I don't think
21 we need to pull it up unless you would like to have
22 a look at the file listing --

23 A. I think for now I'll say no.

24 Q. Sure. I think we can agree that
25 the letters that were accessed were from the period

1 of 2006 to 2011; is that right?

2 A. Yes.

3 Q. And am I right, Mr. Riley, that
4 investment letters rarely, if ever, included
5 information about prospective investments?

6 A. They do on occasion, yes, they do
7 on prospective investments.

8 Q. But rarely?

9 A. Well, again, I'm not going to
10 quibble. I'd rather say that they do include that
11 from time to time.

12 Q. Okay. Can we go to tab 11,
13 please. Mr. Riley, this is a transcript of your
14 cross-examination of July 29, 2014 in which you
15 were cross-examined on this and two of your
16 subsequent affidavits.

17 Now, we weren't there, as it turns out,
18 that day, and Mr. Moyse was represented by
19 different counsel at that time, but you recall
20 being cross-examined on that date?

21 A. I do.

22 Q. Can we go to question 297, please.
23 So you were asked the following question and gave
24 the following answer, Mr. Riley?

25 A. Yes, I did.

1 Q. Okay.

2 "Question: And these letters
3 would give investors updates on
4 potential new investments, updates
5 on current investments, that type of
6 thing?

7 Answer: Yes. Not so much
8 prospective investments. We might
9 say that we're looking at something
10 related to the area, but not very
11 often would the direction be the
12 investments.

13 Question: But they could?

14 Answer: Could."

15 And then if we skip ahead to question
16 302, you were asked:

17 "But would the investment
18 letters not talk about potential
19 acquisitions in a more general form?

20 Answer: No.

21 Question: Not at all?

22 Answer: No. Well, I'd have to
23 go back and look at each one again.

24 Question: I find that hard to
25 believe.

1 Answer: Generally speaking
2 that's very sensitive information,
3 so we would not want to signal it
4 because of a need to ensure that we
5 didn't have information out there
6 that can be used against us."

7 Do you recall being asked those
8 questions and giving those answers?

9 A. I do.

10 Q. And the evidence you gave --

11 THE COURT: Is there any difference
12 between what he said on his cross and what he said
13 today?

14 MR. BORG-OLIVIER: I think there is,
15 Your Honour, to be fair.

16 BY MR. BORG-OLIVIER:

17 Q. So the concern was that the
18 investor letters should not include sensitive
19 information because you didn't want information out
20 there that could be used against Catalyst, correct?

21 A. Yes, that is correct.

22 Q. And we heard this morning for the
23 first time, Mr. Riley, that analysts are not
24 allowed to view old investment letters without
25 authorization from partners. You'll agree that

1 information is nowhere in your affidavit?

2 A. It is not.

3 Q. And when Mr. Winton asked you
4 about policies pertaining to it, if I got this down
5 correctly, I think you made reference to general
6 confidentiality restrictions. Did I have that
7 right?

8 A. That is correct.

9 Q. And I take it then that the answer
10 is there is no formal policy that states as such?

11 A. We are in the course of preparing
12 one.

13 Q. Okay. So the answer is there is
14 no formal policy?

15 A. That is correct.

16 Q. And certainly there wasn't one
17 when Mr. Moyse was there?

18 A. There was not.

19 Q. And there is no firewall on the
20 system, I take it, that limits access to partners
21 alone?

22 A. There are some firewalls but not
23 around this information.

24 Q. Let's move back to your affidavit,
25 if we could, and to paragraph 58, which is the

1 Stelco files.

2 A. Um-hmm.

3 Q. Why don't you read those two
4 paragraphs to yourself, Mr. Riley, to orient
5 yourself.

6 A. (Witness reads document). Yes.

7 Q. And again I won't take you to
8 Exhibit S unless we have to, but I take it you
9 would agree with me that the information in those
10 Stelco documents dated back to approximately 2005
11 to 2007?

12 A. Correct. I'll take it as given.
13 But I may have to refer to it.

14 Q. Sure. And as of 2014 certainly
15 Catalyst's Stelco investment was no longer active?

16 A. That is correct, but steel was
17 back on the table. In other words, there was the
18 start of the Dofasco or Essar, as it's now known,
19 and Stelco or US steel, as it is now known.

20 THE COURT: You've got that wrong.
21 Essar is not Stelco. It's Algoma.

22 THE WITNESS: Sorry, I apologize.

23 MR. BORG-OLIVIER: I could give all
24 sorts of evidence on that, if it's useful.

25 THE COURT: E-S-S-A-R.

1 BY MR. BORG-OLIVIER:

2 Q. So the answer, Mr. Riley, is no,
3 Catalyst's Stelco investment was no longer active?

4 A. Yes.

5 Q. And what you did in preparing your
6 affidavit is you looked at the list of files that
7 Mr. Musters pulled but you didn't actually pull
8 from the system any of the documents that were
9 accessed; do I have that right?

10 A. To the best of my recollection, I
11 did not look at them.

12 Q. And so your concern was really
13 based on nothing more than the file names?

14 A. Yes.

15 Q. And you didn't append any of the
16 documents to your affidavit?

17 A. No.

18 Q. And nor did you produce any of
19 those documents in this litigation?

20 A. No.

21 Q. Let's just scroll down that page
22 to the Masonite files. Am I right, Mr. Riley, that
23 Catalyst never made an investment in Masonite?

24 A. That is correct.

25 Q. And Catalyst had analyzed Masonite

1 in approximately 2008, approximately six years
2 earlier?

3 A. It was before my time but I think
4 that's right.

5 Q. And nothing had occurred to bring
6 Masonite back to the forefront?

7 A. Not to my knowledge.

8 Q. So to the extent that you say at
9 paragraph 60 and the fourth line that these files
10 are related to an opportunity Catalyst has been
11 studying, you'd agree with me that "has been
12 studying" is an inaccurate statement there?

13 A. I think it was correct what I knew
14 at the time, because, as I've said elsewhere, we
15 review investments over a long period of time, so
16 Masonite I think would still have been active
17 because of the time period, it could still be
18 relevant.

19 Q. But it was last analyzed by
20 Catalyst in 2008?

21 A. That is correct.

22 Q. So an opportunity that Catalyst
23 had looked at six years earlier would have been a
24 more accurate statement?

25 A. Yes.

1 Q. Now, I take it that after
2 delivering this affidavit and receiving the
3 responding affidavit from Mr. Moyse, you would have
4 reviewed Mr. Moyse's affidavit?

5 A. Yes.

6 Q. Okay. Can we pull up tab 2,
7 please, again, which is Mr. Moyse's affidavit of
8 July 4, 2014, and at paragraphs 51 and 52. So
9 Mr. Moyse in his responding affidavit says the
10 following with respect to Masonite:

11 "As part of my job search, I
12 interviewed with a number of
13 companies including MacKenzie
14 Investments. The reason that I had
15 documents in my DropBox related to
16 Masonite is because, as part of the
17 interview process, I was asked to
18 use the company as a case study and
19 to draft a 2-4 page model of the
20 company.

21 Attached at Exhibit I is an email
22 (with attachments) from Sharon Beers
23 at MacKenzie Investments assigning
24 me the project.

25 I will note that Exhibits T and E

1 of Mr. Riley's and Mr. Musters'
2 affidavits show that the documents I
3 accessed were located in my personal
4 DropBox (which was linked to my
5 Catalyst computer) and have not
6 provided any evidence that I
7 accessed any Masonite documents on
8 Catalyst's system. This is because
9 no such evidence exists. The
10 documents I used for the case study
11 were public documents, published by
12 Masonite and provided to me by
13 MacKenzie Investments or obtained
14 from Masonite's website."

15 So you would have read that explanation
16 from Mr. Moyse at or around the time you received
17 his affidavit?

18 A. Yes.

19 Q. And I take it you would have
20 looked into Mr. Moyse's explanation to determine
21 whether there was any merit to it?

22 A. I don't recall.

23 Q. You don't recall whether you did
24 or not?

25 A. Correct.

1 Q. Sitting here today, do you have
2 any reason to dispute the evidence of Mr. Moyse as
3 to how he accessed or how he got his hands on these
4 Masonite documents?

5 A. If I could go back to 51?

6 Q. Yes.

7 A. What I could never reconcile when
8 I was looking at this affidavit is why he would
9 access the Masonite documents when they were
10 public. In other words, I think he was looking at
11 our files on that matter as opposed to the public
12 documents. You would have to go back to the
13 document list to see what he accessed.

14 Q. Okay. And I take it you made no
15 attempt to cross-reference the Masonite documents
16 on the Catalyst system with the documents that
17 Mr. Moyse appended to the affidavit?

18 A. No, we did not.

19 Q. And you'll agree with me that that
20 would have been a way to confirm or deny whether
21 Mr. Moyse in fact had accessed Catalyst documents?

22 A. I don't know for sure. In other
23 words, I don't know what would be revealed and what
24 it would show. I don't know.

25 Q. You just made no effort whatsoever

1 to confirm the truth or falsity of Mr. Moyse's
2 statement in this regard?

3 A. That is correct.

4 Q. Can we go back to tab 6, please,
5 and now let's go to paragraph 64. And this is in
6 reference to the Monday meeting notes. I'll take
7 you first, Mr. Riley, to paragraph 64. So you say:

8 "Two days after Moyse gave
9 notice, Moyse apparently created a
10 file containing his notes from our
11 Monday morning meeting held on May
12 26, 2014. According to the record
13 from Moyse's hard drive, an excerpt
14 of which is attached as Exhibit V,
15 Moyse accessed these notes at 12:30
16 p.m., which appears to be after the
17 meeting ended."

18 I think you said you were here when Mr.
19 Glassman testified?

20 A. I was.

21 Q. Okay. And I take it you would
22 have heard Mr. Glassman say that the Monday
23 meetings, despite I think sometimes being referred
24 to as Monday morning meetings, occurred almost
25 invariably over lunch?

1 A. Yes.

2 Q. And you agree with Mr. Glassman?

3 A. Yes, I do. But when we say that,
4 it's kind of colloquially.

5 Q. It's colloquially, exactly. And I
6 take it there is no evidence that the May 26th
7 meeting was any different from normal practice?

8 A. Not to my memory.

9 Q. So, in fact, I take it there is no
10 reason to believe that 12:30 would have been after
11 the meeting ended?

12 A. I'm sorry, say that again, please?

13 Q. Sure. At the back of paragraph 64
14 you say:

15 "Moyse accessed these notes at
16 12:30 p.m. which appears to be after
17 the meeting ended."

18 I take it you have no basis to actually
19 say that 12:30 p.m. would be after the meeting
20 ended?

21 A. I would not recall.

22 Q. Most likely on a typical Monday at
23 12:30 p.m. the meeting would either just be
24 beginning or still going on?

25 A. Yes.

1 Q. And I take it, if we read
2 paragraph 65, the last line of paragraph 65 you
3 say:

4 "I am unaware of any legitimate
5 reason why Mr. Moyse would be making
6 notes of a meeting he attended after
7 he had resigned."

8 I take it this appropriately captures
9 your concern around the Monday morning meeting
10 files in Mr. Moyse's computer?

11 A. Yes.

12 Q. You thought that it was improper
13 that he be attending a meeting on May 26th and
14 taking notes?

15 A. Yes. I would have to remember at
16 what point I had the discussion with him as to why
17 he should go home because it was in the context of
18 his non-compete and what his stance was, but it
19 would be in the context of that morning.

20 Q. Okay. So that's precisely the
21 question that I have for you. So you confirmed
22 this morning that you were the one who in fact sent
23 Mr. Moyse home?

24 A. I did.

25 Q. And if Mr. Moyse testifies that

1 that occurred before the Monday morning meeting
2 ever occurred, you would have no basis to dispute
3 that, I take it?

4 A. No.

5 Q. And it's quite simple, I take it,
6 to confirm attendance at Monday morning meetings
7 since attendance is mandatory, as we heard, and
8 absence would be very rare?

9 A. Yes.

10 Q. I take it, though, you didn't
11 confirm with any of your colleagues as to whether
12 in fact Mr. Moyse had attended on May 26 before
13 swearing this affidavit?

14 A. I did not.

15 Q. And the notes that you make
16 reference to here, you'll have seen Mr. Moyse's
17 evidence in that regard, and let's go back, if we
18 could, to tab 2, which again is Mr. Moyse's
19 affidavit, and if we can go to paragraphs 59 and
20 60, so Mr. Moyse says as follows:

21 "In any event, I did not attend
22 the meeting on May 26, 2014.

23 Earlier that morning, I verbally
24 confirmed my previous written notice
25 of resignation and, as a result, was

1 not invited to the meeting.

2 Following my resignation, I did not
3 attend any further Monday meetings
4 as I was asked to remain at home.

5 The Monday meeting notes were not
6 my notes from the meeting (which
7 would be impossible because I didn't
8 attend it), but were my notes for
9 the meeting consisting of world news
10 and economic events which might be
11 discussed at the meeting. This was
12 my usual practice prior to most
13 Monday meetings. I do not believe
14 the notes were Catalyst's property
15 and in any event they did not
16 contain any confidential
17 information.

18 Nevertheless, I did not transfer
19 the notes to my Box, DropBox or any
20 other personal account, nor have I
21 provided any of the information to
22 West Face."

23 I take it, Mr. Riley, you would have
24 read Mr. Moyse's affidavit and explanation as to
25 those notes?

1 A. Yes.

2 Q. And did you take any steps to
3 access the notes themselves, which, as you know,
4 were resident on the Catalyst computer, to
5 determine whether they were more consistent with
6 Mr. Moyse's description or with in fact being notes
7 of what was said at that meeting?

8 A. I don't remember doing so.

9 Q. Okay. And I take it that's
10 because you didn't do so?

11 A. Correct.

12 THE COURT: Why don't we take the
13 morning break. Mr. Borg-Olivier, should we take
14 the morning break now?

15 MR. BORG-OLIVIER: We could, Your
16 Honour, although I think I'll be less than five
17 minutes and I'll be done.

18 THE COURT: All right.

19 BY MR. BORG-OLIVIER:

20 Q. So if we could pull tab 6 up
21 again, please, and let's go to paragraph 61. And
22 at paragraphs 61 through 63 you make reference to a
23 very sensitive and confidential opportunity in the
24 telecommunications industry and, as I put it to you
25 earlier, this refers at least in part to Wind?

1 A. Yes.

2 Q. And the reason you didn't name it
3 at the time of course is because it was still a
4 live opportunity?

5 A. That is true.

6 Q. And what you say in paragraph 62
7 is that -- I'm sorry, where are you? Yes, in
8 paragraph 62 you say:

9 "On the evening of May 13,
10 2014, shortly after he reviewed or
11 transferred the Masonite
12 International files referred to
13 above, Moyse accessed several files
14 related to this situation."

15 Now, you'll agree with me, Mr. Riley,
16 that of course on May 13, 2014 Mr. Moyse was part
17 of the telecom team?

18 A. Yes.

19 Q. Part of the Wind deal team?

20 A. Yes.

21 Q. You knew that at the time he was
22 doing due diligence and working on the investment
23 memo?

24 A. Yes.

25 Q. And you knew that at the time that

1 you swore this affidavit?

2 A. Yes.

3 Q. And you knew that in that context
4 it was entirely reasonable for Mr. Moyse to be
5 accessing documents related to Wind? In fact,
6 essential to him performing the tasks he needed to
7 perform at the time?

8 A. Yes.

9 Q. And as I read it, nowhere in here,
10 Mr. Riley, do you mention to the court that
11 Mr. Moyse was part of the Wind team at the time?

12 A. No, I did not.

13 Q. And I put it to you, Mr. Riley,
14 that the reason you didn't do so is because you
15 knew that if you disclosed that Mr. Moyse was
16 working on the file, that would take all the sting
17 out of the picture you were trying to paint of
18 Mr. Moyse somehow acting inappropriately?

19 A. That was not my reason.

20 Q. Are you prepared now to concede
21 that nothing in paragraphs 61 to 63 is in any way
22 evidence of inappropriate actions on behalf of
23 Mr. Moyse?

24 A. It would depend on the use he made
25 of the information.

1 Q. Certainly none of the evidence
2 that you have presented here suggests any
3 inappropriate actions?

4 A. That is correct. That is correct.

5 MR. BORG-OLIVIER: That's all I have,
6 Your Honour.

7 THE COURT: Thank you. Any
8 re-examination?

9 MR. DIPUCCHIO: No.

10 THE COURT: Thanks, Mr. Riley.

11 -- WITNESS EXCUSED --

12 THE COURT: We will take the morning
13 break and then I guess you'll have your expert.

14 MR. DIPUCCHIO: We are lining him up as
15 we speak. We are a bit ahead of schedule,
16 actually, Your Honour, happily, so we'll line him
17 up and we'll get him in here as soon as we can.

18 -- RECESS AT 11:08 --

19 -- UPON RESUMING AT 11:35 --

20 THE COURT: Yes, Mr. Winton?

21 MR. WINTON: Thank you, Your Honour.

22 Our next witness is Mr. Musters, our expert.

23 Yesterday afternoon, at the close of the day, you
24 were handed an expert brief. If you have that with
25 you.

1 THE COURT: I do have it.

2 MR. WINTON: Wonderful. I just wanted
3 to make sure you did before we got started.

4 Also, Your Honour, just a housekeeping
5 matter to bring to your attention. We have a small
6 volume of read-ins that for technical reasons we
7 were not able to prepare electronically for this
8 morning. We are preparing briefs and having them
9 brought up to court.

10 THE COURT: You're not going to take
11 the time and actually start reading them in, are
12 you? They are just being taken as being read?

13 MR. WINTON: Absolutely, Your Honour.
14 My question, Your Honour, is if my friends don't
15 disagree, we could just arrange to have them loaded
16 onto the iPad at the next opportunity.

17 THE COURT: That's fine.

18 MR. WINTON: Thank you.

19 THE COURT: Yes, that's fine.

20 MR. WINTON: Thank you. Our next
21 witness is Martin Musters.

22 MARTIN MUSTERS: SWORN.

23 MR. WINTON: Your Honour, there was an
24 agreement of counsel that both the experts who were
25 going to be called to testify before you, counsel

1 were not going to challenge the experts'
2 qualifications. I know my friend does want to make
3 some initial submissions before Mr. Musters gives
4 his evidence regarding some concerns about the
5 qualifications and for what expertise the witnesses
6 are qualified, and we are also in your hands as to
7 whether or not we need to qualify the witnesses by
8 asking questions or whether they'll be accepted --

9 THE COURT: Just let me understand. So
10 you're saying that there is a concern about
11 qualifications?

12 MR. WINTON: No, I'm sorry, I misspoke
13 then. My friend wishes to make some submissions
14 about whether or not some of the evidence that
15 Mr. Musters will either be giving or has given in
16 his affidavit falls outside the scope of his
17 qualifications, as I understand it. I'll leave it
18 to him to make those actual submissions.

19 THE COURT: Which one of your friends?

20 MR. WINTON: Mr. Borg-Olivier.

21 THE COURT: Pardon?

22 MR. WINTON: Mr. Borg-Olivier.

23 THE COURT: Is this not something that
24 can be left for argument at the end of the case?

25 MR. BORG-OLIVIER: It is, Your Honour.

1 I just want it to be clear that to the extent we
2 have an agreement between the parties, we are not
3 conceding the point that everything in Mr. Musters'
4 report necessarily falls within the scope of his
5 expertise. We just wanted to alert you to that.

6 THE COURT: We'll leave it to the end
7 of the case for argument. It works better.

8 MR. WINTON: Thank you, Your Honour.
9 So subject to Your Honour's request for additional
10 questions, we're asking that Mr. Musters be
11 qualified as an expert in the field of computer
12 forensics and cellphone forensics.

13 THE COURT: So the only objection to
14 that is what Mr. Borg-Olivier said. Subject to
15 that I'll --

16 MR. WINTON: Subject to
17 Mr. Borg-Olivier's reservation of rights to make
18 argument. Correct, thank you, Your Honour.

19 THE COURT: You can proceed.

20 EXAMINATION IN-CHIEF BY MR. WINTON:

21 Q. Now, Mr. Musters, you have in
22 front of you a brief, it's the expert brief which
23 sets out some affidavits and other reports and
24 information, and I just want to run through it with
25 you quickly to summarize what's here.

1 If you'd turn to the index, sir, you'll
2 see that tab 1 sets out -- turn to the tab and
3 satisfy yourself that tab 1 is an affidavit that
4 you swore in this proceeding back on June 26th,
5 2014?

6 A. The affidavit is dated June 26,
7 2012.

8 Q. It is. Okay, if we turn then --
9 sorry, that's a typo and should have been
10 corrected. If you turn to page 4 of the affidavit
11 and you look at the jurat, it was sworn, the date
12 is correct here?

13 A. That is correct. So the date was
14 June 26, 2014, that's correct.

15 Q. And that accords with your
16 recollection as to when you swore this affidavit?

17 A. Yes.

18 THE COURT: Look, do you remember what
19 you did on June 26th, 2014?

20 MR. WINTON: I do because I was
21 commissioning this affidavit, Your Honour.

22 THE COURT: Let's not get too worried
23 about all this.

24 MR. WINTON: Thank you, Your Honour.

25 BY MR. WINTON:

1 Q. And prior to testifying today,
2 you've had an opportunity to review your affidavit
3 once again?

4 A. I have.

5 Q. And you adopt the information
6 that's in here?

7 A. Yes.

8 Q. As evidence you have given in the
9 past and evidence you will give today?

10 A. Yes.

11 Q. I'm going to skip over tab 2 for a
12 minute and get back to that, but if you turn to tab
13 3, that is an affidavit that you swore on February
14 15th, 2015?

15 A. That's correct.

16 Q. You reviewed that affidavit prior
17 to testifying today?

18 A. Yes, I have.

19 Q. And subject to any qualifying
20 evidence you give today, do you adopt this evidence
21 as your evidence today?

22 A. I do.

23 Q. You swore, at tab 4, a third
24 affidavit on April 30th, 2015?

25 A. That's correct.

1 Q. And you reviewed that affidavit
2 prior to testifying today?

3 A. I did.

4 Q. And you adopt the evidence set out
5 in that affidavit?

6 A. Yes.

7 Q. And finally, at tab 5 there is a
8 fourth affidavit from you sworn May 13th, 2015?

9 A. Yes.

10 Q. And you reviewed that prior to
11 today?

12 A. Yes, I did.

13 Q. And adopt that as your evidence
14 today?

15 A. Yes.

16 Q. You also were cross-examined on
17 two occasions, and those transcripts are at tabs 6
18 and 7. The first being on August 1st, 2014?

19 A. That's correct.

20 Q. And you reviewed that prior to
21 testifying today, that transcript?

22 A. I have.

23 Q. And do you agree with the evidence
24 that's set out there?

25 A. I do.

1 Q. And adopt it as your evidence?

2 A. Yes.

3 Q. And in tab 7 there is the May
4 19th, 2015 affidavit -- sorry, transcript, and you
5 reviewed that prior to today?

6 A. I did.

7 Q. And adopt that as your evidence?

8 A. Yes.

9 Q. Now, we skipped over tab 2 and I
10 want to go back to that right now because that has
11 not yet been attached to any affidavit of yours.
12 It's the report entitled "Re Brandon Moyse
13 BlackBerry Q10" dated July 9, 2014. It's prepared
14 by CFI, Computer Forensics Inc. What is CFI?

15 A. Computer Forensics Incorporated is
16 a company that I own.

17 Q. Do you know who prepared this
18 report?

19 A. I did.

20 Q. All right. And for what purpose
21 were you preparing or asked to prepare this report?

22 A. I was asked to do an analysis of
23 the BlackBerry provided to me. In section 1 of the
24 report it says you had asked me to retrieve all
25 information possible from the BlackBerry.

1 Q. And that's at page 4?

2 A. That's correct.

3 Q. And so what did you do in pursuit
4 of that investigation?

5 A. Well, in order to extract
6 information from a BlackBerry - I'll be specific in
7 my comments to a BlackBerry as opposed to other
8 types of smartphones - the first step is to turn it
9 on, and after I turned the phone on, it would be
10 normal process to enter in the pass code and put
11 the phone into airplane mode.

12 When I turned the phone on, I noticed
13 immediately that it was at its welcome screen,
14 which tells me that the BlackBerry was
15 reinitialized.

16 Q. You attached images from that
17 investigation to this report?

18 A. Yes.

19 Q. All right. So am I correct the
20 welcome screen is the screen at page 9?

21 A. That's correct.

22 Q. And in turning to page 10, what is
23 that screen showing us?

24 A. The tabs at screen 9 and 10
25 basically tell me that the phone was reinitialized,

1 meaning that it would be the state that you would
2 receive it if you were to go to the store, the
3 Apple -- not the Apple store, I'm sorry, the Rogers
4 or Bell or whoever. It's how you would receive the
5 phone in its initial state.

6 Q. And so what effect did this have
7 on your attempt to retrieve information from the
8 phone?

9 A. Well, BlackBerrys are unique in
10 that their file systems are encrypted, so that
11 effectively means that you can't recover any data
12 from the phone after it's been factory reset.

13 So from -- clearly the operating system
14 of the phone is present, but all SMS, text
15 messages, call logs, anything that was present on
16 the device from a user perspective is no longer
17 there. No longer retrievable, let me rephrase it
18 that way.

19 Q. If we can turn to page 11 of your
20 report, were you able to determine when the
21 BlackBerry was initialized?

22 A. From the BlackBerry itself, no.
23 But I did have access to Catalyst email and I found
24 an email from Mr. Moyse where he sends an email to
25 Lorne Creighton dated June 17th, 2014 at 3:59 p.m.,

1 and you'll notice on page 12 it says sent from my
2 BlackBerry 10 smartphone on a Rogers network.

3 So from the phone itself, no, but from
4 other information I was -- I can say that the
5 BlackBerry was functioning as of June 9th, 2014 at
6 3:59 p.m. It may have been functioning after that.
7 So specifically to your question, I can't --

8 THE COURT: You say June 9th. Did you
9 mean to say June 17th?

10 THE WITNESS: June 17th, I'm sorry.
11 Thank you, Your Honour.

12 THE COURT: You're welcome.

13 THE WITNESS: So I know it was working
14 at that time. I can't tell you when it was wiped.

15 BY MR. WINTON:

16 Q. To your knowledge, if the owner of
17 the BlackBerry was concerned about personal text
18 messages on the phone that they would have wanted
19 to keep confidential, would it be necessary to
20 initialize the phone in order to delete those from
21 the BlackBerry?

22 A. There would be two ways to do it.
23 One would be to simply go into his text messages
24 and delete the text messages that he was concerned
25 about, or -- so that would be one way.

1 Q. And if one were to do so, would
2 that delete them beyond the ability of a forensic
3 investigator to recover them from the phone?

4 A. Like I said, BlackBerrys are
5 unique in that unless we're talking about special
6 tools that the RCMP have, for all intents and
7 purposes those messages are not recoverable.

8 Q. Do you have access to those tools?

9 A. No.

10 Q. To your knowledge do any civilians
11 have access to those tools?

12 A. To my knowledge, civilians don't
13 have access to those tools.

14 Q. So for today's examination, Your
15 Honour, we're not going to touch on the other 2014
16 affidavit. We're just going to turn to tab 3 and
17 I'm going to examine Mr. Musters on his affidavits
18 from 2015.

19 You have adopted the evidence but I
20 wish to draw, because this was the subject of prior
21 cross-examination which you also adopted, I want to
22 draw your attention, Mr. Musters, to page 4 and ask
23 that you review paragraphs 12 and 13 of your
24 February 15, 2015 affidavit.

25 A. Which paragraphs? Just 12?

1 Q. 12 and 13, please.

2 A. (Witness reads document). Yes.

3 Q. Now, first of all, let's say are
4 you aware of whether the information set out in
5 those paragraphs is entirely accurate?

6 A. It's not entirely accurate and I
7 can explain, if you wish, or you can ask --

8 Q. Can you explain what portion of it
9 is inaccurate?

10 A. Certainly. When I initially
11 looked at -- and maybe I should just put a bit of
12 context to this. There is a program called
13 Advanced System Optimizer and it has many
14 functions, one of them being a Secure Delete
15 feature.

16 I was asked to look at that Secure
17 Delete feature and had loaded it on to, let's call
18 it, a test computer, a forensics work station, to
19 have a look at it.

20 On a test machine, I loaded the
21 software, went into the Secure Delete function, and
22 I deleted some random files that I had myself
23 created, and I noticed after that that there was a
24 folder called Secure Delete created, which was a
25 result of the actions that I had took, and in item

1 number 12, I had indicated that -- I had mistakenly
2 indicated that running the Secure Delete features
3 and deleting a file created the Secure Delete
4 folder as a remnant.

5 I was mistaken in that, in that
6 launching the program creates the Secure Delete
7 folder. You don't necessarily have to delete any
8 files for that folder to be present.

9 Q. Okay. And can you explain to us
10 today why it is that you did not understand that to
11 be the case back at the time?

12 A. At the time I was aware that the
13 ISS had flagged the purchase and installation of
14 the program, more specifically the Advanced System
15 Optimizer and the Secure Delete. So I was testing
16 its functionality and I made an assumption that if
17 one were to launch the program, one were to use the
18 program. It's kind of like launching Word and not
19 creating a document.

20 So I simply didn't think to look at the
21 directory structure after I launched it. I kind of
22 lumped it into one and said hey, I ran it, I
23 deleted some files, look, here's that folder.

24 MR. WINTON: Now, Your Honour, just
25 because there is some technical information

1 involved in the expert evidence, I'm in your hands
2 as to whether it would assist the court with a
3 description of the way a file, a program such as
4 Secure Delete works, or whether you feel that is --

5 THE COURT: Well, it's your case. Can
6 I just ask you a question, Mr. Musters. I
7 understand what you said, just launching a program
8 creates the Secure Delete file. I understand that.

9 THE WITNESS: Secure Delete folder,
10 Your Honour.

11 THE COURT: Folder. So does that mean
12 that your conclusion in paragraph 13 isn't correct?

13 THE WITNESS: My conclusion remains the
14 same, Your Honour. The steps in terms of when that
15 folder got created is not correct.

16 BY MR. WINTON:

17 Q. Maybe we could --

18 THE COURT: Just a minute.

19 MR. WINTON: Sure.

20 THE COURT: The reason I ask is because
21 in paragraph 12, what it says in paragraph 12 is
22 that the folder is only created when the user runs
23 the Secure Delete feature to delete a file or
24 folder.

25 THE WITNESS: Correct, Your Honour.

1 THE COURT: Now you're saying but the
2 folder is created just by launching the program?

3 THE WITNESS: That's correct.

4 THE COURT: So the conclusion -- what's
5 the conclusion of 13 based on then, if the last
6 sentence of 12 is a mistake?

7 THE WITNESS: The last sentence of 12
8 is a mistake. My conclusion is based on a number
9 of factors. The program was purchased and paid
10 for. The Secure Delete feature is a function of a
11 program called the Advanced System Optimizer, and
12 when you load -- when you launch Advanced System
13 Optimizer, you get a home screen and the Secure
14 Delete feature is not on the home screen. There
15 are about five options, if you will, on the
16 left-hand side, one of them is security and
17 privacy.

18 If you then go to the security and
19 privacy, it gives you, I believe, three options,
20 one of them being Secure Delete. Underneath the
21 Secure Delete it says this is how you permanently
22 erase a file, its contents, never to be recovered,
23 and then you launch -- then you click on that
24 Secure Delete feature to launch that function.
25 That's when the folder gets created.

1 I draw my conclusion in 13 on the fact
2 that the program was bought, paid, installed, it
3 wasn't easy to get to that function, and it was
4 done on the night before the ISS was to examine the
5 computer. So for those reasons, based on my
6 experience, it makes no sense to me that number 13
7 wouldn't remain valid.

8 THE COURT: All right. Thank you.
9 Yes, Mr. Winton.

10 MR. WINTON: Thank you, Your Honour.

11 BY MR. WINTON:

12 Q. And I just want to make sure we
13 are assisting the court. There is the opinion
14 which is the first sentence of paragraph 13 and
15 then there is the explanation which is the second
16 sentence of paragraph 13. You see that in
17 paragraph 13?

18 A. Yes.

19 Q. So just to make sure, the opinion
20 reached is the same?

21 A. The opinion -- my opinion is the
22 same regardless of when the folder got created.
23 It's certainly for the court to decide. The fact
24 is that the folder was created at the time the
25 program, the Secure Delete program was launched.

1 It's my opinion that it was launched for a purpose
2 and that purpose would be deleting files.

3 THE COURT: Essentially you're saying
4 he opened the thing up and launched it and he
5 didn't do that for the sake of his health?

6 THE WITNESS: Correct. That's exactly
7 what I'm saying.

8 THE COURT: Right, I understand.

9 BY MR. WINTON:

10 Q. Now, just turning to tab E of this
11 affidavit, there is the -- there's some promotional
12 material you attach regarding Advanced System
13 Optimizer and on the third page is -- it's got a 28
14 at the top right corner of tab 3-E of this brief.

15 A. I'm there.

16 Q. Okay. We may not have had this
17 electronically on your iPad, Your Honour, so we'll
18 attend to that during the break, but it is in a
19 hard copy brief at page 3-E.

20 And this is just for context. Can you
21 explain to the court how a program of that nature
22 works and what is the effect of running a program
23 of that nature?

24 A. If you will permit me to just give
25 a bit of context technically to the answer?

1 Q. If you feel it's necessary, I
2 think you should.

3 A. A computer, and let's talk about a
4 Windows operating system, has what's called a
5 master file table, very much like an index entry in
6 the old library systems. We had an index card
7 showing us where the book was. So we have an index
8 entry in the master file table that shows us where
9 the file is.

10 On a normal basis, we simply delete the
11 master file table entry but the book stays there.
12 And what these programs do is they go to where the
13 book is located, so that we as forensic
14 investigators can no longer recover that data, and
15 it writes the out random characters, meaningless
16 random characters to overwrite the data, and once
17 the data is overwritten it can't be recovered.

18 THE COURT: Unfortunately, Mr. Musters,
19 I had another trial like this and I had far too
20 much evidence about this and unfortunately I
21 understand it.

22 MR. WINTON: All right. Then, Your
23 Honour, just one question.

24 BY MR. WINTON:

25 Q. Is it possible to detect that

1 Secure Delete was run after it's been run just
2 through a forensic examination of the hard drive?
3 So it overwrites it but is it possible from that
4 path to determine that something was overwritten?

5 A. Well, that's a difficult question
6 and I need to break that down into several pieces.
7 If you simply gave me the hard drive and only
8 looked at the area where files existed, Secure
9 Delete talks about writing out a random pattern.
10 There's no way that I can detect that a random
11 pattern had overwritten this data. So in that
12 sense, no.

13 There may be clues in the registry, but
14 we can get to that later, with respect to things
15 that may have been done to the registry to remove
16 certain data from there.

17 And then we have the knowledge that the
18 program was launched and some question in terms of
19 whether or not it was launched for the purpose of
20 simply being looked at or launched for the purpose
21 of deleting files.

22 So there are clues, but there's nothing
23 definitive. And if I understand your question, can
24 I look at the hard drive and say there used to be a
25 file there, the answer is no.

1 Q. Then turning to tab 4 of the
2 brief, which is your affidavit sworn April 30th,
3 2015, and as you note at paragraph 2, you're
4 swearing this affidavit after having reviewed
5 affidavits from Mr. Moyse and Mr. Lo. And you're
6 familiar with who Mr. Lo is and his work?

7 A. Yes, he is a person I know
8 professionally in the industry.

9 Q. And do you recall what was the
10 gist of the evidence that was in Mr. Lo's affidavit
11 dated April 2nd, 2015? Do you recall?

12 A. I recall it. I wouldn't mind
13 reviewing it if you would --

14 Q. It's not in this brief, but if you
15 look to paragraph 6 of your affidavit, you do
16 include it in the summary. Perhaps you want to
17 review paragraph 6.

18 A. Thank you. (Witness reads
19 document). So I disagree with Mr. Lo's conclusion
20 in basically where he says that it did not contain
21 the Secure Delete log, therefore his conclusion was
22 that the Secure Delete program wasn't run.

23 Q. Can you explain for the court what
24 the Secure Delete log is?

25 A. Okay. On a Windows computer, and

1 I think His Honour is somewhat educated in this
2 area, there is a registry and the registry keeps
3 track of a whole lot of different things.
4 Sometimes, and in this particular case, Secure
5 Delete writes a log of the files that it deletes
6 and keeps certain information in the registry as a
7 result of its use.

8 Q. So turning to page 6 of your
9 affidavit, what is that a screen shot of?

10 A. Is this page 622, big bold
11 letters, 622?

12 Q. Yes, that's right. It's also on
13 the screen in front of you for your reference.

14 A. Thank you. So when I ran the
15 Secure Delete program, again simply in a very test
16 environment, it gave me the following screen that
17 said four files had been deleted and the total
18 amount of space wiped was 31 kilobytes.

19 Q. And turning over to the next page.

20 A. So when I went back into the
21 program or its summary screen, it basically said I
22 last ran that wipe on April 29th, I wiped four
23 items, again that 31 kilobytes. So it's gives me a
24 little history of what I've done so far with that
25 Secure Delete program.

1 Q. All right. Did you make any
2 efforts to reset or remove this information from
3 the program?

4 A. Well, I was -- Mr. Lo had come to
5 the conclusion that in the absence of this summary
6 information that the program hadn't been deleted,
7 and I undertook it upon myself to understand how
8 easy or hard it would be to make that summary go
9 away.

10 I found these entries in the registry.
11 I did a little bit of searching on the internet,
12 found these entries in the registry and made them
13 go away in the registry. And you'll see on page 9
14 of my affidavit that with a little bit of knowledge
15 I was able to make this screen appear.

16 So again, bringing it back to Mr. Lo's
17 affidavit, he concluded in the absence of the
18 summary data that the program hadn't been run, and
19 I respectfully disagree with that conclusion.

20 Q. Now, at paragraph 20 you draw or
21 refer to the conclusion as to what happened with
22 the Secure Delete program on July 20th. Turning
23 over to page 10, it's based on what's set out there
24 within paragraph 20.

25 Can you review that and explain what

1 conclusion you drew and why?

2 A. I'm guessing you don't want me to
3 read points A to D?

4 Q. Not into the record, there's no
5 need for that. But if you could explain what they
6 mean?

7 THE COURT: If it's of any help to you,
8 I understand what they mean. It's plain English.

9 BY MR. WINTON:

10 Q. Very well.

11 A. I would like to consider myself a
12 computer investigator, I do a lot of criminal work
13 for both the Crown and defence, I used to do a lot
14 of Crown work, I do less of it today only because
15 law enforcement has brought that work in-house. I
16 do work for the College of Physicians and Surgeons,
17 the College of Pharmacists, the College of Chinese
18 Medicine, and every one of those is really trying
19 to understand what's going on and why.

20 And my role, I feel, whether I'm
21 representing the Crown or the defence, is to assist
22 in understanding the facts and putting them
23 together.

24 So I'm drawing this conclusion based on
25 -- again, I won't read them, but trying to

1 understand Mr. Moyse, his pattern of behaviour, the
2 fact that this was done the night before. I mean,
3 His Honour said it well, you know, he didn't just
4 go into this the night before just for fun, in my
5 opinion. So I base my conclusions on that and --

6 Q. Okay. Turning to tab 5 in the
7 brief, which is your affidavit sworn May 13th,
8 2015, this affidavit concerns an issue regarding
9 metadata in the registry editor.

10 Do you recall what the circumstances
11 leading up to or what led you to swear this
12 affidavit?

13 A. Yeah. Mr. Lo, and just for His
14 Honour's information, I didn't have access to the
15 computer forensic image so I was relying on
16 information from whether it be the ISS or Mr. Lo,
17 and having said that, Mr. Lo said there was no
18 evidence that the registry editor program was run,
19 therefore he couldn't have gone in and deleted
20 registry entry keys.

21 Unfortunately, Mr. Lo was wrong in that
22 conclusion and I wrote this affidavit and I believe
23 Mr. Lo corrected that in a subsequent affidavit.

24 In a nutshell, Your Honour, in Windows
25 7, Microsoft stopped updating the last access date

1 so you can run a program or open a file and close
2 it without changing it and the last access date
3 won't be updated. It's only when the master file
4 table entry gets updated for some other reason that
5 the last access date gets updated.

6 I simply ran RegEdit on my computer and
7 closed, made some changes and closed it and there
8 was no evidence to suggest I had run RegEdit.

9 MR. WINTON: I have no further
10 questions. Thank you.

11 THE COURT: Thank you.

12 CROSS-EXAMINATION BY MR. BORG-OLIVIER:

13 Q. Nice to see you again,
14 Mr. Musters.

15 Your Honour, I plan to use only the
16 hard copy brief. I apologize if you're going to
17 the iPad, but that's the basis on which I prepared.

18 THE COURT: That's fine.

19 BY MR. BORG-OLIVIER:

20 Q. Mr. Musters, I know that
21 Mr. Winton didn't really take you to the affidavit
22 at tab 1, or if he did, didn't spend much time on
23 it. I'd like to take you to it just for one
24 moment, if you would, that's the one at tab 1.

25 A. Yes.

1 Q. That was sworn on June 26th, 2014
2 notwithstanding that it says 2012 on the first
3 page, correct?

4 A. Correct.

5 Q. If I could take you to paragraph
6 11 of that affidavit, please.

7 A. Yes.

8 Q. So at paragraphs 11 through 16,
9 you report on your analysis of the desktop computer
10 that Mr. Moyse had at Catalyst?

11 A. Correct.

12 Q. Which you were retained to search?

13 A. Yes.

14 Q. And what you determined in
15 paragraph 11 and then expanded on in the subsequent
16 paragraphs is that Mr. Moyse accessed specific
17 files on specific dates?

18 A. Correct.

19 Q. We went through that a bit with
20 Mr. Riley this morning and the only thing I want to
21 get from you here, Mr. Musters, is your
22 confirmation that nowhere in this report or
23 anywhere do you purport to express an opinion as to
24 whether the documents accessed contained
25 confidential information?

1 A. I am not in -- you're absolutely
2 correct. I am not in a position to make that
3 determination. I can't tell you what's
4 confidential or not to the Catalyst group.

5 Q. Thank you. With respect to the
6 wiped BlackBerry, Mr. Musters, am I correct that to
7 the extent Mr. Moyse had been sending emails from
8 his Catalyst email account, you would expect those
9 emails to survive on the Catalyst server
10 notwithstanding the fact that the BlackBerry was
11 wiped?

12 A. The emails, absolutely, yes. And
13 just to be specific, and you did raise it in your
14 question, the Catalyst emails would be available at
15 Catalyst, yes.

16 Q. Let's move to your second
17 affidavit, the one sworn February 15, 2015 which is
18 found at tab 3.

19 A. Yes.

20 Q. So Mr. Winton asked you a few
21 questions about this, as did Justice Newbould, so I
22 don't intend to belabour this. You understood that
23 one of the reasons for which you were retained by
24 Catalyst in this matter was to provide an opinion
25 on the import or meaning of the existence of the

1 Secure Delete folder on the imaged computer,
2 correct?

3 A. Slightly broader than that, but
4 yes.

5 Q. Absolutely. I don't mean to
6 suggest that was the entirety of your mandate but
7 that was one of the critical questions you were
8 looking at?

9 A. Certainly.

10 Q. And you understood that this was
11 an important piece of information, your analysis,
12 that you expected the court would likely rely on in
13 reaching a conclusion with respect to Mr. Moyse's
14 conduct?

15 A. Of course.

16 Q. And as Mr. Winton took you to
17 originally, you came to the conclusion that the
18 existence of the Secure Delete folder meant that
19 somebody had used it to delete files?

20 A. Yes, that's what I said.

21 Q. Okay. And in fact, at paragraph
22 12 you said that folder is only created when a user
23 runs the Secure Delete feature to delete a file or
24 folder from his computer?

25 A. I did say that, yes.

1 Q. And Justice Newbould took you to
2 paragraph 13 and I just want to explore a little
3 bit the answer that you provided His Honour.

4 Your position is that notwithstanding
5 your admitted error as to your analysis in
6 paragraph 12, your conclusion in paragraph 13
7 remains unchanged?

8 A. That's correct.

9 Q. And the conclusion, as I
10 understood it, was based, among other things, on
11 the fact that the program had been purchased and
12 paid for by Mr. Moyse?

13 A. Correct.

14 Q. And based on your experience, an
15 assumption based on how you say somebody would act
16 in that circumstance essentially?

17 A. Yes.

18 Q. And I just want to make sure, and
19 to alert Your Honour, this was the point that we
20 were making in the preamble, certainly you're not
21 here qualified as an expert in psychology or human
22 behaviour or anything like that?

23 A. I am not an expert in those areas.

24 Q. You have not been qualified as an
25 expert in other cases?

1 A. Not in psychology or human
2 behaviour, that's correct.

3 Q. Your focus is on computer
4 forensics?

5 A. My focus is on computer forensics
6 and I would like to -- there is an investigative
7 aspect to that based on my experience in the many
8 hundreds of cases that I've done.

9 Q. But the expertise for which you
10 are qualified both in this case and in the hundreds
11 of other cases that are referred to in your CV and
12 elsewhere is with respect to computer forensics and
13 related matters?

14 A. Correct.

15 Q. So one of the questions that was
16 asked to you, or I've got this down from your
17 evidence in-chief, what you said was "Can I look at
18 the hard drive and say there used to be a file
19 there? The answer is no." And this was with the
20 question of whether the Secure Delete file had been
21 run, correct?

22 A. Yeah, and I tried to clarify that
23 in my chief. If I'm simply looking at the data on
24 the hard drive, there's other factors, there's the
25 registry, there's the master file table, but

1 excluding those items for a minute, if we simply
2 look at the data, you can't tell.

3 Q. When you say excluding those
4 matters, are you intending to exclude the Secure
5 Delete log? Is that part of the registry and all
6 the other things that you're excluding?

7 A. The Secure Delete log is part of
8 the registry, yes.

9 Q. So let's now include that.

10 A. Sure.

11 Q. So typically you'd agree that when
12 the Secure Delete program is run, a Secure Delete
13 log is created? I think you said that in-chief.

14 A. Typically, yes.

15 Q. And what that does is it records a
16 log of the files that have been deleted?

17 A. Correct.

18 Q. So absent any other sort of
19 intervention, that would be one place where you
20 would look to determine whether the Secure Delete
21 program was run?

22 A. Could.

23 Q. And I take it that in doing your
24 assessment of whether the Secure Delete program had
25 been run, you aren't able to look for a log because

1 you didn't have access to that computer?

2 A. I didn't have access to the
3 computer. There are other things that I would have
4 done had I had access to the computer.

5 Q. Okay. But you certainly reviewed
6 Mr. Lo's report and you saw Mr. Lo's report that in
7 fact there was no Secure Delete file on Mr. Moyse's
8 computer, correct?

9 A. We can establish -- we can take as
10 fact that there was no registry entries with
11 respect to the Secure Delete log in the registry,
12 yes.

13 Q. Okay. And like I say, absent any
14 other intervention, that would be a meaningful
15 fact?

16 A. That would be a meaningful fact
17 absolutely.

18 Q. And that would be a meaningful
19 fact tending to suggest or tending to lead to the
20 conclusion that the Secure Delete program had not
21 been used to delete files?

22 A. Well, if I can put it in its
23 opposite, had those logs been there, then we could
24 have concluded that it was run.

25 Q. Sure. But that's not precisely

1 what I'm asking. The absence of a Secure Delete
2 log --

3 A. Yes.

4 Q. -- is a meaningful factor in your
5 analysis?

6 A. It's a factor, clearly.

7 Q. And it's a factor tending to
8 suggest, tending to lead to the conclusion that the
9 Secure Delete program had not been run to delete
10 any files or folders?

11 A. I'm not sure that I would agree
12 with your conclusion. I'm just saying that it
13 raises another question. Again, I didn't have
14 access to the computer, but I would have -- a
15 simple search of Mr. Moyse's internet searches, had
16 he done internet searches on how to delete registry
17 entries, and I'm being hypothetical because again I
18 didn't know that, that would have been meaningful
19 as well. And there's other areas of the registry
20 called shell bags which would have again been
21 meaningful to try to answer these questions. None
22 of that was in Mr. Lo's affidavit.

23 So all I'm saying is that there were
24 more questions in my mind than answers.

25 Q. Absolutely. And I'm not quibbling

1 with that. In fact, you've got a report at tab 4
2 which deals with precisely this, right, the fact
3 that the Secure Delete log can be changed, correct?

4 A. That's what I'm saying.

5 Q. Okay. And what I'm saying is that
6 absent any of that sort of intervention of somebody
7 tampering with the registry keys, if I can put it
8 that way, to delete the Secure Delete log, the
9 absence of a Secure Delete log on that computer
10 would tend to lead to the conclusion that the
11 Secure Delete program had not been run to delete
12 files or folders?

13 A. I'm not sure we're saying the same
14 thing and I'm not sure we're not saying the same
15 thing. I feel that you're trying to draw me to the
16 conclusion that in the absence of the registry
17 entries, therefore the conclusion is it wasn't run,
18 and I disagree with that.

19 Q. I'm not and I don't intend to be
20 unfair to you. So let's explore this a bit with
21 your affidavit. So let's go to tab 4, which is
22 your affidavit sworn April 30, 2015.

23 A. Okay.

24 Q. Got that, Your Honour?

25 THE COURT: I do.

1 BY MR. BORG-OLIVIER:

2 Q. And the section in which you deal
3 with this issue that you and I have just been
4 discussing is at paragraph 6 and following,
5 correct?

6 A. Correct.

7 Q. So you note at paragraph 7 that
8 Mr. Lo's conclusion that the Secure Delete program
9 had not been used was based on the absence of the
10 Secure Delete log-in registry?

11 A. Correct.

12 Q. At paragraph 8 and beyond, you
13 explain to the court that we shouldn't read too
14 much into the absence of the Secure Delete file?

15 A. It's a factor to be considered but
16 let's not be blind-sided. Well, blind-sided is the
17 wrong word. Let's not look at that in isolation.

18 Q. Let's not look at that in
19 isolation. And the reason you say we shouldn't
20 look at that in isolation in paragraph 8 is
21 because, in your words, it's a relatively simple
22 matter to reset Secure Delete to hide any trace of
23 having run the program, correct?

24 A. That's what I said, yes.

25 Q. Okay. And at paragraph 8 you go

1 on to say the following:

2 "A simple internet search on
3 how to delete the remnant files of
4 Advanced System Optimizer, the
5 software program that contains the
6 Secure Delete tool from a computer
7 registry," I think that's a sentence
8 fragment but that's how it reads,
9 "this publicly available information
10 walks a user through the steps
11 necessary to open the registry,
12 identify the Secure Delete files and
13 delete those files so as to remove
14 all traces of the user having run
15 Secure Delete to delete files
16 without a trace."

17 So in this paragraph you're describing
18 certain publicly-available information, correct?

19 A. Correct.

20 Q. And that, you say, is
21 publicly-available information derived from a
22 simple internet search, correct?

23 A. Yes.

24 Q. And of course you haven't appended
25 that publicly-available information to your

1 affidavit, correct?

2 A. At the time, no. I know it's in
3 this brief.

4 Q. Yes, we're getting there.

5 A. Okay, sorry.

6 Q. So the answer is no, it was not
7 appended?

8 A. It wasn't appended to the
9 affidavit, correct.

10 Q. Okay. But what you're describing
11 here at paragraph 8, I put it to you, is that's a
12 fairly specific process that presumably came from
13 you having done this, namely a user being walked
14 through the steps necessary to open the registry,
15 identify the Secure Delete files and delete those
16 files so as to remove all traces, correct?

17 A. That's what I did, yes.

18 Q. So you'll recall that at your
19 cross-examination we looked a little bit at this
20 and you undertook through your counsel to provide a
21 copy of the publicly-available information referred
22 to. Do you remember that?

23 A. Yes, you had asked me at that time
24 what the search terms were and I said I didn't
25 recall.

1 Q. Right. So if we can turn up tab 8
2 of your brief.

3 A. Yes.

4 Q. This is a letter from Mr. Winton
5 to counsel for West Face and for Mr. Moyse dealing
6 with the question that was taken under advisement
7 at your cross-examination. If you have a quick
8 look at this letter, Mr. Musters - when I say
9 quick, obviously take as much time as you need - I
10 take it that the information set out in this letter
11 came via consultations between you and Mr. Winton?

12 A. Yes.

13 Q. And if I can draw your attention
14 to the final paragraph on the first page, I'll read
15 it into the record:

16 "Mr. Musters wishes to correct
17 an error in his testimony. At
18 question 162 Mr. Musters stated that
19 it was incorrect, the information he
20 was referring to provided advice as
21 on the removal of the entire ASA
22 program and not simply removal of
23 the remnant files. Upon reviewing
24 the publicly available information,
25 Mr. Musters notes that the

1 information includes advice on the
2 removal of the entire ASA program
3 and his answer to question 162 was
4 incorrect."

5 Now, it occurs to me that I should
6 probably have taken you to those questions before
7 taking you to the letter so that Your Honour can
8 follow on --

9 THE COURT: I'm following. Let's just
10 move on.

11 MR. BORG-OLIVIER: Let's move on?
12 Okay.

13 BY MR. BORG-OLIVIER:

14 Q. So attached to that letter is what
15 you, through Mr. Winton, say is the
16 publicly-available information that was referred to
17 in your affidavit, correct?

18 A. Correct.

19 Q. And what the correction as
20 described by Mr. Winton says is that in fact the
21 publicly-available information talks only about
22 removing the entire ASO software suite from
23 someone's computer?

24 MR. WINTON: Sorry, I just rise because
25 I don't think that's accurate.

1 THE COURT: Pardon?

2 MR. WINTON: I don't think that's an
3 accurate summary of what the letter says.

4 THE COURT: We've got the letter.

5 MR. WINTON: Okay.

6 BY MR. BORG-OLIVIER:

7 Q. Am I reading that correctly,
8 Mr. Musters? You wished to correct your testimony
9 through Mr. Winton, right?

10 A. Correct.

11 Q. And maybe I'm describing it
12 incorrectly, and this is your opportunity to tell
13 me otherwise. As I understood this, what
14 Mr. Winton was saying is that you wished to -- you
15 wished to explain to the court that in fact the
16 publicly-available information that you had
17 referred to spoke only to the removal of the entire
18 ASO software suite from someone's computer and not
19 in fact deletion of the individual Secure Delete
20 log; is that correct?

21 A. Would you permit me to answer that
22 without a yes or no?

23 Q. Sure.

24 A. Thank you. What I wished -- at
25 the time you cross-examined me, I had in my mind

1 that I found instructions, registry settings
2 specifically for the Secure Delete program. That's
3 the piece that I wish to correct. It was the
4 registry keys for the Advanced System Optimizer
5 program and it talked about all of the keys for
6 that.

7 So that's the thing that I wanted to
8 correct, to say it wasn't about Secure Delete, it
9 was about ASO and Secure Delete being a subset of
10 ASO.

11 Q. Right. So what you describe at
12 paragraph 8, talking about a user being walked
13 through the steps of opening the registry,
14 identifying the Secure Delete files and deleting
15 those files so as to remove all traces of the user
16 having run Secure Delete to delete files without a
17 trace -- sorry, are you with me, Mr. Musters?

18 A. I'm not, no, I'm not.

19 Q. Let's go back to your affidavit,
20 tab 4. I apologize.

21 A. Tab 4. What number?

22 Q. Tab 4, paragraph 8.

23 A. Thank you.

24 Q. And I'm focusing, Mr. Musters, on
25 the last line in that paragraph.

1 A. Yes.

2 Q. And I put it to you that what you
3 say there, that the publicly-available information
4 walks a user through the steps necessary to open
5 the registry identified as Secure Delete files and
6 delete those files so as to remove all traces of
7 the user having run Secure Delete to delete files
8 without a trace, that statement is incorrect?

9 A. It's not incorrect and it's not
10 particularly correct. And I don't wish to mislead
11 you or the court. Let me clarify.

12 The publicly-available information was
13 about the registry keys for the Advanced System
14 Optimizer program, and if you go to that key, call
15 it a tree structure, if you will, as soon as you
16 open up that tree structure, you see Secure Delete
17 and it becomes obvious that there are keys specific
18 to the Secure Delete program.

19 So I can't begin to hypothesize what
20 may or may not have been in Mr. Moyse's mind as he
21 was doing this. What I was trying to say,
22 obviously not very well, is that there's
23 publicly-available information on how the registry
24 keys are structured for the ASO program, including
25 Secure Delete.

1 And the walking through, I can take you
2 to the publicly-available information to try to
3 demonstrate to you what I mean, or at least show
4 you what I mean.

5 Q. I think we're going to move on,
6 Mr. Musters.

7 A. Okay.

8 Q. In paragraphs --

9 THE COURT: I just want to make sure I
10 understand. I think I understand, Mr. Musters.
11 What you're essentially saying is the
12 publicly-available information includes both how to
13 remove the entire ASO program but it also includes
14 how to deal with the registry for the Secure
15 Delete?

16 THE WITNESS: It wasn't specific to
17 Secure Delete, but it becomes obvious once you're
18 there, is I guess what I'm trying to say. Any fool
19 would be able to say oh, that's where this
20 information is, if they were looking for it.

21 THE COURT: And that's what you did?

22 THE WITNESS: That's exactly what I
23 did.

24 THE COURT: That's what you did?

25 THE WITNESS: Yes.

1 BY MR. BORG-OLIVIER:

2 Q. And you did that at paragraphs 9
3 and subsequent, right?

4 A. Yes.

5 Q. And I think what you said in your
6 examination in-chief is that you were able to do
7 that with a little bit of knowledge?

8 A. Correct.

9 Q. Right? And I put it to you,
10 Mr. Musters, that you're being far too humble. You
11 have a lot more than a little bit of knowledge in
12 this area, don't you?

13 A. Well, I do. I'm a forensic
14 investigator, but sure.

15 Q. So --

16 A. But thank you for the compliment.

17 Q. Well, you're very welcome. So
18 what you were able to do is not necessarily at all
19 indicative of what somebody with less training
20 would be able to do, correct?

21 A. Well, clearly that's an obvious
22 statement, yes.

23 Q. Let's move to paragraphs 20 and 21
24 of this affidavit.

25 A. Yes.

1 Q. So at paragraph 20 you say:
2 "In my experience as a computer
3 forensic IT investigator, the most
4 likely conclusion to draw from
5 Moyse's conduct of June and July
6 2014 is that he did in fact use
7 Secure Delete to permanently delete
8 files from his computer on July 20,
9 2014."

10 And you base this conclusion on four
11 facts set out at subparagraphs A, B, C and D; is
12 that correct?

13 A. Right.

14 Q. And let's walk through those, if
15 we could.

16 A. Sure.

17 Q. So the first one refers to
18 Mr. Moyse exhibiting a pattern of conduct that is
19 consistent with taking confidential information
20 from his former employer as set out in my June
21 26th, 2014 affidavit and my evidence given during
22 my cross-examination held August 1st, 2014?

23 A. Right.

24 Q. Am I right, Mr. Musters, that when
25 you're talking about the pattern of conduct prior

1 to July 20th referred to in your June 26th, 2014
2 affidavit, that's the accessing of the files that I
3 took you to at the beginning of this?

4 A. That's correct.

5 Q. The ones that you said you
6 expressed no opinion on as to whether they were
7 confidential, correct? Those files?

8 A. That's correct.

9 Q. And without belabouring this
10 point, to the extent that if the court was to draw
11 the conclusion from its own analysis that in fact
12 that conduct did not represent the taking of
13 confidential information from Catalyst, I take it
14 this factor would fall by the wayside?

15 A. Well, if we -- if we eliminate the
16 word confidential information, the statement would
17 still -- exhibited a pattern of conduct that is
18 consistent with taking information, can we agree on
19 those words? Whether it be confidential or not.

20 Q. Okay. Let me broaden it.

21 A. Okay.

22 Q. To the extent that the court
23 concludes that there was nothing improper about
24 Mr. Moyse accessing the files referred to there,
25 can I assume that this factor falls by the wayside?

1 A. I just want to be reflective.
2 Sorry.

3 Q. Absolutely.

4 THE COURT: One of the problems I have
5 with this line of cross-examination,
6 Mr. Borg-Olivier, is that in his opening Mr. Centa
7 said that Mr. Moyse made mistakes and one of those
8 was he sent these four memoranda to West Face that
9 were marked confidential.

10 MR. BORG-OLIVIER: That's not what's
11 referred to here, Your Honour. That's an entirely
12 different thing. That doesn't bear on the forensic
13 analysis whatsoever because that was simply sent by
14 email.

15 So this paragraph, to be clear, and I
16 can pull up the affidavit if necessary, if Your
17 Honour would like me to, but what's being referred
18 to here is the accessing of the Stelco file, the
19 Masonite file, the investment letters, the Monday
20 morning meeting notes and the telephone calls.

21 THE COURT: Right.

22 BY MR. BORG-OLIVIER:

23 Q. Correct?

24 A. Yes.

25 Q. Have you had the chance to reflect

1 now on my question?

2 A. Assuming there was nothing
3 improper, I see a pattern of accessing those types
4 of files which, let's just say, that as an
5 investigator seemed unusual.

6 Q. But in terms of forensic
7 importance, I take it there's none. I mean, this
8 is mere speculation on your part and nothing more?

9 A. Well, I don't have the big picture
10 which you -- which you rightfully pointed out. I
11 don't know the contents of all these files. I have
12 no idea what happens inside the walls of Catalyst
13 Capital. I have no idea what their business does.
14 I can think -- I can speculate but I don't know
15 what they do, really.

16 So it's not for me, as you said, to
17 decide. I don't know what projects Mr. Moyse was
18 working on or not. So again, I don't have context
19 to answer your question properly. It seems an
20 unusual pattern.

21 Q. Okay. But the reason that the
22 pattern is relevant, from your perspective as an
23 investigator or analyst, is because the pattern was
24 suggestive of taking confidential information from
25 the employer?

1 A. Yes, yes.

2 Q. So what I'm putting to you is to
3 the extent that the court concludes that in fact he
4 wasn't taking confidential information or he wasn't
5 accessing information improperly, notwithstanding
6 how unusual it might have looked --

7 A. Sure.

8 Q. -- it's not a meaningful data
9 point at that point?

10 A. Assuming your assumptions are
11 correct, yes.

12 Q. Next is the admitted conduct of
13 Mr. Moyse of investigating how to clean his
14 registry displays, and I don't think Mr. Winton
15 took you to this. And, Your Honour, I know that
16 you have read the reports but maybe I can just
17 place this in some context so it's clear what we're
18 talking about here.

19 Mr. Moyse provides evidence through his
20 affidavits that in attempting to permanently delete
21 his internet browser, he did some -- he did some
22 internet research and determined that cleaning his
23 registry would be the way to accomplish that.
24 That's what you're referring to here?

25 A. Correct.

1 Q. And what you say is that his
2 admitted conduct of admitting how to clean -- or
3 investigating how to clean his registry displays a
4 level of IT sophistication that exceeds that of the
5 ordinary user. Do I have that right?

6 A. The average user wouldn't know
7 what a registry was.

8 Q. So let's go to paragraph 3 of this
9 affidavit, please.

10 A. Yes.

11 Q. And at paragraph 3 of this
12 affidavit, you're responding to Mr. Moyse's
13 evidence --

14 THE COURT: Just before you do that.
15 Where is it?

16 MR. BORG-OLIVIER: I'm sorry, Your
17 Honour, it's the same affidavit that we've been in,
18 so it's tab 4. This is the affidavit of
19 Mr. Musters sworn April 30, 2015.

20 THE COURT: I thought you meant
21 Mr. Moyse's affidavit. Um-hmm.

22 MR. BORG-OLIVIER: I'm at the first
23 page of that affidavit, Your Honour.

24 THE COURT: Yes, I have it.

25 BY MR. BORG-OLIVIER:

1 Q. At paragraphs 3 to 5, you respond
2 to Mr. Moyse's affidavit about cleaning his
3 registry, correct?

4 A. Correct.

5 Q. And what you say here is that the
6 explanation provided by Mr. Moyse, namely that he
7 cleaned the registry of his computer before turning
8 it over to be imaged in order to fully erase his
9 worldwide web activity, makes no sense. That's
10 what you've said here, correct?

11 A. Well, the registry doesn't contain
12 web history.

13 Q. Right. And as a result of that,
14 you say the explanation provided by Mr. Moyse
15 doesn't actually make any sense?

16 A. Sure. That's correct.

17 Q. So to the extent that Mr. Moyse
18 attempted to permanently delete his internet
19 browsing history by cleaning the registry, he just
20 got it completely wrong?

21 A. Well, in that sense, and again,
22 I've never met Mr. Moyse, I know he's a smart guy,
23 he has a math degree, like I do, so he's got to be
24 a smart guy, so the question is why does he want to
25 clean his registry? Like, why does he want to

1 clean his internet history? What's he hiding,
2 right? So those are the --

3 Q. That's not the question, to be
4 fair.

5 A. I know that's not the question,
6 but I'm trying to put context to my answer in terms
7 of --

8 Q. Let me, with respect, cut you off
9 and focus on the point here. Because what I'm
10 interested in at this point --

11 THE COURT: I don't think that's fair.
12 Mr. Musters was responding to you.

13 BY MR. BORG-OLIVIER:

14 Q. Okay.

15 A. When I see, even though we can all
16 agree that the internet history is not stored in
17 the registry, I ask myself the questions, why does
18 he want to clean the registry, why does he want to
19 clean his internet history, what's he hiding, what
20 doesn't he want us to know?

21 And those are the things that are going
22 through my head when I write some of these words
23 with respect to cleaning his registry and for what
24 purpose. Did he lie about his knowledge of the
25 registry or not?

1 I have been trained to ask questions to
2 try and find answers, and these are my comments
3 with respect to why I drew that conclusion.

4 Q. And the conclusion that you drew
5 was if we take him at his word that he attempted to
6 clean the registry to wipe his internet browser --

7 A. Yes.

8 Q. -- he got that wrong?

9 A. Sure.

10 Q. His explanation makes no sense?

11 A. Because it's not stored there, so
12 yes.

13 Q. Because it's not stored there?

14 A. Yes.

15 Q. Correct. So let's flip back to
16 the last page of that affidavit.

17 A. Okay.

18 Q. Sub-paragraph B.

19 A. Which affidavit, I'm sorry?

20 Q. Still the same one.

21 A. Yes.

22 Q. So are you with me on --

23 A. Are we talking page 66?

24 Q. Yes.

25 A. Okay, thank you.

1 Q. Your Honour, are you there?

2 THE COURT: Yes.

3 BY MR. BORG-OLIVIER:

4 Q. So I put it to you, Mr. Musters,
5 that in fact Mr. Moyse's conduct with respect to
6 attempting to clean his registry displays the
7 opposite of a high level of sophistication. He
8 couldn't even figure out how to delete his internet
9 history. That's what you've just told us, that his
10 explanation made no sense.

11 A. I have a different theory, if you
12 allow me it.

13 Q. Sure.

14 A. Well, we know that he's a very
15 bright research analyst and maybe five hours prior
16 to these events he didn't know anything about the
17 registry. But he's a smart guy and he's figuring
18 it out through publicly-available information.

19 And that's why I'd love to see his
20 internet browsing history and maybe that's why he
21 wants to get rid of it. I'm being purely
22 speculative. I don't know any of these things.

23 But again, I'm just saying -- I
24 understand what you're saying, if he doesn't
25 understand what's in the registry, then he clearly

1 has got it wrong. I understand that.

2 Q. And it would be the opposite of a
3 high level of IT sophistication?

4 A. And it would be the opposite. At
5 the same time, what's he trying to hide? Why does
6 he even bother? Why doesn't he just hand over his
7 machine?

8 Q. And --

9 A. No, I'm just saying it kind of
10 plays both ways.

11 Q. With respect, I think you're
12 trying to play it both ways, Mr. Musters. On the
13 one hand you're suggesting that Mr. Moyse doesn't
14 know what he's talking about, and on the other hand
15 nine pages later you're suggesting that he displays
16 a level of IT sophistication exceeding that of the
17 ordinary user?

18 A. If he's playing in the registry,
19 he exceeds 50 percent of the population at least.

20 Q. Even though he was there for
21 completely the wrong reason based on erroneous
22 research?

23 A. I'm not sure of that.

24 Q. Third, Moyse wiped the BlackBerry
25 smartphone thereby permanently destroying evidence

1 of his phone and data usage at a time when he knew
2 litigation would likely result from his conduct.

3 The only point I want to get from you
4 here, Mr. Musters, is that perhaps that statement
5 with respect to phone and data usage is overly
6 broad; is that fair?

7 A. Well, and I never meant it to be
8 that way. I used the word "user" as opposed to
9 operating system. So clearly the BlackBerry is
10 functioning. So what's missing? Is it text
11 messages, BBM, BlackBerry messages? You can put in
12 contacts that are not part of the network, personal
13 email, you can have personal memos, any other
14 information. You can copy files onto a BlackBerry
15 that may or may not be the property of Catalyst
16 Capital or not.

17 Q. Sure. My only point here,
18 Mr. Musters, is that to the extent that you're
19 suggesting, for example, all evidence of his use of
20 the phone would be permanently destroyed, you're
21 not suggesting that because you know the records
22 might continue to exist in the phone bills or
23 elsewhere?

24 A. We have call logs and email that
25 you've adequately pointed out.

1 Q. Right. And the last one that you
2 point to here of course is the running of the
3 Secure Delete program, and we've gone over this,
4 but I take it that to the extent that a finding is
5 made that in fact the Secure Delete program was not
6 used for the purposes of deleting files or folders,
7 this one falls by the wayside too?

8 A. I'm sorry, I don't understand
9 exactly the question you are asking me.

10 Q. So the running of the Secure
11 Delete program is relevant in your view because it
12 was potentially used to delete file folders?

13 A. Correct.

14 Q. And to the extent the court should
15 find that, in fact, it was not used for that
16 purpose, that in fact all that was done was that it
17 was launched but not used to delete, then this one
18 falls by the wayside?

19 A. Sure.

20 MR. BORG-OLIVIER: Can I have a moment,
21 Your Honour, please?

22 THE COURT: I beg your pardon?

23 MR. BORG-OLIVIER: May I have a moment,
24 please?

25 THE COURT: Sure.

1 MR. BORG-OLIVIER: Those are all my
2 questions, Your Honour. Thank you, Mr. Musters.

3 THE WITNESS: Thank you.

4 THE COURT: Any cross-examination by
5 counsel for West Face?

6 MR. THOMSON: No, Your Honour.

7 THE COURT: Any re-examination?

8 MR. DIPUCCHIO: I'll let Mr. Winton
9 respond.

10 MR. WINTON: No, Your Honour. I get to
11 handle all the tough tasks like that.

12 THE COURT: Thank you, Mr. Musters.

13 THE WITNESS: Thank you.

14 -- WITNESS EXCUSED --

15 MR. WINTON: Now, at this point, Your
16 Honour, we do have the physical briefs of read-ins
17 which we're happy to circulate if they need to be
18 filed before we close our case or else we can --

19 THE COURT: Why do I need those bound?
20 Why don't you just put them on the laptop?

21 MR. WINTON: It's just a question of
22 whether anyone is going to object to us doing that
23 after we close our case.

24 MR. THOMSON: Not at all. We haven't
25 had a chance to look at the read-ins, Your Honour.

1 If we have an issue, we'll deal with that in due
2 course, but we have no problem at all with filing
3 them.

4 Do I take it then that subject to
5 filing the read-ins, that is the case of Catalyst?

6 MR. DIPUCCHIO: Yes.

7 MR. WINTON: Of course, on the
8 assumption that the defendant witnesses are being
9 called, yes.

10 MR. THOMSON: But to be clear, Catalyst
11 is now closing its case in-chief?

12 MR. WINTON: Yes.

13 MR. DIPUCCHIO: Yes.

14 THE COURT: Has Catalyst closed its
15 case or not?

16 MR. DIPUCCHIO: Yes, yes, Your Honour.

17 MR. THOMSON: Your Honour, our next
18 witness is Mr. Griffin, as I understand it, and I
19 think he's on his way down.

20 THE COURT: Why don't we stop for the
21 lunch break and come back at two o'clock.

22 By the way, we'll start at 9:30
23 tomorrow morning. I've got a meeting at 9 o'clock,
24 but it doesn't sound like that's going to be a
25 problem.

1 MR. THOMSON: Thank you.

2 -- LUNCHEON RECESS AT 12:45 --

3 -- UPON RESUMING AT 2:05 --

4 MR. MILNE-SMITH: Your Honour, the
5 order of proceedings that we have decided upon
6 between the defendants is that West Face is going
7 to call its witnesses first, followed by Mr. Moyse,
8 and the first witness for West Face we'd like to
9 call to the stand is Anthony Griffin.

10 ANTHONY GRIFFIN: SWORN.

11 MR. MILNE-SMITH: Your Honour,
12 hopefully on your iPad you will have a folder
13 dedicated to Mr. Griffin's examination in-chief and
14 I do not intend to stray from that folder.

15 EXAMINATION IN-CHIEF BY MR.MILNE-SMITH:

16 Q. Mr. Griffin, could you please just
17 briefly describe for the court your position at
18 West Face?

19 A. I'm one of four partners at West
20 Face Capital.

21 Q. And what are your responsibilities
22 as partner?

23 A. I sit on the West Face Investment
24 Committee, I am responsible for finding investment
25 ideas for the firm, also overseeing our junior

1 staff, analysts and associates.

2 Q. And do you recall swearing various
3 affidavits in this proceeding in the past?

4 A. Yes, I do.

5 Q. Let's just walk through those so
6 we have got a common basis. First of all, you
7 recall there was an affidavit dated March 7th, 2015
8 in connection with the injunction proceedings that
9 year?

10 A. Yes.

11 Q. And you then filed a supplementary
12 affidavit in that proceeding dated May 6th, 2015?

13 A. Yes.

14 Q. And most recently you have sworn
15 an affidavit dated June 4 of 2016?

16 A. Yes.

17 Q. And do you adopt the contents of
18 that affidavit as your evidence in-chief?

19 A. Yes.

20 Q. And, Your Honour, the affidavit
21 sworn June 4th, 2016 --

22 THE COURT: I have it.

23 MR. MILNE-SMITH: Okay.

24 BY MR. MILNE-SMITH:

25 Q. Now, just for the sake of

1 completeness, you also swore an affidavit in a
2 related proceeding; do you recall that?

3 A. Yes, I do.

4 Q. And that was the Plan of
5 Arrangement for the sale of Mid-Bowline Group
6 Corp., correct?

7 A. That is correct.

8 Q. And is there anything in any of
9 the prior affidavits that you need to correct?

10 A. No.

11 Q. As a quick preliminary question,
12 Mr. Griffin, we're going to talk mostly about Wind
13 Mobile, but there is another wireless company I
14 just want to get your evidence on. You're familiar
15 with Mobilicity?

16 A. Yes, I am.

17 Q. And did West Face ever have an
18 investment in Mobilicity?

19 A. Yes, we had a bond position in
20 Mobilicity.

21 Q. And does West Face still hold that
22 bond position in Mobilicity?

23 A. We do not.

24 Q. Okay. And when did you exit that
25 investment?

1 A. That would have been in the first
2 quarter of 2013.

3 Q. Thank you.

4 THE COURT: What was the size of that
5 bond position in Mobilicity?

6 THE WITNESS: I believe the face value
7 of the bond position was less than 10 million
8 dollars, approximately 9, if I recollect.

9 THE COURT: Thank you.

10 BY MR. MILNE-SMITH:

11 Q. Mr. Griffin, when did you first
12 start following or analyzing Wind Mobile?

13 A. It would have been back in
14 2008-2009 when the AWS1 auctions first occurred for
15 spectrum in the Canadian telecom industry.

16 Q. And how did the AWS3 auction
17 relate to Wind Mobile? What was the connection
18 between those two events?

19 A. With the AWS3?

20 Q. Correct.

21 A. The AWS3 spectrum was necessary to
22 allow the company to eventually migrate to an LTE
23 standard with its customers.

24 Q. When was Wind itself founded?

25 A. I believe it just immediately sort

1 of predated the 2008 period when the incentive
2 auctions were created.

3 Q. And have you been following the
4 company since that time?

5 A. We had at various points. We had
6 been approached to provide financing in various
7 capacities. The first time would have been an
8 original proposed high yield financing to partially
9 pay for their allocation of spectrum under the
10 original AWS1 incentive auction process.

11 Q. And in your history of following
12 Wind Mobile, were you aware of regulatory issues
13 being a factor for Wind Mobile or its owners?

14 A. Yes.

15 Q. How so?

16 A. Well, under the original ownership
17 structure where Orascom, an Egyptian company, was
18 the ultimate parent, the CRTC had intervened and
19 had suggested or taken the position that the
20 ownership structure that Orascom had put in place
21 made Wind non-compliant with foreign ownership
22 restrictions and Canadian ownership requirements as
23 they saw it at the time, and that was subsequently
24 overturned by the federal government.

25 Again, when VimpelCom ultimately

1 acquired Orascom, and indirectly its interest in
2 Wind Mobile, VimpelCom had sought to basically
3 convert its majority economic -- minority voting
4 position into a majority economic and majority
5 voting position in the company and they had been
6 blocked under the Investment Canada Act from doing
7 so.

8 Q. Could you just explain to me the
9 ownership structure of VimpelCom?

10 A. Well, as best I understand it, the
11 ultimate parent company is, while Amsterdam based,
12 is ultimately controlled by Russian interests, and
13 I believe it was that factor that played a role in
14 the federal government's ultimate view that they
15 were unpalatable as an owner of a Canadian
16 telecommunications company.

17 Q. Were you familiar with 2011
18 amendments to the Telecommunications Act concerning
19 foreign ownership of so-called new entrants to the
20 wireless industry?

21 A. Yes, that is all really what
22 kicked off this initiative on the part of
23 VimpelCom, is that the federal government decided
24 that small market participants, companies that had
25 less than 10 percent market share in Canada, would

1 receive a form of exemption which would allow for
2 foreign ownership of those entities.

3 And I believe VimpelCom ultimately
4 thought that was an avenue for them to assert not
5 only economic but also voting control over the
6 business.

7 Q. And when you say small entrants
8 who were under 10 percent, which companies would
9 that description apply to?

10 A. Well, that would have specifically
11 been at the time Public Mobile, Mobilicity and Wind
12 Mobile.

13 Q. Okay. And just about two minutes
14 ago you talked about VimpelCom's efforts to acquire
15 a majority voting control of the company. Did that
16 come before or after the 2011 telecommunications
17 amendments?

18 A. That would have come after.

19 Q. Mr. Griffin, could you please turn
20 to paragraph 29 -- or I should say could we please
21 call up paragraph 29 of Mr. Griffin's affidavit,
22 tab 1.

23 So this states that on November 4, 2013
24 you received a telephone call from Mr. Lacavera and
25 the paragraph goes on to describe what it was

1 about.

2 Could you just in your own words please
3 summarize that call or the import of that call for
4 the court?

5 A. Sure. Effectively what had been
6 communicated to us was that VimpelCom was no longer
7 interested in continuing to fund the Wind Mobile
8 business indirectly through its interest in
9 Orascom.

10 Up until that point in time, it had
11 been a series of shareholder loans that had funded
12 the capital requirements insofar as capital
13 expenditures and operating losses were concerned.

14 And I think after a series of efforts
15 to try to change the relationship that VimpelCom
16 had with this company into a position where its
17 voting control of the business reflected its true
18 economic interest, with those efforts having been
19 frustrated by the decisions of the federal
20 government, they were effectively going to make a
21 last attempt to either sell the business on a very
22 expedited basis and exit entirely, cleanly and
23 conclusively, or the company was likely going to
24 fall into CCAA proceedings sometime in the future.

25 Q. As of the date of this phone call

1 in November 2013, did you have any opinion or
2 understanding regarding VimpelCom's approach to
3 regulatory risk?

4 A. I think there had been a long
5 series of frustrations that had been discussed
6 publicly in the press. Certainly their efforts to
7 seek an ability to exercise voting control over
8 this company were well known and the government's
9 responses to that were well known.

10 Q. And how did you expect that to
11 affect negotiations with VimpelCom for a potential
12 transaction?

13 A. Well, I think, given the history
14 with the federal government, they were distrustful
15 of the Canadian federal government, they were
16 frustrated given the amount of money that had been
17 invested in the firm, and I think they wanted to
18 wash their hands of the situation as quickly as
19 possible.

20 Q. Did you have an understanding at
21 the time as to Wind's cash flow position?

22 A. We knew that at the time Wind had
23 a history of losing money, whether it was, you
24 know, operationally or operations combined with
25 capital expenditures necessary to fund and build

1 out the business. It had been a serial capturing.

2 Q. And how about their debt
3 structure?

4 A. The company had actually, as a
5 consequence of VimpelCom and/or Orascom being
6 unable to put in voting actually as a means of
7 funding the company, they had reverted to vendor
8 financing for at least part of the network
9 construction in an amount of about 150 million
10 dollars at the time, and they had also reverted to
11 advancing money pursuant to shareholder loans and
12 it was actually the shareholder loans that
13 comprised the majority of the capital that had been
14 invested in the company.

15 Q. Do you know the approximate amount
16 of the shareholder loans?

17 A. Yes. Between money that was spent
18 to acquire spectrum, money that was spent to build
19 out the network, and money that was spent to
20 effectively fund operating losses, my recollection
21 it was on the order of 1.4 billion dollars
22 cumulatively that had gone into the company.

23 Q. And you referred earlier to the
24 vendor debt of 150 million. Do you have any
25 understanding as to when that was due, if at all?

1 A. That was one of the issues that
2 was a concern to the company, and certainly driving
3 some of the timing was that vendor debt was due in
4 April of the following year. Or end of May
5 effectively, excuse me.

6 Q. And you talked about the cash flow
7 situation and ongoing losses. Did VimpelCom ever
8 express an attitude about --

9 THE COURT: Just before that, you said
10 April of the following year. That would be April
11 of 2014? Or May, you said.

12 THE WITNESS: I believe the ultimate
13 maturity date was April 30th of that year.

14 THE COURT: It's the year I'm asking
15 about.

16 THE WITNESS: Yes.

17 THE COURT: The following year you're
18 referring to is 2014?

19 THE WITNESS: That's correct.

20 THE COURT: Thank you.

21 BY MR. MILNE-SMITH:

22 Q. Just to make sure that the court
23 has it, you're talking there about the vendor debt,
24 not the shareholder --

25 THE COURT: I understand that.

1 MR. MILNE-SMITH: Okay.

2 BY MR. MILNE-SMITH:

3 Q. And we also talked briefly about
4 the cash flow position. Did the ongoing losses
5 have any effect on VimpelCom's position regarding
6 the timeline for the transaction?

7 A. The company was either going to
8 run into one of two eventualities. One was a
9 default triggered by the maturing of that vendor
10 financing. The other date with destiny was
11 effectively running out of cash liquidity in the
12 business.

13 Which of those two things was going to
14 happen sooner, it looked to us like the vendor debt
15 was going to predate an exhaustion of liquidity in
16 the company.

17 Q. And was VimpelCom willing to
18 continue to fund the company's obligations as they
19 came due?

20 A. Not as we understood it at the
21 time, no.

22 Q. Okay. If we could fast-forward a
23 little bit in the timeline. As of the beginning of
24 May 2014, did you have an understanding as to what
25 price VimpelCom was seeking for its interest in

1 Wind?

2 A. Yes. They had engaged UBS
3 Securities as their financial advisor and it had
4 been clearly communicated to us that an enterprise
5 valuation on the order of 300 million dollars
6 Canadian was the price that they had established.

7 And that was a fairly unique piece of
8 information in terms of other processes that we'd
9 been involved in. We seldom had had or gone into a
10 process where the price was effectively stipulated
11 at the outset and a price that was very low with
12 respect to the cumulative amount of investment that
13 had gone into this business.

14 Q. Can you just explain that a little
15 bit more, how the price was very low in relation to
16 the cumulative investment in the business?

17 A. Sure. Well, we looked
18 historically at the amount of money that had been
19 committed to build a network within their core
20 markets, and, as I said previously, that was on the
21 order of about a half a billion dollars just
22 discretely on that one element.

23 There had been another billion dollars
24 invested, roughly equally split between their prior
25 acquisitions of spectrum under the licensing rounds

1 for AWS1, and about 500 million dollars invested in
2 funding cumulative operating losses as the company
3 grew its subscriber base over time.

4 So that was certainly one goal-post
5 with which I would reference the price would be in
6 the context of how much had gone into the business
7 to get it to that point.

8 Q. So given that they had effectively
9 set the price at the beginning, as you just
10 described, what were they negotiating about? What
11 was VimpelCom's ask?

12 A. As best we could tell, the only
13 other available alternative to the company was to
14 -- to VimpelCom, that is, was to put Wind into a
15 CCAA proceeding, and so this process was clearly
16 set up to provide a more expedient alternative with
17 which to provide VimpelCom with some level of
18 recovery of proceeds on the capital they had
19 invested into the company on an expedient basis.

20 Q. Could we pull up tab 3, please.
21 This is WFC0109163. Mr. Griffin, just have a look
22 at that and then just describe for the court, if
23 you could, the context in which this email was
24 sent.

25 A. Okay. So this was a response from

1 their financial advisor to the very first proposal
2 that we could put into the company.

3 Q. And what was the nature of that
4 proposal?

5 A. The nature of that proposal was
6 really one where we were trying to stage our
7 investment at West Face, such that we did not put
8 up a full 300 million dollars initially, that we
9 really stepped into a position of being in the
10 first instance creditors effectively stepping into
11 the shoes of the pre-existing providers of vendor
12 financing.

13 Q. Right.

14 A. Replacing them, taking away the
15 immediate pressure on the business that existed
16 from its pending maturity. We would then also
17 contemplate concurrently an equity investment but
18 not for a hundred percent of the outstanding
19 equity. It would have left VimpelCom in a position
20 of having a continued financial interest, albeit a
21 minority interest in the company, and we believed
22 that we could provide them with a means of
23 liquidity at a later stage.

24 Part of this was due to the fact that
25 the risk profile associated with the investment we

1 were making, if we went in as credit for a lesser
2 amount of money, was substantively different.

3 And the other factor we were trying to
4 control for was we knew that because the company
5 was burning money at the time and there were some
6 additional capital expenditure requirements in
7 front of us, we had to keep some powder dry to
8 allow us to or to facilitate that incremental
9 investment. So we were really trying to stage our
10 entry.

11 Q. So just to look at the substance
12 of the email then, this is you writing to Greg
13 Boland and then to numerous other people at West
14 Face?

15 A. That's correct.

16 Q. And can you just describe who
17 these people are, what this circulation list
18 represents?

19 A. Sure. So Peter Fraser, Tom Dea,
20 Greg Boland, Yu-jai Zhu and Alex Singh are all
21 individuals internal to West Face, members of the
22 deal team effectively involved in the Wind
23 transaction. The remaining individual, Patrick
24 Barry, was our external legal advisor on the
25 transaction, from Davies, Ward.

1 Q. And I'm not sure, I can't remember
2 if Justice Newbould would have heard this in
3 evidence so far. You describe yourself as one of
4 the partners of West Face. Who are the other
5 partners? Are they on this email?

6 A. All of the other remaining
7 partners are on that email, being Greg, Peter and
8 Tom.

9 Q. And who is Alex Singh?

10 A. He was our general counsel at the
11 time.

12 Q. And what position did Yu-jai hold?

13 A. He was a vice-president with the
14 company. Still with us.

15 Q. And so you say that VimpelCom
16 provided feedback on your proposal and it asked
17 that you amend the offer to simply contemplate a
18 purchase of 100 percent of their equity interest
19 for cash, they did not wish to have any rollover
20 equity participation in the business.

21 Do you recall who you had that
22 conversation with?

23 A. That would have been with a
24 combination -- well, that would have been expressed
25 through UBS Securities, with Jonathan Hirsch and

1 Francois Turgeon.

2 Q. And did you make a further
3 proposal in response to this feedback?

4 A. We did make another proposal.

5 Q. Tab 4. This is WFC0106772. So
6 you see the date is May 4th, that's two days after
7 the email we just looked at, and this is being sent
8 to Globalive Wireless Management Corp. So that's
9 Wind Mobile itself?

10 A. Yes.

11 Q. And it's being sent to VimpelCom
12 and we've talked about them?

13 A. Yes.

14 Q. And it's being sent to Global
15 Telecom Holdings SAE. Who were they?

16 A. That, I believe, is the legacy
17 company that had been set up under Orascom to hold
18 the interest in Wind.

19 Q. Okay. And just --

20 A. And so Orascom at that time was a
21 subsidiary under VimpelCom.

22 Q. That was my question. So
23 VimpelCom controlled GTH?

24 A. That's correct.

25 Q. And AAL Holdings?

1 A. That was the Lacavera company.

2 Q. Okay. Just to make sure we
3 covered it, we talked about the debt structure
4 earlier and you sort of alluded to the equity
5 structure. Can you just briefly describe what the
6 equity structure was of the ownership of Wind
7 Mobile at this time?

8 A. Sure. So VimpelCom indirectly
9 through Orascom effectively owned a one-third
10 voting interest and two-thirds economic interest in
11 the company. The Canadian group or the Lacavera
12 group, as you may refer to them, owned basically
13 the reciprocal interest. They owned a minority
14 one-third economic interest and two-thirds voting
15 interest.

16 Q. So if we flip over to page 2 of
17 this letter, and you see that paragraph, it says
18 the transaction would have two key elements?

19 A. Yes.

20 Q. So what was the basic structure of
21 this proposal?

22 A. Well, again, here we were trying
23 to tailor our initial investment with 200 million
24 of first lien debt financing to the company in the
25 form of senior secured notes and we appended a term

1 sheet outlining those terms.

2 And then we would make a follow-on
3 contribution or follow-on investment that was
4 contingent on certain outcomes occurring in the
5 future.

6 Q. Okay. And just under "Valuation
7 and Structure," what was the enterprise value that
8 was the basis for your deal?

9 A. Right. This was predicated on
10 enterprise value that was responsive to their ask
11 which was 300 million dollars Canadian.

12 Q. And in this offer did you ask for
13 any condition precedent that West Face obtain any
14 regulatory concessions from the government?

15 A. No. This wasn't based on, I call
16 it -- we understood that there would be regulatory
17 approvals required, which were part and parcel with
18 any transaction, including Industry Canada approval
19 and Competition Bureau approval, amongst others.
20 That was well understood to be a feature of this
21 transaction and many others that we looked at.

22 One of the things that we were very
23 concerned about for the company going forward was
24 that they have access to additional spectrum in the
25 future, and that was important insofar as ensuring

1 that the business could transition from a 3G
2 standard to LTE and that was only going to be
3 possible by being furnished that additional
4 spectrum in the future.

5 Q. We're going to come back and talk
6 about that in a little bit more length. If we
7 could flip over to page 4 of the document now,
8 please.

9 THE COURT: Just wait a second, please.

10 MR. MILNE-SMITH: Sorry, Your Honour,
11 do you have any questions about page 2 before we
12 move on?

13 THE COURT: No, I'm just making a note.
14 You're going a little fast for me, that's all.

15 MR. MILNE-SMITH: My apologies.

16 BY MR. MILNE-SMITH:

17 Q. So page 4 and then if we could
18 scroll down to the bottom, the section headed
19 "Conditions." You'll see that the second last
20 bullet there, Mr. Griffin, says:

21 "Receipt of any necessary or
22 desirable regulatory and
23 governmental approvals and third
24 party consents on terms satisfactory
25 to us."

1 Now, what sort of regulatory approvals
2 were you referring to there?

3 A. Sure. Well, those were the ones
4 that I just mentioned previously which was what we
5 understood to be requirement for Industry Canada
6 approval, Competition Bureau approval, and then
7 also when you work up the chain in terms of the
8 required shareholder approvals that would be
9 required, that would include obviously the Canadian
10 ownership group and I believe both the boards of
11 Orascom and VimpelCom as the case would have been
12 at the time.

13 Q. Did West Face ever speak to the
14 government about regulatory issues?

15 A. We did. We visited with Industry
16 Canada and made a presentation to them.

17 Q. Could we go to tab 5, please.
18 This is WFC0106480. And do you recognize this
19 presentation?

20 A. Yes, I do.

21 Q. And was this the presentation you
22 delivered to Industry Canada?

23 A. Yes, that's correct.

24 Q. Just skip ahead two pages to the
25 executive summary. Just before we get into the

1 details, could you just describe for me the purpose
2 of this presentation to Industry Canada?

3 A. Well, one of the principal
4 objectives here was to ensure that Industry Canada,
5 being one of the parties whose consent would be
6 required to consummate any transaction, we wanted
7 to go in there and basically introduce ourselves
8 very simply and try to convince them that we were a
9 counterparty who had the expertise and financial
10 wherewithal, and a Canadian-based investor for that
11 matter, who we thought would be a suitable
12 counterparty to own Wind if we were successful in
13 acquiring it.

14 Q. Why did the fact that you were
15 Canadian-based matter?

16 A. Well, clearly it had been an issue
17 historically in terms of establishing ownership of
18 Canadian telecom companies more generally, even
19 though some specific carve-outs had been created
20 that you referenced previously for small market
21 participants.

22 We thought it was a good and logical
23 step to have that dialogue with Industry Canada to
24 familiarize them with us.

25 Q. Okay. And just on this page,

1 point number 4 refers to West Face activity to
2 date, so I'd just like to walk through this so the
3 court can understand what you had done as of this
4 presentation.

5 Sorry, do you recall -- this is on the
6 cover page, it indicated May of 2014. Is that when
7 the presentation occurred?

8 A. Yes, that's correct.

9 Q. So as of May 2014, West Face
10 activity to date, it says you engaged two teams of
11 telecom consultants. Who are they?

12 A. Sure. So we engaged one of the
13 leading telecom consultants called Altman Vilandrie
14 based out of the United States. We also engaged a
15 local boutique consultancy run by two individuals
16 named Peter Rhamey and George Horhota.

17 We engaged Davies, Ward as our legal
18 counsel. And then we had also talked to two of the
19 major Canadian accounting firms, or international
20 firms I should say, about an engagement for a
21 quality of earnings review and accounting review
22 for the company.

23 Q. And what sort of work did the
24 teams of telecom consultants do?

25 A. It was quite expansive. We had

1 given them a list of questions that we wanted to
2 have answered before we stepped off the curb and
3 bought this company. Everything from an analysis
4 of the subscriber base that existed at the time,
5 the competitive pricing environment and competitive
6 dynamics in the Canadian market specifically and
7 how that might evolve in the future, an analysis of
8 the specifics of the pricing strategy that this
9 company was adopting in the market vis-à-vis not
10 only the other small market participants but also
11 the large incumbent firms in Canada.

12 We ultimately wanted to develop a
13 suitable financial forecast that we could predicate
14 our investment thesis on, and part of that was
15 trying to estimate when and to what degree this
16 company would turn from and under what conditions
17 they would turn from generating losses to levels of
18 sustained profitability.

19 We also had to estimate what the
20 additional spectrum requirements of this business
21 would be going forward, not only to support the
22 growth in the subscriber base, but also to support
23 the transition that we have discussed previously in
24 terms of the technical standards on which this
25 network was operating and how it was evolving.

1 Q. You referred to transition from
2 losses to profits and to spectrum requirements, so
3 that's a perfect segue if we could move to page 9.
4 Just scroll down a little bit more. There.

5 So you'll see that the third heading on
6 this page is "Wind appears to be at a favourable
7 inflection point operationally"?

8 A. Yes.

9 Q. Could you just explain that and
10 square that with your earlier testimony about
11 ongoing losses?

12 A. Sure. Well, as we viewed the
13 situation, we had an ultimate vendor in VimpelCom
14 who was selling the business at a very favourable
15 price, at a very inopportune moment for reasons
16 that weren't motivated by economics.

17 And the reason I say that is because
18 after years of losses and a billion five of
19 cumulative funding into the company, we knew the
20 business was within striking distance of having
21 enough subscribers, as one indicia of success, to
22 turn from years of cumulative operating losses to a
23 position of profitability.

24 And there was a few other things that
25 were happening concurrently through the course of

1 our diligence process that really strengthened that
2 belief. We had new developments in terms of tower
3 sharing and wholesale roaming that the CRTC had
4 been overseeing, that had a very positive impact on
5 all small market participants, but Wind
6 particularly.

7 We had two of the three new market
8 entrants, Public Mobile and Mobilicity, which had
9 really sort of, I won't say left the picture, but
10 their prior behaviour in terms of being antagonist
11 pricers in the market or discounters created a much
12 more rational pricing environment for Wind, and we
13 had seen the average revenues per user really
14 trough and start to move back upwards after those
15 small market entrants started to have less of an
16 influence in the market.

17 And we also started to see more
18 rational pricing behaviour from the incumbents, and
19 we believed that this company, as the incumbents
20 slowly raised prices, would always continue to
21 operate discounted service but would do it under an
22 umbrella where incumbent pricing rates were
23 increasing.

24 And so the last component of this was
25 we needed some clarity on what was going to happen

1 with AWS3 and the spectrum auctions. And the
2 Canadian government came out in short order, I
3 believe it was in July of that same year, this was
4 really the last thing we were waiting to see, and
5 said look, we know some of the factors that are
6 important to creating a sustainable fourth carrier
7 nationally in the country and we've heard loud and
8 clear that availability of additional spectrum is
9 key and we understand that a great set of
10 conditions for creating success would be to have
11 another set-aside auction.

12 And that's what they ultimately
13 delivered, was an AWS3 set-aside auction where Wind
14 was really one of the few remaining participants
15 that had the financial wherewithal to participate
16 as a bidder.

17 So you had this confluence of factors
18 all converging at once, and yet through the piece
19 the vendor never adjusted their price expectations,
20 and yet the certainty and our conviction in the
21 ability of this business to survive on its own as a
22 fourth market entrant just increased through the
23 period.

24 Q. Now, you referred to the --

25 THE COURT: Just a second. When you

1 talk about a set-aside auction, you are talking
2 about setting aside for new entrants apart from the
3 incumbents? Is that what you mean by that?

4 THE WITNESS: That's correct, yes.

5 BY MR. MILNE-SMITH:

6 Q. In fact, just on that point, Your
7 Honour, why don't we just pull up tab 9 right now
8 because it addresses this very point. So this is
9 WFC0109450.

10 It's a Government of Canada news
11 release titled "Harper Government to release more
12 valuable spectrum to strengthen competition in
13 Canada's wireless industry."

14 If you just go down a little bit, you
15 will see the date is July 7, 2014. To the best of
16 your recollection, is that when this new policy was
17 announced?

18 A. Yes, that's what I recall.

19 Q. And the paragraph there at the
20 bottom says:

21 "Today, the Government of
22 Canada took another step in
23 delivering for consumers by
24 unveiling details of a new spectrum
25 auction. Beginning next year, AWS3

1 spectrum licenses will be made
2 available to wireless companies.
3 AWS3 spectrum is ideal for
4 delivering fast, reliable service to
5 Canadians on the latest smartphones,
6 tablets and mobile devices."
7 Go down to the next page. Stop there.

8 So it says:

9 "Consistent with the
10 government's previous spectrum
11 auctions, the AWS3 spectrum auction
12 will have rules designed
13 specifically to put Canadian
14 consumers first. These include: A
15 large 30 megahertz block of spectrum
16 set aside for new operating
17 entrants."

18 Just so we're all clear on that, would
19 Rogers, Bell and Telus be able to bid on this
20 spectrum?

21 A. No, they would have been excluded
22 from that process.

23 Q. And what, if any, competition
24 would Wind have faced for that spectrum?

25 A. Well, we thought it was going to

1 be quite limited. Mobilicity could certainly have
2 participated, the estate of Mobilicity.

3 Q. Did Mobilicity ultimately
4 participate in the auction?

5 A. They did not, to our
6 understanding.

7 THE COURT: Well, I think they did. I
8 think they put in an initial bid and then they
9 didn't make the final bid.

10 THE WITNESS: That's correct. That's
11 correct, Your Honour. There was a deposit
12 requirement that had to be put up and, to the best
13 of my recollection, they did not meet the deposit
14 obligation.

15 There were a number of --

16 THE COURT: They put up the original
17 deposit, they put the initial deposit in to keep
18 themselves in the game, but when it came time to do
19 the bidding, in the end they didn't.

20 MR. MILNE-SMITH: Of course the court
21 is intimately familiar with the Mobilicity saga.

22 THE WITNESS: There were a number of
23 other small regional participants who could
24 certainly have participated in the process.

25 BY MR. MILNE-SMITH:

1 Q. Right.

2 A. I believe at the time Public
3 Mobile or the new owners of Public Mobile were
4 likely not precluded from participating.

5 But suffice to say we thought the range
6 of participants that would provide, you know, any
7 sort of fierce competition to us and in the
8 quantity of spectrum we were looking to acquire was
9 quite limited, and consequently we didn't know but
10 we certainly hoped that the spectrum would be
11 acquired at, you know, in a perfect world, the
12 reserve price that had been established by the
13 government.

14 Q. And when it came time, when push
15 came to shove, were you able to acquire spectrum?

16 A. Yes, we were.

17 Q. And at what price?

18 A. Effectively without getting into
19 the minutia, basically at or near the reserve price
20 that was established.

21 Q. Once this spectrum issue had been
22 dealt with, did West Face believe the business of
23 Wind Mobile needed any further regulatory
24 concessions to be viable?

25 A. We were never looking for

1 concessions. I mean, that was not what this
2 investment was predicated on at any point in time.

3 Q. And you described earlier, when we
4 were looking at the presentation made to Industry
5 Canada why you thought the business was at a
6 positive inflection point, with all the benefit of
7 hindsight now, how did your projections fare?

8 A. Quite accurately during the period
9 of our ownership. In the first year of our
10 ownership -- actually, let me backtrack. Before we
11 even closed the transaction --

12 THE COURT: I think what you're talking
13 about, you say we acquired, we closed, you're
14 talking about the consortium?

15 THE WITNESS: Yes, Your Honour.
16 Comparing our own internal projections at West Face
17 as against what the business actually produced, it
18 had -- actually before we closed the transaction,
19 it had stopped burning money at the EBITDA level so
20 it was producing neutral operating cash flow, and
21 we actually turned into a position of profitability
22 for the first time in the first 12 months under our
23 ownership. So that was a very material swing in
24 the performance of the business.

25 And then we also acquired this AWS3

1 spectrum at a price that met our most optimistic
2 expectations as to what we could acquire it for.

3 BY MR. MILNE-SMITH:

4 Q. At any time between that first
5 conversation you described in November of 2013
6 right through until you closed the transaction or
7 the consortium closed the transaction in September
8 of 2014, did you or anyone at West Face believe
9 that Wind or the purchasers of Wind would need the
10 ability to sell Wind spectrum to an incumbent after
11 five years?

12 A. We did not.

13 Q. How could --

14 THE COURT: Just wait, please. Go
15 ahead.

16 BY MR. MILNE-SMITH:

17 Q. And, Mr. Griffin, you of course
18 wouldn't be aware of this because you haven't heard
19 any of the testimony given in this case, but since
20 it has been a point of controversy in this trial,
21 could you please explain to the court how you
22 thought that the consortium would be able to obtain
23 financing to acquire and then build out a network
24 for the company without a confirmed ability to sell
25 the spectrum to an incumbent without restrictions?

1 A. Well, I think we'd actually
2 established that fact right at the outset only
3 insofar as when we refinanced the original vendor
4 financing that was connected to Wind when we closed
5 the transaction, from the outset we had an arm's
6 length third party called Canyon Group, who is not
7 a member of the consortium and had no other
8 financial interest in the company, willing to
9 provide, if you will, a go-forward or exit facility
10 for this business under its new ownership
11 structure.

12 In addition to that, we were confident
13 that the network infrastructure that would be built
14 in the future, there was significant vendor
15 financing and bank financing available to the
16 company that was, in fact, put in place after we
17 acquired ownership that would have facilitated
18 those capital plans.

19 And so we never viewed this as being an
20 issue, the transferability of the spectrum. This
21 was a business that could stand on its own two feet
22 with the right ownership structure, the right
23 oversight from management. We knew this was a
24 business that would turn into a solid business and
25 a credit that arm's length parties would be willing

1 to underwrite.

2 Q. And you said that you refinanced
3 the original vendor financing that was connected to
4 Wind. That was the 150 million that you talked
5 about before?

6 THE COURT: You have to keep watching.
7 I'm trying to make a note here. If you want me to
8 follow this, don't just keep looking down at your
9 notes and turn on the wheel.

10 Go ahead.

11 BY MR. MILNE-SMITH:

12 Q. So in your last answer, Mr.
13 Griffin, you referred to refinancing the original
14 vendor financing that was connected to Wind. That
15 was the 150 million we talked about earlier?

16 A. Yes, that's correct.

17 Q. And when did you obtain that
18 commitment, roughly?

19 A. It would have been contemporaneous
20 or -- well, shortly before the closing. We walked
21 into the closing of this transaction with that
22 commitment in hand.

23 Q. Now, we talked earlier about
24 spectrum and the availability of the set-aside
25 auction. Can you briefly describe to the court why

1 that spectrum was needed or why it mattered?

2 A. Sure. The handsets that the
3 company was using --

4 Q. Sorry, the handset, that means?

5 A. The actual telephone units or
6 mobile devices themselves were operating on a 3G
7 wireless standard on AWS1 spectrum. The reason
8 that was the case was that one of the largest US
9 mobile carriers, T-Mobile, had adopted this
10 standard in the United States.

11 The problem going forward was that if
12 that large US carrier moved off of that standard,
13 and they had publicly discussed the fact that they
14 would, and that they would be moving to an LTE
15 system and that the handset inoperability would be
16 an issue for anyone on the old 3G standard on AWS.
17 There was no standing still in this business.

18 The cell phone manufacturers themselves
19 would never manufacture units that were specific to
20 the standards that had been adopted by a small
21 market participant like Wind, and as a consequence
22 of that, we cannot presuppose that we could just
23 continue to operate indefinitely on that standard
24 on those handsets. We had to really transition
25 over as the industry standards changed and evolved.

1 As a consequence of that, the spectrum
2 was an absolute necessity as one piece of the
3 puzzle.

4 The other piece being the rollout of
5 additional network infrastructure to support the
6 standard and the growth of the customer base.

7 Q. What would additional spectrum
8 allow you to do?

9 A. Well, the additional spectrum
10 would include -- well, really very simply this was
11 about improving the quality of the customer
12 experience with the handsets. Everything from
13 signal propagation within the network, reducing
14 dropped call frequency, improving the extension of
15 the network's service area, the speed of delivery,
16 particularly of data, not so much voice but rather
17 data, all of these were necessary components to
18 improving the customer experience with Wind.

19 Q. So tab 7, please. This is
20 WFC0106765. It is another letter from West Face
21 dated June 3rd, 2014 now. And I'd like to go down
22 to the bottom of the page, actually over to the
23 carry-over paragraphs, so maybe we can bridge pages
24 1 and 2.

25 You see the paragraph starting at the

1 bottom to summarize, it says:

2 "Our new proposal for the
3 transaction is as follows.

4 1. The West Face funds would
5 provide bridge financing to be
6 funded 14 days from the date of your
7 signing of this letter, allowing you
8 to repay the company's existing
9 vendor debt.

10 2. We would enter into a share
11 purchase agreement contemporaneously
12 with funding this bridge loan for
13 deferred contingent consideration of
14 \$100 million, payable on our
15 obtaining sufficient spectrum within
16 12 months to support the company's
17 LTE rollout strategy..."

18 And just pausing there, is that the
19 issue we were just discussing?

20 A. That is correct.

21 Q. And:

22 "3. The West Face funds would
23 be responsible for funding the
24 company's working capital after
25 funding of the bridge loan."

1 A. Yes.

2 Q. So just to pause there to make
3 sure we've got the chronology right, because we've
4 jumped around a little bit, this letter is dated
5 June 3rd, 2014 and the announcement of the
6 set-aside spectrum came later, on July 7th, 2014,
7 correct?

8 A. That is correct.

9 Q. So was this offer acceptable to
10 VimpelCom?

11 A. No, this also was not acceptable
12 to VimpelCom.

13 THE COURT: Can I just ask you a
14 question. The bridge financing that you're
15 proposing here would be in what amount?

16 THE WITNESS: That was to take out the
17 entirety of the vendor financing.

18 THE COURT: So 150?

19 THE WITNESS: It was a little bit more
20 than that at the time.

21 THE COURT: So this proposal then was a
22 little in excess of 250?

23 THE WITNESS: That is correct. If I
24 could just add as well, by this time --

25 BY MR. MILNE-SMITH:

1 Q. Yes?

2 A. -- the vendor financing was in
3 fact technically in default or forbearance. They
4 were in a forbearance period with the vendors and
5 so this was an acutely important issue for the
6 company to solve in terms of the debt.

7 Q. So let's then look at VimpelCom's
8 response at tab 8. This is WFC0058252. And it's
9 an email from Francois Turgeon at UBS, who I think
10 you said already was the investment bankers for
11 VimpelCom, correct?

12 A. Yes, that's correct.

13 Q. And it's sent to you?

14 A. Yes.

15 Q. So this is June 10th and he says:

16 "Tony, the delayed settlement
17 feature you proposed does not work,
18 for VimpelCom has the objective
19 still a clean exit at \$300 million
20 EV. My client is not prepared to
21 have any portion of the proceeds
22 contingent on a future event, in
23 this case the acquisition of
24 spectrum."

25 A. Yes.

1 Q. Did VimpelCom ever waver from this
2 position, being that they wanted a clean exit at
3 300 million? Did they ever waver from that
4 position in their discussions with West Face?

5 A. At no point did they waver on that
6 issue.

7 Q. Now, just take a moment for a
8 quick aside here. We're in June of 2014. What
9 awareness, if any, did you have of other potential
10 bidders for Wind Mobile?

11 A. Well, there had been a significant
12 amount of press speculation as to who may be
13 involved or who may be coming back that might have
14 been previously involved. There was a whole series
15 of names that were battled around in the papers.
16 Verizon Communications was one. The Tennenbaum
17 group, given their involvement as one of the
18 holders of the vendor financing which they had
19 acquired through the secondary market was my
20 understanding.

21 Q. Right.

22 A. Birch Hill, a private Canadian
23 equity group. We knew the incumbent firms, if they
24 thought there was a way to wrest control of this
25 business, would certainly love to own it but that

1 seemed to be a bit of an impossibility given the
2 legislative backdrop.

3 Q. And did you have any understanding
4 as to whether Catalyst might potentially be
5 interested?

6 A. We had -- you know, there was
7 press discussion of their potential involvement in
8 both Mobilicity and Wind going back to 2013, I
9 believe was the first time we saw any mention of
10 it, where one of the principals of the firm had
11 been discussing the possibility of combining
12 Mobilicity and Wind into a large fourth national
13 carrier.

14 Q. Tab 15, please. This is
15 WFC0068142. And if we could go to the bottom of
16 this email string on page 2, so this is an email
17 from you, Mr. Griffin, to Anthony Lacavera on June
18 the 4th of 2014 and you see you ask him:

19 "What is your change of control
20 payment under a Catalyst or
21 Tennenbaum deal - i.e. what do we
22 have to work with in our bid? Is it
23 a fixed number if you have a
24 negotiated deal?"

25 Were you asking Mr. Lacavera about the

1 terms of a Tennenbaum or Catalyst deal with
2 VimpelCom?

3 A. What I was asking about was the
4 terms of a deal that the Canadian management group
5 had mentioned in our dialogue that they had
6 understood or had structured with VimpelCom. Our
7 understanding was effectively that regardless of
8 what value the business traded for, if it traded to
9 a third party buyer, that there was some minimum
10 threshold consideration that VimpelCom would
11 provide the Canadian management group for providing
12 their consent or support to the transaction.

13 Q. When you say the Canadian --
14 sorry. When you say the Canadian management group,
15 who do you mean by that? Which company?

16 A. This would be AAL and chiefly --
17 chiefly the principals, Mr. Lockie, Mr. Scheschuk,
18 Mr. Lacavera, amongst others.

19 Q. Okay. So just so I make sure I
20 understand your answer, you were asking about the
21 terms of an agreement between AAL or its principals
22 in VimpelCom?

23 A. That's correct.

24 Q. If we could then go up to page 1.
25 Stop there. So we just skipped past an email where

1 Mr. Lacavera asked about what would be a good time
2 to talk and you replied back and say:

3 "Tony, I think it might make
4 the most sense for us to pick up the
5 conversation with the Tennenbaum
6 group and discuss the possibility of
7 joining that syndicate. We're not
8 going to be able to better them on
9 value and I think theirs is the only
10 real proposal in front of the
11 company outside of ours - Catalyst
12 seems to be a lot of air."

13 What did you mean by that, "Catalyst
14 seems to be a lot of air"?

15 A. Well, I guess, to put it in
16 layman's terms, for all the smoke and discussion
17 about their potential involvement, we had nothing
18 to substantiate that they were there, that they
19 were serious or credible. I didn't know.

20 Q. Now, just to jump ahead in time,
21 we've looked at Mr. Turgeon's email where he talked
22 about a clean exit at 300 million EV. Do you
23 recall that?

24 A. Yes.

25 Q. And what did your winning offer or

1 the consortium's winning offer ultimately provide
2 in relation to what Mr. Turgeon described as
3 VimpelCom demands?

4 A. Well, in short strokes we met that
5 requirement. In fact, the initial consideration
6 was a little bit less than that and we had a
7 commitment to follow up that initial investment
8 with additional working capital support by the
9 consortium, effectively I'd call it almost
10 back-stop equity, to make sure that the business
11 was sufficiently funded.

12 Q. And was --

13 THE COURT: Once you acquired the
14 company, the working capital support would be
15 irrelevant to VimpelCom. Did you say you met the
16 300 or was it a little bit less than the 300?

17 THE WITNESS: The initial purchase
18 price, as I remember, was 285 million as split
19 between the debt and equity. But the total
20 financing commitment that the consortium had
21 provided was -- provided for additional equity
22 support into the business, and that was an
23 important condition, as you rightly cite, perhaps
24 not so much for VimpelCom, but rather for the
25 business itself, the management and for the

1 consortium members.

2 BY MR. MILNE-SMITH:

3 Q. Was Mr. Turgeon's email that we
4 just looked at the only time that UBS and VimpelCom
5 expressed a desire for a clean exit?

6 A. No, we finally got the message and
7 they never wavered in that desire, neither value
8 nor the terms of the exit.

9 Q. Let's just look at one further
10 example of that. Tab 10, please. Scroll down to
11 the bottom of the page, please. Do you have that,
12 Your Honour?

13 THE COURT: I do.

14 BY MR. MILNE-SMITH:

15 Q. So this is an email from Francois
16 Turgeon on June 23rd now and he says:

17 "This mark-up is really not
18 helpful as it seems to be completely
19 redoing the SPA or starting with the
20 form your lawyers have put together.
21 As discussed on Friday, our client
22 is looking for a clean exit on as-is
23 basis with an SPA very close to what
24 we have sent you. As we told you,
25 this is a competitive process and

1 others are further advanced on their
2 due diligence and have provided a
3 much lighter mark-up to our form of
4 SPA."

5 So, let's turn then to tab 14, just to
6 see what Mr. Turgeon was talking about. So this is
7 WFC -- sorry, Your Honour, tab 14.

8 THE COURT: Go ahead.

9 BY MR. MILNE-SMITH:

10 Q. WFC0075344. And Mr. Turgeon was
11 asking for an SPA very close to what we have sent
12 you. What is this document that I have just
13 brought up?

14 A. Well, when we received the, I
15 guess, common form of SPA from UBS, we went back to
16 our legal advisors at Davies and talked about the
17 document, and their opinion was that it was so far
18 off-base to what we actually needed, why don't we
19 just start with, you know, a sort of common
20 template draft share purchase agreement from the
21 Davies people, skinny it down to a very minimal set
22 of reps and warranties and other conditions and
23 send it back to them in the hopes that we could
24 start with that document.

25 I believe when we did that, UBS asked

1 us to black-line the document to that original
2 common form of SPA that they had sent out to
3 parties, and I believe that's what you've got in
4 front of us here, is that black-line.

5 Q. Sorry, let's just be -- so I'll
6 tell you this isn't a black-line. So you see this
7 is dated May 9th. Do you recall who had drafted
8 this document? Was it a VimpelCom document or a
9 West Face document?

10 A. This -- can you just scroll
11 through it so I can see it. All right. This would
12 have been our document because it included a set of
13 reps and warranties.

14 Q. Hang on a second. Go to section
15 7.3, please, which is on page 32. Stop there.

16 A. I'm sorry, okay.

17 Q. Do you recognize that provision?

18 A. Yes. Sorry, this was the SPA that
19 was provided by -- well, by VimpelCom effectively
20 through UBS.

21 THE COURT: The file reference at the
22 bottom of every page is WS Legal. Who is WS Legal,
23 does anybody know?

24 BY MR. MILNE-SMITH:

25 Q. Do you know?

1 A. I don't know the answer to that.

2 MR. MILNE-SMITH: I can advise the
3 court it's not Davies, Ward.

4 BY MR. MILNE-SMITH:

5 Q. Just to make sure we're all on the
6 same page now, I think you just said this was the
7 VimpelCom draft, correct?

8 A. That's correct.

9 Q. Okay. And we've talked before
10 about regulatory approval conditions. Is that what
11 we're looking at here in 7.3?

12 A. Those were the two chief
13 conditions that I think everyone understood have to
14 be fulfilled, being Competition Act approval and
15 Industry Canada approval.

16 Q. So based on this draft and your
17 communications with UBS about using their form that
18 we just looked at, did you have an understanding
19 about whether any competing bid would similarly
20 contain a condition of regulatory approval like the
21 one found here at 7.3?

22 A. It would be impossible that it
23 wouldn't contain that condition. It was a
24 necessity.

25 Q. Why is that?

1 A. Well, I think it had been well
2 established in almost any telecom transaction that
3 you looked at in the Canadian market that Industry
4 Canada certainly had an ability to determine, you
5 know, transfer of licenses to a successor
6 purchaser, and similarly the Competition Bureau had
7 an ability to opine on whether the transaction
8 would positively or negatively impact competition
9 in the wireless industry in Canada. There was
10 never any doubt.

11 Q. Moving forward in time, did you
12 eventually learn that another party had gone into
13 exclusivity with VimpelCom?

14 A. Yes, we had been informed of that.

15 Q. And did you know who it was?

16 A. At the time we had been guessing
17 as to who it was. There were theories as to who it
18 was. I don't think we, you know, ever knew
19 definitively. Our supposition was, though, that
20 Catalyst was the party in exclusivity with
21 VimpelCom.

22 Q. And do you recall or did you
23 eventually learn when Catalyst's exclusivity period
24 ultimately expired?

25 A. We did. I think that was

1 communicated through UBS and I believe the original
2 date was the 18th of August.

3 Q. Did West Face ultimately
4 participate in an offer to VimpelCom during
5 Catalyst's period of exclusivity or during the
6 period of exclusivity that you guessed was
7 Catalyst?

8 A. Yes, we submitted an offer.

9 Q. Didn't that breach the
10 exclusivity?

11 THE COURT: When you say "we," you're
12 talking about the consortium, aren't you?

13 MR. MILNE-SMITH: The consortium, yes.

14 THE COURT: The question was West Face.

15 MR. MILNE-SMITH: I apologize.

16 THE COURT: I think I know what you're
17 talking about.

18 THE WITNESS: Yes, that consortium of
19 bidders submitted a proposal.

20 BY MR. MILNE-SMITH:

21 Q. And were you permitted to do that
22 during the period of exclusivity?

23 A. We understood there would be no
24 constraints insofar as what we were able to do in
25 that process. We had seen it done frequently. We

1 were not bound by that agreement.

2 Q. Could we go to tab 12, please.

3 THE COURT: Go ahead.

4 BY MR. MILNE-SMITH:

5 Q. This is WFC0040932. You see the
6 letterhead refers to Tennenbaum Capital Partners,
7 West Face Capital Inc. and LG Capital Investors
8 LLC?

9 A. Yes.

10 Q. Was that the consortium as it
11 existed at that time?

12 A. Yes, that's correct.

13 Q. And the date of this offer is
14 August 7th, 2014, correct?

15 A. Yes.

16 Q. You see the third bullet on this
17 page says:

18 "Our offer is not subject to
19 any regulatory, financing, diligence
20 or any other conditions that are
21 outside the control of the parties
22 to this transaction."

23 Now, you had just told me in looking at
24 draft VimpelCom SPA that regulatory approval was a
25 requirement of any deal, so how were you able to

1 make this offer not subject to any regulatory
2 condition?

3 A. So this was predicated effectively
4 on a transaction whereby the consortium would step
5 into the shoes of VimpelCom as shareholder and
6 effectively purchase their position in the company
7 as they requested on an as-is/where-is basis, with
8 limited conditionality, and we would assume their
9 one-third voting and majority economic interest for
10 a period of time and basically allowed them to make
11 a clean exit from the business.

12 As a consequence of that transaction
13 and given the fact that management that controlled
14 the company was not being affected in our view just
15 by virtue of purchasing their share interest, we
16 had the view and our advisors had the view that
17 that first stage of the transaction didn't require
18 the regulatory consents that would otherwise be
19 required in the prior deals we had contemplated.

20 Q. Now, in your answer you just
21 referred to the first stage of the transaction.
22 Was there a subsequent stage?

23 A. Yes, there was a share
24 reorganization, in fact, as a second stage.

25 Q. And was regulatory approval

1 required for that stage?

2 A. Yes.

3 Q. And what exactly did you do with
4 this share reorganization?

5 A. Well, effectively we restruck the
6 ownership such that the Canadian management
7 contingent or Canadian ownership group stepped into
8 minority voting and economic interest and all the
9 parties ultimately went to voting interests that
10 reflected their proportionate share of the
11 investment in the deal.

12 So it was very much a pari passu voting
13 structure, if you will.

14 Q. Do you recall how long it took you
15 to obtain that regulatory approval?

16 A. I believe start to finish it was
17 approximately six weeks.

18 Q. So we've talked before about
19 VimpelCom's desire for a clean exit on an as-is
20 basis. How did this August 7 proposal address that
21 desire?

22 A. Well, for them I think it was a
23 pretty elegant solution. They got a cheque, they
24 washed their hands of the business. The release of
25 proceeds was contingent only on the consortium

1 providing the funding. They had no further
2 financial support that they would have to make to
3 the business. They really just washed their hands
4 of it and walked away.

5 Q. As of the date of this offer on
6 August the 7th, did you have an understanding of
7 how West Face and the other consortium members were
8 perceived by VimpelCom at the time?

9 A. Well, I can only speak insofar as
10 our impression of West Face insofar as VimpelCom
11 was concerned. We had had a whole series of false
12 starts, proposals that had sought to do something
13 different than what they were requesting insofar as
14 an exit was concerned, and I believed at the time
15 that if they couldn't find a buyer for the business
16 they were quite determined to just file the company
17 for CCAA protection as their best alternative.

18 And I think they doubted, given the
19 history and the time that elapsed since we started
20 discussions with them, that we would necessarily
21 get to the finish line.

22 Q. And how did that understanding
23 affect your strategy?

24 A. Well, we knew that we had to put
25 up something that was, you know, very concrete,

1 that addressed their requirements in terms of an
2 expedient exit, and whereby the complication of the
3 regulatory aspects of this transaction and the time
4 that may be required to wait for approval and the
5 question of who was funding or bridging that
6 business during the period, I think they were just
7 so fatigued with the whole situation we really
8 wanted to try to shoulder a bit more of that
9 burden.

10 THE COURT: Do I understand what you
11 said a few minutes ago, the two stages, the first
12 one was you and your advisors didn't think you
13 needed regulatory approval; the second stage, the
14 share reorganization, you did. Was the offer to
15 VimpelCom conditional at all upon approval of the
16 second stage or was that just a risk you took?

17 THE WITNESS: That was a risk that we
18 assumed, Your Honour.

19 THE COURT: Thank you.

20 BY MR. MILNE-SMITH:

21 Q. And if you can remember, whose
22 idea was this structure?

23 A. Well, it didn't emanate with us.
24 This was something that had been floated as an idea
25 at one point in time, and I think ultimately came

1 back to us as a proposal from Larry Guffey in a
2 discussion with Michael Leitner at Tennenbaum
3 Capital as being a fairly elegant solution.

4 Q. Let's talk then about Brandon
5 Moyse for a little bit. So switch gears here.

6 THE COURT: Would this be a good time
7 to take the afternoon break for 15 minutes?

8 MR. MILNE-SMITH: Sure, of course, Your
9 Honour.

10 -- RECESS AT 3:25 --

11 -- UPON RESUMING AT 3:49 --

12 BY MR. MILNE-SMITH:

13 Q. Sorry, Mr. Griffin, before we move
14 on to Brandon Moyse, just using the document we
15 have up here, which again for the record is tab 12
16 of my cross-examination binder, or examination
17 in-chief binder, document WFC0040932, see the first
18 bullet point that's listed here says:

19 "The purchase price for
20 VimpelCom's interest will be \$135
21 million. Our proposal contemplates
22 that AAL Holdings Corp. and Anthony
23 Lacavera will waive their rights to
24 any fees or payments to which they
25 may be entitled in connection with

1 the sale of GIHC/GWMC - the net
2 proceeds to VimpelCom will be the
3 full \$135 million pursuant to the
4 purchase agreement."

5 What's that referring to there? What
6 are they waiving?

7 A. This is what I was referring to
8 previously insofar as a consent or support fee was
9 concerned on the order of 15 million dollars, and
10 so in effect instead of paying VimpelCom 150
11 million dollars, we pay them a net 135 and have the
12 Lacavera group or AAL effectively participate in
13 the consortium investment going forward.

14 THE COURT: I thought the price was
15 around 300 million?

16 THE WITNESS: Yes, so to --

17 THE COURT: That was the enterprise
18 value and this is just VimpelCom's interest?

19 THE WITNESS: Yes, that is correct.

20 THE COURT: Thank you.

21 THE WITNESS: I could try to explain
22 the difference. If you take the 135, add the 15
23 million dollars of consent payments to get to 150,
24 and then add in the debt value, which was roughly
25 150, that corresponds to the 300 million you're

1 referencing.

2 BY MR. MILNE-SMITH:

3 Q. So under your proposal is
4 VimpelCom going to have to pay anything to AAL and
5 Anthony Lacavera?

6 A. No, they would not.

7 Q. Okay. And under the previous
8 agreements like their draft share purchase
9 agreement that they sent you, that we looked at,
10 the May 9th one, would they have had to pay
11 VimpelCom -- sorry, would they have had to pay AAL?

12 A. That's our understanding of what
13 Mr. Lacavera communicated with us, is that there
14 was a minimum consent payment regardless of what
15 the transaction value was that provided a minimum
16 condition, if you will, in terms of value that
17 would flow to them.

18 Q. So you're just cutting out the
19 middleman?

20 A. Correct.

21 Q. So let's talk about Brandon Moyse
22 then. As I understand it, the hiring process for
23 Mr. Moyse took place over sort of March to May of
24 2014. Why was West Face looking to hire someone at
25 that time?

1 A. We had started a new credit
2 investment fund called the alternative credit fund,
3 and we needed someone who had particular experience
4 in all forms of credit, but we also needed
5 additional analyst resources generally, and so the
6 intention was to hire individuals who would be able
7 to assist with the analysis of investments for this
8 alternative credit fund.

9 Q. And did you have any involvement
10 in the hiring of Mr. Moyse?

11 A. I interviewed him but it was
12 chiefly my partner, Tom Dea, who was responsible
13 for the hiring process.

14 Q. Do you recall roughly how long
15 your interview with Mr. Moyse took?

16 A. It was between 15 and 20 minutes.

17 Q. And what do you recall, if
18 anything, discussing with him?

19 A. We talked about his educational
20 background, we talked about the training that he
21 had received at some of the large, one in
22 particular, US investment firm that he looked at,
23 which I believe was Credit Suisse. We talked
24 generically about what his interests were going
25 forward and why he wanted to make a change.

1 Q. Did you discuss any specific
2 files, mandates, companies or opportunities he
3 worked on at Catalyst, specifically identifying the
4 names of the entities involved?

5 A. We did not.

6 Q. Did you discuss Wind Mobile or the
7 telecom industry with Mr. Moyse?

8 A. No, I did not.

9 Q. How can you be so sure?

10 A. The subject never came up.

11 Q. Did you support the hiring of
12 Mr. Moyse?

13 A. I did.

14 Q. Do you recall ever expressing any
15 concerns about his hiring during the process?

16 A. Yes. At one point he had
17 circulated some writing samples or memos that he
18 had put together and I believe these originally
19 came to my partner, Tom Dea, and they were
20 circulated within the firm to -- well, I don't
21 remember the distribution list but certainly I
22 received a copy.

23 And I was concerned about the fact that
24 some of this information was marked private and
25 confidential and I raised this concern with

1 Mr. Dea.

2 Q. Tab 13, please.

3 THE COURT: Go ahead.

4 BY MR. MILNE-SMITH:

5 Q. This is WFC0109149. How does this
6 email relate to the evidence you just gave me?

7 A. Well, the original email that my
8 partner Tom sent reflected his ongoing discussions
9 with Mr. Moyse, and I emailed him here on April
10 24th raising the concerns I have just enumerated
11 insofar as the memos that he sent to us, and I was
12 specifically concerned about albeit he was a young
13 person, he showed a bit of a lack of judgment in
14 terms of sending that information, and I didn't
15 know if -- nor was I willing to take a risk as to
16 whether the information was in fact private and
17 confidential.

18 But I certainly didn't want to take any
19 chances so I'm flagging the issue for Tom and
20 asking him to weigh in on that.

21 Q. Was it unusual for West Face to
22 request writing samples from a job applicant?

23 A. No, it was not. This is something
24 we frequently did.

25 Q. Why was that?

1 A. We wanted to see whether they had
2 an ability to string together a coherent sentence
3 in a very basic basis, because part of the
4 investment process that we run through involves
5 circulating memos to our limited partners and
6 internal members of our Investment Committee, and
7 that's certainly one of the jobs that someone like
8 Brandon would be responsible for.

9 We will also frequently give them
10 specific projects as a test of their ability to
11 analyze a company, do things like basic modelling,
12 presentation, and understanding how to pull
13 together the structure of a memo.

14 Q. You expressed these concerns to
15 Mr. Dea but you've already indicated you did
16 support his hiring. Could you just explain why you
17 were willing to hire him in spite of the concern
18 you expressed?

19 A. Well, I don't think there was any
20 malicious intent. Clearly he made a mistake, but,
21 you know, I think it was an honest mistake. I
22 don't think, again, there was any malicious intent.
23 I felt it incumbent upon myself to point out this
24 issue and ask Tom to speak with our general counsel
25 as well.

1 And I also said, you know, if we do
2 hire him, we have to have an express discussion
3 with him before he's hired about issues of
4 confidentiality and handling of information because
5 this is something we understand to be important,
6 but I didn't think it was something that he should
7 be hung on, if you will.

8 Q. And are you aware of whether West
9 Face took any such steps once it decided to move
10 ahead with hiring Mr. Moyse?

11 A. I understand Tom Dea spoke to
12 Mr. Moyse directly.

13 Q. Yes.

14 A. And there was also subsequent
15 discussion, or discussions, excuse me, of similar
16 nature with our chief compliance officer, Supriya
17 Kapoor, and our general counsel, Alex Singh, all
18 roughly along the same lines.

19 Q. Do you have any understanding as
20 to what they said to him?

21 THE COURT: Why is that helpful? It's
22 complete hearsay.

23 MR. MILNE-SMITH: Fine, Your Honour.

24 BY MR. MILNE-SMITH:

25 Q. Speaking of the writing samples

1 attached to the March 27th email, did you review
2 them?

3 A. I opened one of the documents.

4 Q. And do you remember what it was
5 about?

6 A. I remember the name on the
7 document being Homburg, and in the header of the
8 document there was the confidential moniker
9 attached to it and I didn't get much further than
10 that before emailing Mr. Dea.

11 Q. After Mr. Moyse had been hired,
12 did you become aware of any concerns raised by
13 Catalyst about his hiring?

14 A. There was a letter and contact
15 that we received from counsel to Catalyst and there
16 was a flag raised about concern with a telecom deal
17 and Brandon's or Mr. Moyse's involvement in that
18 file.

19 Q. And did West Face take any steps
20 in specific response to those concerns raised by
21 counsel to Catalyst?

22 A. We did. We established a
23 confidentiality wall with respect to the only
24 telecom investment that we were working on at the
25 time, which was Wind Mobile.

1 Q. And did you have any discussions
2 on the Wind deal team as to how to deal with that
3 ethical wall on a day-to-day basis?

4 A. Yes, at the outset our chief
5 compliance officer communicated to everyone in the
6 firm, particularly to the investment personnel, and
7 Mr. Dea also provided or asked for a sit-down with
8 all the investment personnel to discuss what it
9 meant in terms of establishing a confidentiality
10 wall and the rules that had to be adhered to in
11 connection with that.

12 Q. And what were those rules?

13 A. Effectively, you know, Mr. Moyse
14 would be completely precluded from any
15 conversations of any kind regarding Wind Mobile as
16 an employee of West Face, that we weren't to
17 discuss the file except behind closed doors with
18 the deal team, and that he wouldn't have access to
19 any of the West Face folders with any of the
20 supporting materials in connection with any of our
21 work on Wind Mobile.

22 Q. And did you abide by those
23 restrictions?

24 A. Yes, we did.

25 Q. Did you have any communications

1 with Brandon Moyse about Wind at any time?

2 A. No.

3 Q. To your knowledge did anyone else
4 on the Wind deal team or any West Face investment
5 professionals ever discuss Wind with Brandon?

6 A. No.

7 Q. Before, during or after his time
8 working at West Face, did you ever communicate with
9 Brandon about the telecom industry?

10 A. No.

11 Q. How can you be so sure?

12 A. I would recollect that
13 conversation if it occurred. I can tell you
14 definitively it did not.

15 MR. MILNE-SMITH: Thank you very much.
16 Those are my questions.

17 THE COURT: Thank you. Just before you
18 do, I don't know whether -- Mr. Centa, do you have
19 any questions for this witness?

20 MR. CENTA: No questions.

21 THE COURT: Thank you. Mr. DiPucchio?

22 MR. DIPUCCHIO: Thank you, Your Honour.

23 CROSS-EXAMINATION BY MR. DIPUCCHIO:

24 Q. Good afternoon, Mr. Griffin. You
25 had a discussion with your counsel just moments ago

1 about the investment memos that were sent by
2 Mr. Moyse to Mr. Dea on March 24th and -- sorry,
3 27th, I misspoke, and you said that those were sent
4 in response to a request for writing samples; is
5 that correct?

6 A. Yes, that's correct.

7 Q. And you said -- I just want to
8 correct something in terms of the chronology as you
9 stated it. I believe you said in relation to the
10 email that you looked at with Mr. Milne-Smith where
11 you were talking to Mr. Dea about the concern that
12 you had, I believe you said that you had just made
13 your way through one page of the Homburg memo, saw
14 that it was marked private and confidential, and
15 then stopped and emailed Mr. Dea. Was that your
16 evidence?

17 A. That's the best of my
18 recollection, yes.

19 Q. But you know, sir, that Mr. Dea
20 had forwarded those memos to you on the morning of
21 March 27th. Were you aware of that?

22 A. Yes.

23 Q. Okay. And, in fact, you
24 interviewed Mr. Moyse on April 15th; do you recall
25 that?

1 A. Yes.

2 Q. All right. So it's unlikely then,
3 I suggest to you, that you were first reading the
4 memos on April 24th, the morning that you emailed
5 Mr. Dea.

6 A. I don't know when he received the
7 original email.

8 Q. You don't know when who received
9 the original email?

10 A. Mr. Dea.

11 Q. No, no, you're not following me.
12 You received the memos from Mr. Dea on March 27th?

13 A. Yes.

14 Q. And you interviewed Mr. Moyse on
15 April 15th?

16 A. Yes.

17 Q. So I'm suggesting to you that you
18 weren't reading his so-called writing samples on
19 the morning of April 24th which was when you email
20 Mr. Dea to say don't we have a concern about the
21 internal memo?

22 A. Could you please bring up the
23 email that Mr. Milne-Smith --

24 Q. You want the email that you sent
25 to --

1 A. Yes, to Mr. Dea.

2 Q. -- to Mr. Dea. Mr. Milne-Smith
3 will have to help me out because they're not part
4 of my documents.

5 MR. MILNE-SMITH: Tab 15.

6 THE COURT: It's tab 13.

7 MR. MILNE-SMITH: Tab 13, yes.

8 THE WITNESS: Could you please repeat
9 the question?

10 BY MR. DIPUCCHIO:

11 Q. My question to you, Mr. Griffin,
12 is, and it was actually a suggestion, that your
13 evidence is incorrect in that you testified that
14 you were reading the Homburg memo and only got
15 about a page into it when you realized it was
16 marked privileged and confidential and then you
17 immediately emailed Mr. Dea and that's the email we
18 see here. That was your evidence.

19 A. Right. I spoke to Mr. Dea as well
20 in the intervening period and that's not reflected
21 in this email chain.

22 Q. All right.

23 A. This is a reiteration of that same
24 point.

25 Q. All right.

1 A. I'm not trying to confuse the
2 issue, sorry.

3 Q. Well, you have for me, so let's
4 break it down a little bit because I thought your
5 evidence was pretty clear but now you're saying it
6 was a conversation. So am I right that you would
7 not have been reading the Homburg memo on the
8 morning of April 24th? Your evidence was incorrect
9 in that regard?

10 A. I don't think I was ever asked a
11 question when I read the original memo. I was
12 trying to provide a chronology of when Tom received
13 the memos, when those were circulated, when I
14 originally brought up the concern with him, which
15 is verbally, and then the reiteration of the
16 concern in this email on April 24th. So I'm not
17 trying to be argumentative, I'm just trying to lay
18 it out to you as best I recollect it.

19 Q. That's fine. So let me take a
20 step back then. When do you say you read the memos
21 or at least the one memo?

22 A. It would have been shortly after
23 Tom circulated them. I don't have that specific
24 email in front of me.

25 Q. On or about March 27th?

1 A. Probably within a few days, yes.

2 Q. Do you want to look at the email
3 whereby Mr. Dea forwards the memos to you?

4 A. If you'd like to ask me a question
5 on it.

6 Q. Let me just find it quickly. Tab
7 1 of our folder, Your Honour, which you should have
8 on your iPad.

9 THE COURT: The other thing I want to
10 do, Mr. DiPucchio, I know you're not trying to be
11 unfair, but you put to Mr. Griffin that he had said
12 he read the first page, which wasn't my
13 recollection. What he did say in his evidence
14 in-chief, he said I remember the name on the
15 document being Homburg and in the header of the
16 document there was the confidential moniker
17 attached to it, and I didn't get much further than
18 that.

19 MR. DIPUCCHIO: That's fair, Your
20 Honour.

21 BY MR. DIPUCCHIO:

22 Q. So you never even read the first
23 page, you just looked at the first page?

24 A. That's correct.

25 Q. So here's the email, we have it up

1 on the screen now, it's WFC0075126, just for the
2 record, and we see the original email from
3 Mr. Moyse at the bottom part of the first page.
4 Correct, Mr. Griffin?

5 A. Yes.

6 Q. Then at the top Mr. Dea forwards
7 that on to Mr. Boland, Mr. Fraser, yourself and
8 Yu-jai Zhu?

9 A. Yes.

10 Q. And he forwards it on some hours
11 later, 10:28 a.m., correct?

12 A. Yes.

13 Q. Now, if you read the first page or
14 didn't read the first page, I apologize, looked at
15 the first page of the Homburg memo and had this
16 concern about confidentiality, did you raise that
17 at all in your interview with Mr. Moyse on the
18 15th?

19 A. No, I didn't speak to him about
20 it.

21 Q. It wasn't important enough for you
22 to raise with him?

23 A. No, it was a very important issue
24 and that's why I raised it with Mr. Dea and I asked
25 Mr. Dea to speak with our general counsel Alex

1 Singh at the time. So I'm not trying to deflect
2 the importance of the issue but I didn't feel it
3 incumbent upon me to bring it up in the interview
4 for no reason.

5 Q. Well, aren't you trying to assess
6 Mr. Moyse's character in this 15 or 20-minute
7 interview that you have with him on the 15th?

8 A. I would say that's a fair
9 component of it, yes.

10 Q. And yet part of that didn't
11 include mentioning to Mr. Moyse "By the way, you
12 sent out some memos to us that apparently were
13 marked privileged and confidential, you shouldn't
14 have done that"?

15 A. I did not bring it up with him.

16 Q. And --

17 THE COURT: Was that the 15th of April
18 when you sat down with Mr. Moyse? Was it the 15th
19 of April or May?

20 MR. DIPUCCHIO: I believe that's what
21 the witness said.

22 THE COURT: 15th of April?

23 THE WITNESS: Yes.

24 THE COURT: Thank you.

25 BY MR. DIPUCCHIO:

1 Q. I take it you and I can agree, Mr.
2 Griffin, that you obviously had a strong view that
3 Mr. Moyse ought not to have sent those memos to
4 anybody at West Face?

5 A. Certainly anything with a private
6 and confidential header on it gives rise to that
7 concern, yes.

8 Q. And from the West Face
9 perspective, you certainly would never want one of
10 your analysts, vice-presidents, partners, to
11 circulate investment memoranda to a third party?

12 A. Unless it was with our express
13 approval or pursuant to an NDA that covers those
14 parties, I would agree with that.

15 Q. It's just crystal clear in your
16 business, I take it, that an investment memoranda
17 is a confidential, proprietary piece of work; is
18 that fair?

19 A. Yes.

20 Q. And did you have any similar
21 concerns that you have expressed about Mr. Moyse
22 and his judgment in relation to the judgment that
23 your partner, Mr. Dea, had in circulating the
24 privileged and confidential memos internally to
25 your partners?

1 A. It's a difficult question for me
2 to answer because I don't know if Tom really
3 analyzed what was in the contents of this before he
4 sent it. But I know he shared the same respect for
5 confidentiality of information that we all do.

6 Q. Well, all right, I take your
7 answer. At the moment when Mr. Dea became aware
8 definitively that he had done so, let's say first
9 time that you brought it to his attention, right,
10 there were no steps taken thereafter to deal with
11 that breach of confidence by West Face; is that
12 fair?

13 A. No, I don't think that's fair. I
14 went to Tom and highlighted the issue for him. My
15 understanding, which would be corroborated by any
16 evidence that he could provide, is that he spoke to
17 our general counsel, Alex Singh, and Alex was made
18 aware of the issue.

19 So it's not that the issue was a small
20 one. It was one that I trusted Dea would deal with
21 appropriately and particularly our general counsel.

22 Q. But what you didn't do or what
23 anyone at West Face didn't do was actually take
24 steps to delete the confidential information that
25 you had improperly received. You didn't take that

1 simple step?

2 A. Well, I'm not sure how we could
3 delete it. It's effectively imbedded on our
4 servers.

5 Q. You're not sure how you can delete
6 or destroy a copy of a document that you have
7 received improperly?

8 A. No, I don't mean the act of just
9 deleting it. I mean permanently erasing it from
10 our servers, if that's what you meant.

11 Q. West Face has IT professionals on
12 staff, right?

13 A. I didn't feel it incumbent on me
14 personally to deal with this issue once our general
15 counsel had been informed of it. I trusted that he
16 would deal with it.

17 Q. So you washed your hands of it
18 once you had raised your concern?

19 A. I wouldn't say I washed my hands
20 of it. I remained concerned about it but I felt
21 the appropriate channels had been informed about
22 the issue.

23 Q. You didn't even take the simple
24 step of deleting it from your own computer?

25 A. When I was instructed to, yes.

1 Q. When was that?

2 A. I don't recollect the date. There
3 would probably be an email exchange with our
4 general counsel.

5 Q. All right. And do you agree with
6 me that at the time that you became aware, at
7 least, that this confidential information had been
8 improperly communicated to West Face, that nobody
9 at West Face reached out to Catalyst to tell
10 Catalyst that its confidential information had
11 found its way into your hands?

12 A. I don't know what steps Mr. Singh
13 took after our initial exchange.

14 Q. And you certainly didn't do
15 anything?

16 A. I did not personally, no.

17 Q. Without having looked at those
18 deal memos, were you able to evaluate then
19 Mr. Moyse's writing ability?

20 A. No, not with this. This was not
21 going to provide the content with which to do that.

22 Q. Did you ever subsequently receive
23 content from him with which to evaluate his writing
24 ability?

25 A. My understanding is that one of

1 the vice-presidents who interviewed Mr. Moyse had
2 given him an assignment which was meant to
3 effectively speak to some of those qualifications
4 and he followed up with him independently.

5 Q. Did you ever receive it?

6 A. I did not personally.

7 Q. Now, on May 30 -- you referred in
8 your evidence in-chief to some counsel letters that
9 were going back and forth so I want to take you to
10 the chain of correspondence. If we can turn up tab
11 2 in the cross-examination brief, Your Honour,
12 that's -- I'm just going to read out the document
13 number, CCG0018692.

14 And you should be looking, Mr. Griffin,
15 at a letter dated May 30, 2014 from my firm to,
16 amongst others, Mr. Boland. Correct?

17 A. Yes.

18 Q. And Mr. Boland is your CEO?

19 A. That's correct.

20 Q. And in the letter there's a number
21 of statements that are made about Mr. Moyse and his
22 employment?

23 THE COURT: Can I ask you why it was
24 sent to Mr. Hopkins?

25 MR. DIPUCCHIO: Mr. Hopkins at the time

1 was representing Mr. Moyse.

2 THE COURT: Thank you.

3 BY MR. DIPUCCHIO:

4 Q. And in the letter, one of the
5 statements that's made is that Moyse is in
6 possession of highly sensitive and confidential
7 information. Would you agree with me?

8 A. Sorry, the paragraph you're
9 referring to is which one?

10 Q. Turn to the next page, you see at
11 the top, sort of the first full paragraph:

12 "The information received and
13 generated by Mr. Moyse in his
14 capacity as an employee of CCGI was
15 highly sensitive and confidential."

16 A. Yes.

17 Q. And West Face was then provided
18 with a copy of a portion of Mr. Moyse's employment
19 agreement as it related to the duty of
20 confidentiality, and then further on down on that
21 page his non-competition covenant?

22 A. Yes.

23 Q. And you were aware of that?

24 A. I was not involved in this
25 correspondence until it was presented to me during

1 the examination process.

2 Q. All right. And in fact, this
3 wouldn't surprise you, in any event, because West
4 Face has very similar provisions in its own
5 employment agreements with its employees; is that
6 correct?

7 A. I'd say confidentiality clauses
8 are common. I do not know if we have
9 non-competition agreements in those employment
10 agreements as well.

11 Q. Okay.

12 A. I don't handle HR for our firm.

13 Q. At minimum, though, you are aware,
14 of course, that there were confidentiality
15 provisions?

16 A. Yes.

17 Q. And then if you go to the bottom
18 of page 3 of this letter, you're going to see a
19 paragraph right at the bottom of the page that ends
20 with the words:

21 "Moreover, our client is
22 concerned, reasonably in our view,
23 that Mr. Moyse has imparted..."

24 And then go over to the next page:

25 "...or will be imparting

1 confidential information to West
2 Face that he acquired in the course
3 of his employment with CCGI, thereby
4 causing irreparable harm to CCGI.
5 This confidential information
6 includes, but is not limited to,
7 current investment strategies of
8 CCGI..." et cetera, et cetera.

9 So were you aware at that time that the
10 position that was being taken on behalf --

11 THE COURT: Well, didn't the witness
12 say he didn't see this stuff until examinations?

13 MR. DIPUCCHIO: Yes, that's why I'm
14 asking if he was aware at that time.

15 BY MR. DIPUCCHIO:

16 Q. Were you aware at that time that
17 counsel for Catalyst was taking the position that
18 they were concerned that Mr. Moyse would be or may
19 have already imparted confidential information to
20 West Face?

21 A. I hadn't seen the correspondence
22 that's reflected here on the screen. I was aware
23 generally there was some issues with his hiring as
24 it pertained to non-competition. Beyond that, I
25 was not involved in any of the discussion or

1 dialogue about these issues.

2 Q. My question was a little
3 different. My question was were you aware as of
4 May 30th that counsel for Catalyst had taken the
5 position that Catalyst was concerned that
6 confidential information had been imparted by
7 Mr. Moyse or would be imparted by Mr. Moyse to West
8 Face? Were you aware that that was a concern on
9 May 30th?

10 A. No, I was not personally aware of
11 that.

12 Q. Nobody brought that to your
13 attention?

14 A. Not that specific issue, no. And
15 let me -- if I could expand on that. My
16 understanding at the time was it really pertained
17 to whether Brandon had to go on some form of garden
18 leave, if you will, as it's sort of commonly
19 referred to in the industry, and that's about all I
20 knew about the situation. I was not directly
21 involved in it whatsoever.

22 Q. All right, fair enough. Do you
23 agree with me -- well, the letter will speak for
24 itself, but I'm suggesting to you, Mr. Griffin,
25 that this letter doesn't refer at all to a telecom

1 deal. You would disagree? It says what it says.

2 THE COURT: Your statement is right, it
3 does speak for itself.

4 MR. DIPUCCHIO: Thank you, Your Honour.

5 BY MR. DIPUCCHIO:

6 Q. So whatever understanding you may
7 have had that the concern related around a telecom
8 deal, it didn't come from this letter?

9 A. No, there was another letter that
10 I believe was sent by Lax O'Sullivan as well that
11 raised the issue or originally a phone call that I
12 was informed of.

13 Q. Which one is it, a letter or a
14 phone call?

15 A. I don't know what predated,
16 whether the phone call was first or the letter was
17 first.

18 Q. Okay.

19 A. But I was informed of this by, I
20 believe, originally one of my partners.

21 Q. All right. And I want to take a
22 look at what the response is on behalf of West Face
23 to this concern that had been expressed by Catalyst
24 early on in the piece. So let's go to tab 4 of the
25 brief, and this is document CCG0018693, and what

1 we're looking at here, Mr. Griffin, is a letter
2 addressed to me by Dentons, or from Dentons,
3 rather, on June 3rd, 2014.

4 Do you recall that at the time your
5 lawyers were Dentons?

6 A. I was informed of the fact that
7 Dentons had been engaged.

8 Q. Okay. And do you know who engaged
9 Dentons on your behalf?

10 A. I don't. I would assume it was
11 our general counsel, Alex Singh.

12 Q. Were you aware that this letter
13 was being sent out?

14 A. No.

15 Q. And the letter --

16 THE COURT: What's the point? What's
17 the point? He didn't receive this letter. What's
18 the point of putting it to him?

19 MR. DIPUCCHIO: I'm just going to ask
20 him one little piece that's basically reflected in
21 the letter, Your Honour, and then we'll move on
22 from that, obviously.

23 THE COURT: All right.

24 BY MR. DIPUCCHIO:

25 Q. If you go to page 2 of the letter,

1 the comment is made at the top of the page:

2 "Notwithstanding the above, you
3 have provided no evidence to support
4 your allegation that your client has
5 suffered irreparable harm. Your
6 assertion that West Face induced
7 Mr. Moyse to breach his contractual
8 obligations to CCGI is similarly
9 baseless. In any event, West Face
10 has impressed upon Mr. Moyse that he
11 is not to share or divulge any
12 confidential information that he
13 obtained during his employment with
14 CCGI."

15 Did you know that that was the position
16 that was being taken by your lawyers at that time?

17 A. No, I haven't seen the letter.
18 Sorry, no.

19 Q. All right. And did you have any
20 knowledge or do you have any knowledge as to why
21 your counsel wasn't instructed to inform Catalyst
22 that you had received investment memos at that
23 point in time?

24 A. No.

25 Q. Then on June 5th, 2014, just to

1 close the loop on this little point, Mr. Moyse's
2 counsel responds. This is at tab 6 of the brief,
3 Your Honour. And I take it, Mr. Griffin, that you,
4 obviously, not having seen your own counsel's
5 letter, probably didn't see Mr. Moyse's counsel's
6 letter either?

7 A. No, I did not.

8 Q. All right. And did you know that
9 Mr. Moyse was taking the position that he hadn't
10 breached his confidentiality obligations at this
11 point in time?

12 A. I didn't have any knowledge of the
13 contents of this letter on any point, including
14 that.

15 Q. All right. Let's leave the
16 letters because apparently you weren't part of any
17 of the drafting of these letters or whatever
18 discussions may have occurred prior to sending the
19 letters, right? Is that fair?

20 A. That's fair.

21 Q. So you became aware, I take it, at
22 some stage that Catalyst wasn't satisfied with the
23 assurances it was being given with respect to the
24 protection of its confidential information in that
25 it threatened to move for an injunction to prevent

1 Mr. Moyse from coming to work for West Face. Did
2 you know that?

3 A. I remember a discussion of that
4 being raised, yes.

5 Q. And obviously West Face had taken
6 the position at that point in time that it wasn't
7 prepared to agree to any form of garden leave for
8 Mr. Moyse?

9 A. I honestly don't know what the
10 position was. Maybe if I could just explain, in
11 terms of my day-to-day function at the firm, other
12 than working with the analysts who we have on staff
13 and analyzing investments, I don't play any role in
14 the HR function of the firm, and any of this
15 communication and decisions with respect to whether
16 Brandon was retained immediately or whether there
17 was a waiting period, I have no knowledge of any of
18 this dialogue.

19 Q. But at the very least, you had had
20 a discussion with Mr. Singh where your concerns
21 were brought to the floor, right?

22 A. No, to go back to what I
23 originally said, I went straight to Mr. Dea and
24 asked that he speak to Mr. Singh.

25 Q. Okay.

1 A. I didn't go directly to Mr. Singh.

2 Q. And do you understand that Mr. Dea
3 had had that discussion?

4 A. To the best of my knowledge, yes.

5 Q. All right. So could we just turn
6 up tab 10 of the brief. I actually promised you I
7 wasn't going to go back to another letter but I do
8 want to take you to this one.

9 This is on June 19th now, which is
10 quite a bit after all of this has occurred, the
11 sending of the memos and your interview of
12 Mr. Moyse and your conversation with Mr. Dea and
13 all the rest, right? That had all occurred in
14 March and April; is that fair?

15 A. Yes.

16 Q. So in this letter this is your
17 counsel now basically writing to my firm and the
18 position taken in paragraph 2 is, reading from the
19 last sentence in that paragraph, Mr. Griffin:

20 "Your client has not provided
21 any evidence that Mr. Moyse has
22 breached any of his confidentiality
23 obligations to Catalyst."

24 Do you see that?

25 A. Yes.

1 Q. And you'll agree with me at
2 minimum that that's a misleading statement by this
3 point in time?

4 A. I'm not going to take a position
5 on it because I did not draft this letter.

6 Q. Well --

7 A. This came from Dentons.

8 Q. I appreciate you haven't drafted
9 the letter. We all heard that evidence. What I'm
10 asking you now is for your fair assessment based on
11 what you knew at that time as to whether that was a
12 misleading statement?

13 A. Well, I will agree with you that
14 the memos that we received which were marked
15 private and confidential, or at least the one that
16 I opened, gave rise to that concern. As to whether
17 we were in fact in possession of confidential or
18 material non-public information, I don't know
19 definitively because I didn't read the memos.

20 Q. Well, let's just take a step back
21 because are we going to get into a discussion now,
22 you and I, about what confidential information is,
23 because I thought you had agreed with me that by
24 your logic, investment memos were considered
25 confidential by West Face?

1 A. I'm not going to take a position
2 on it. I said I respected confidentiality of
3 information and I raised a concern to Mr. Dea when
4 I opened the memo and saw it was marked private and
5 confidential. It wasn't something that I was going
6 to take a risk on because there was no upside to it
7 and I went and informed Mr. Dea of that fact and
8 asked him to speak to our counsel.

9 I haven't seen this correspondence at
10 the time that Dentons has sent, so I don't know
11 what more you want me to say on the matter.

12 Q. All right.

13 A. I don't know the contents of the
14 memo so I'm not arguing with you about
15 confidentiality of information. That's not the
16 objective.

17 Q. What I want to understand from
18 you, just so we don't continue to have this debate,
19 is I understood your evidence to be that it really
20 doesn't matter what the contents of the memos are,
21 your understanding is that any investment research
22 that your firm does is confidential vis-à-vis your
23 firm?

24 A. Yes.

25 Q. Right? So the content doesn't

1 matter, it's the analysis that's confidential?

2 THE COURT: I'm not sure where all this
3 is going to get anybody. Dentons says or denies
4 he's breached his confidentiality obligations to
5 Catalyst. What those confidentiality obligations
6 to Catalyst are, I don't see there what they are.
7 What this witness thinks about this letter that he
8 hasn't seen, I don't understand how that's going to
9 help anybody.

10 MR. DIPUCCHIO: In fairness, Your
11 Honour, the confidentiality obligations were
12 outlined in the original letter.

13 THE COURT: But this witness didn't see
14 that either.

15 MR. DIPUCCHIO: No, I agree with that.
16 I guess what I'm trying to understand from the
17 witness now is whether we have a dispute that the
18 internal work product, the analysis, is
19 confidential.

20 THE COURT: But this letter talks about
21 the obligations of Mr. Moyse to Catalyst.

22 MR. DIPUCCHIO: Yes.

23 THE COURT: I doubt very much this
24 witness knows what those obligations to Catalyst in
25 fact were.

1 MR. DIPUCCHIO: Right. Your Honour,
2 I'm not asking him about what the obligations are
3 to Catalyst. What I'm asking him now is a question
4 that arises out of one of the answers he gave.

5 BY MR. DIPUCCHIO:

6 Q. So what I'm asking him is whether
7 he agrees with me that it's the analysis that's
8 being done by, for example, a person like Mr. Moyse
9 or one of your analysts at West Face that makes the
10 investment memo confidential?

11 A. If we're talking in the abstract
12 as opposed to the contents of the letter and the
13 judgment of Dentons and whoever else was involved
14 in drafting this in terms of determining whether
15 Mr. Moyse had breached confidentiality, I have to
16 plead ignorance on that matter.

17 Insofar as the investment memos are
18 concerned in the prior conversation we had, yes, I
19 agree with that, memos are confidential and should
20 be treated as such. And I raised that concern with
21 Mr. Dea for that specific reason, because we take
22 those provisions seriously and I personally take it
23 seriously.

24 Q. Okay. And you don't have any
25 knowledge, do you, as to whether your partners read

1 those investment memos?

2 A. I have no personal knowledge, no.

3 Q. And do you recall, sir, that one
4 of the confidential memos, maybe you became aware
5 of this after the fact, one of the confidential
6 memos that Moyse sent to West Face was concerning a
7 company called Arcan Resources?

8 A. I was made aware of that through
9 the production of this through the examination
10 process.

11 Q. And it's your evidence here today
12 that you never looked at the memo as it related to
13 Arcan?

14 A. I did not. I opened the Homburg
15 memo only and I didn't need to get much further
16 than that to know that this was an issue that
17 needed to be flagged.

18 Q. And your evidence, as I understand
19 it from your affidavit that's been filed, is that
20 you had been following Arcan for a number of years?

21 A. That's correct.

22 Q. And on Mr. Moyse's first day, very
23 first day at the office, you sent him an email of
24 your analysis concerning the Arcan opportunity. Do
25 you remember that?

1 A. Yes.

2 Q. And we can bring it up, Your
3 Honour, it's tab 11 of the cross-examination brief.
4 And it's your evidence, as I understand it, Mr.
5 Griffin, that you did this completely innocently;
6 that is, you didn't even know that Mr. Moyse had
7 been involved in analyzing an Arcan opportunity on
8 behalf of Catalyst; is that right?

9 A. That's correct. On this day in
10 question, my backup, one of my responsibilities at
11 West Face is covering the energy sector broadly.
12 Arcan would fall under that coverage universe. On
13 the day in question that this was sent, an
14 unsolicited proposal had been made for the company
15 by a third party named Aspenleaf Financial which is
16 a private equity group, backed by private interests
17 and I believe Ontario Teachers' Pension Plan and
18 Arc Resources.

19 So until that transaction was
20 announced, you know, and we are an event-oriented
21 investment fund, this really gave rise to doing
22 work on the proposal that had been tabled, and
23 what's reflected in this email is some analysis
24 that I did myself on the announcement of the deal
25 and the consideration in terms of it.

1 I did not know that Brandon had ever
2 looked at Arcan. It was an effort to get this new
3 analyst started on something, anything, given he
4 had just started. And so I copied him and our
5 trader, Pat McGuire, who is cc'd on this email.

6 Q. By that point in time, June 23rd,
7 by that point there's actually been threats of
8 litigation. I believe there's even been a claim
9 commenced; is that right?

10 A. I don't know, honestly, what was
11 happening in the background.

12 Q. Actually, I misspoke. I think the
13 litigation actually formally gets commenced on the
14 25th, two days later, but there's been discussion
15 amongst counsel.

16 A. I am not aware of that.

17 Q. You weren't aware of that at all.
18 You weren't even aware of the threat of litigation
19 that had been made in relation to Mr. Moyse?

20 A. Oh, I think we could see where it
21 was potentially leading. You didn't have to make
22 much of a leap to come to that conclusion. But
23 again, in terms of my day-to-day activities and
24 what I'm doing personally is really very squarely
25 focused on the investment process and those matters

1 are not under my purview.

2 Q. All right. And when you forwarded
3 this analysis to Mr. Moyse, I take it Mr. Moyse
4 himself didn't approach you to say "You may not
5 know this, but I actually had done an analysis and
6 have done some work at my previous employer in
7 relation to Arcan"? I take it Mr. Moyse never came
8 to you and had that conversation?

9 A. I don't think -- when I sent this
10 email at 10:41 p.m., I was sending this from my
11 residence, I don't think we ever had a chance to
12 talk to one another on the day that this was
13 actually distributed.

14 So I left the office and performed this
15 analysis after the market had closed and sent this
16 email from my residence. So yes, certainly at the
17 time that this was sent there was no opportunity to
18 have a conversation about it.

19 Q. At some point, I take it, you
20 returned to the office?

21 A. Yes.

22 Q. All right. And Mr. Moyse never
23 took the opportunity ever to come to you and say "I
24 have been working or have worked on Arcan for my
25 previous employer, I sent you a memo by mistake in

1 relation to Arcan, I probably shouldn't be working
2 on this"?

3 A. This issue was actually flagged to
4 me not by Mr. Moyse but by our general counsel,
5 Mr. Singh, and I believe, to the best of my
6 recollection, it was on the following day in the
7 office, in the morning that Mr. Singh approached me
8 before trading hours and spoke to me about this
9 email that I had sent and informed me that any
10 correspondence or discussion with Brandon on this
11 name was not to go any further.

12 Q. And do you know the circumstances
13 that led Mr. Singh to intervene?

14 A. He didn't provide me a lot more
15 detail than that.

16 Q. And you didn't ask any further
17 questions?

18 A. Quite honestly, I didn't
19 personally care. Only insofar as I had done all
20 the work myself, I knew that situation inside and
21 out, I knew exactly what I wanted to do going into
22 the next trading day in terms of our investment
23 decision. I talked to my partners about it, and
24 whether Brandon was involved in any capacity, it
25 wasn't going to be particularly additive to the

1 investment decision for us which needed to be made
2 that morning.

3 Q. Well, am I understanding your
4 evidence right now that notwithstanding you sent
5 this to Mr. Moyse, you didn't expect him to do
6 anything?

7 A. I said my expectation was that if
8 there was additional work to be done beyond the
9 immediate decision of accumulating a position in
10 this company, I would look to get him involved if
11 he had the capacity to do so, depending on what
12 other work had been assigned to him.

13 I was simply trying to extend an olive
14 branch to get this kid started on something given
15 it was his first day on the job and I thought, you
16 know, this is an interesting situation, let's see
17 if this is a good test case for him.

18 The fact that he did any work on it
19 before was purely coincidental.

20 Q. Well, you're jumping ahead of me.
21 First of all, my question is, did you actually ask
22 him to do any work?

23 A. No, not when I sent this email.
24 This was information.

25 Q. At any time, at any time did you

1 ask him to do any work?

2 A. I didn't have the opportunity to.

3 THE COURT: You mean on Arcan?

4 BY MR. DIPUCCHIO:

5 Q. On Arcan, yes.

6 A. I didn't have an opportunity to.

7 I would have the next morning when I came into the
8 office, but Mr. Singh interceded.

9 Q. Did Mr. Moyse call you or speak to
10 you to say "Thank you, I'll take a look at this"?

11 A. No. I don't recall unless there
12 was a curt email response from him anywhere in the
13 record, I don't recall any dialogue on this.

14 Q. Do you recall he might have said
15 that to you?

16 A. We certainly did not have a verbal
17 conversation. What I don't know is if you're going
18 to produce an email where he would have said
19 "Thanks, talk tomorrow" or something of that
20 nature.

21 Q. You seem to be afraid that I'm
22 going to produce an email. That's not the point.
23 The point is, do you recall having a conversation
24 with him where he said "Thanks, I'm going to take a
25 look at this"?

1 A. No.

2 Q. And that might have happened or it
3 might not have happened?

4 A. No, I definitively did not have a
5 conversation with him about the situation.

6 Q. All right. Can we bring up Mr.
7 Griffin's cross-examination transcript from May
8 8th, 2015, which is tab 46, Your Honour. Mr.
9 Griffin, if you go to page 27 of that transcript,
10 question 118:

11 "Question: All right. And
12 Mr. Moyse, I take it, never
13 responded to your email?"

14 This is now a reference to the email we
15 just looked at in regards to Arcan. And your
16 answer is:

17 "I don't recollect a response.
18 There could have been a short one, a
19 thank you or I will look at this."
20 Was that your answer at the time?

21 A. Well, strangely, it's almost
22 verbatim to what I just said to you.

23 Q. No, no, what you just said, Mr.
24 Griffin, is that you definitively recollect that
25 there was no such discussion.

1 A. Yeah, I have no better evidence of
2 a discussion than what I have attested to here.

3 Q. So are you accepting that there
4 could have been a short discussion?

5 A. I do not recall one, so I would
6 say no.

7 Q. And in fact, despite what you say
8 was no conversation and no instruction to do any
9 analysis, Mr. Moyse actually did start working on
10 an Arcan analysis, correct?

11 A. I didn't -- I was not aware of
12 that at the time. I was informed of that during
13 the examination process.

14 Q. So you were informed during the
15 examination process and you're aware now --

16 A. Yes.

17 Q. -- that in fact Mr. Moyse
18 performed a financial analysis of the proposed deal
19 and summarized Arcan's financials? You're aware of
20 that now?

21 A. I've never seen the work product
22 that he's done on that file.

23 Q. You didn't even look at it at the
24 time you were being cross-examined in May?

25 A. I don't remember it being

1 produced.

2 Q. All right. Well, why don't we
3 take you to it very briefly. I think we're going
4 to have to pull it up, WFC0080746.

5 THE COURT: What's the tab number?

6 MR. DIPUCCHIO: I don't think this is
7 actually -- 53, sorry. No, that's right.
8 Paragraph 55.

9 BY MR. DIPUCCHIO:

10 Q. If we go to paragraph 55 of the
11 affidavit, there may be a reference to it. This is
12 your affidavit. You say in paragraph 55, Mr.
13 Griffin, and just for the record this is the
14 affidavit that you swore on March 7, 2015, you say:

15 "I now understand that at some
16 time between June 24 and June 26,
17 2014, Mr. Moyse performed a
18 financial analysis of Arcan's
19 proposed deal with Aspenleaf and
20 summarized Arcan's financials."

21 Do you see that?

22 A. Yes.

23 Q. And where did you get that
24 information from?

25 A. That was likely through the

1 examination process that I discussed.

2 Q. But you never saw the actual
3 analysis; that's your testimony here?

4 A. Yes. I don't recall any work that
5 he did on this file being presented to me during
6 the cross-examination process. You know, again, in
7 the following sentence I also make note of the fact
8 that he did not do so at my request and I was not
9 at the time provided with copies of the analysis,
10 nor was I informed of its contents.

11 Q. I understand what your evidence
12 is. And I'm going to suggest to you, Mr. Griffin,
13 that that's just simply flat-out wrong, that in
14 fact you did request Mr. Moyse to perform work for
15 you; otherwise he wouldn't have been taking up the
16 task in performing a financial analysis?

17 A. Is there a question in there?

18 Q. The question is, I'm suggesting
19 that to you. Do you agree?

20 A. I disagree.

21 Q. So this was Mr. Moyse acting on
22 his own initiative just simply having received an
23 email out of the blue from you?

24 A. Yes.

25 Q. And your evidence today was that

1 Mr. Singh -- the reason that this didn't go any
2 further, correct, was that Mr. Singh approached you
3 the following morning before you even had an
4 opportunity to communicate with Mr. Moyse and told
5 you that there was a problem, right, Mr. Moyse
6 couldn't work on this project for you? That's your
7 evidence, right?

8 A. Yes.

9 Q. Okay. And Mr. Singh's
10 instructions are followed because he's the general
11 counsel. It's a serious discussion, right? You
12 would expect his instructions to be followed?

13 A. Yes.

14 Q. So can you explain for me why in
15 your affidavit at paragraph 55 that work continues
16 on the file between June 24th and June 26th?

17 A. I can't -- you'd have to produce
18 to me the exact record when Mr. Singh spoke to him
19 and to me. I just can't recollect.

20 Q. Well, these aren't my words. This
21 is your affidavit.

22 THE COURT: This doesn't say when
23 Mr. Singh spoke to Mr. Moyse.

24 MR. DIPUCCHIO: No, that was his
25 evidence here.

1 THE COURT: No, it wasn't.

2 MR. DIPUCCHIO: Yes, it was.

3 THE COURT: The evidence was that
4 Mr. Singh came to Mr. Griffin himself.

5 BY MR. DIPUCCHIO:

6 Q. Yes. Oh, no, no, I agree with
7 that, Your Honour. I'm just saying do you have any
8 explanation for why Mr. Moyse continued to work on
9 the matter between June 24th and June 26th?

10 A. I wasn't -- I wasn't party to the
11 conversation he had with Mr. Singh and I didn't
12 pursue this any further. I mean, once I was told,
13 it was black and white. So what Brandon did or
14 didn't do, I have no knowledge of it.

15 Q. And do you have any knowledge as
16 to how Mr. Singh knew to speak to you the next
17 morning?

18 A. I don't know personally.

19 Q. It wasn't through anything you
20 said to Mr. Singh?

21 A. No.

22 Q. And if you look at Mr. Singh's
23 affidavit, which was filed in July of 2014, it's at
24 51, Your Honour -- sorry, this is the
25 cross-examination transcript. I want his affidavit

1 of July 7, 2014.

2 There should be a folder on your iPad,
3 Your Honour, called the Singh affidavit.

4 THE COURT: Oh, okay. Just a second.

5 MR. DIPUCCHIO: It's just a separate --

6 THE COURT: It's not in your cross --

7 MR. DIPUCCHIO: It is, but it's an
8 actual folder.

9 THE COURT: One second. I don't know
10 where to find it.

11 MR. DIPUCCHIO: You can't find it in
12 the root directory, the cross-examination
13 directory?

14 THE COURT: I've got the Catalyst
15 cross-examination Griffin directory.

16 MR. DIPUCCHIO: Your Honour, you know
17 what, let's just leave it.

18 THE COURT: Oh, I see, it's right at
19 the beginning. Singh affidavit, July 7?

20 MR. DIPUCCHIO: Yes, July 7. It's
21 WFC0075056/1, for the record.

22 BY MR. DIPUCCHIO:

23 Q. And, Mr. Griffin, having regard to
24 your previous answers, I'm going to take it that
25 you didn't see this affidavit when it was filed in

1 July of 2014, you had no involvement in it?

2 A. No.

3 Q. You don't know that it was filed
4 in relation to an injunction motion that had been
5 provided?

6 A. Look, I've never looked at it or
7 at its contents so I don't know anything about that
8 process.

9 Q. That's fair enough. It's a very
10 brief affidavit but Mr. Singh doesn't mention this
11 episode of speaking to you in June and speaking
12 potentially to Mr. Moyse about the Arcan, it's not
13 mentioned at all in that affidavit. Do you know
14 why that would be the case?

15 A. I don't know.

16 Q. So in addition to sending you the
17 four Catalyst deal memos that were part of the
18 email of March 27, 2014, one of the other things
19 that Mr. Moyse sent you was a deal sheet, right?

20 A. Could you produce that? I don't
21 recall that document.

22 Q. If we go back to the email which
23 was tab 1, I think it may be the last page of this
24 document so we're going to have to flip through
25 quite a bit to get there, this was the deal sheet

1 that Mr. Moyse sent along to you, he sent it to Mr.
2 Dea and it was flipped to you by Mr. Dea?

3 A. Was it in fact?

4 Q. Yes, it was part of that email
5 chain.

6 A. I don't recall.

7 Q. Well, one step at a time. It's
8 part of the email chain that I referred you to
9 earlier in which Mr. Dea was flipping these memos
10 to you.

11 A. I remember the email with the four
12 memos you reference. I apologize, I just don't
13 specifically remember this sheet.

14 Q. All right. So you don't recall --
15 that's fair, you don't recall looking at this deal
16 sheet?

17 A. No, I don't. If you can produce
18 an email at which point it was sent to me, I'm
19 happy to have you prove me wrong but I just don't
20 recall.

21 Q. It was sent to you as part of the
22 same email as the deal memos.

23 THE COURT: Where do I find it?

24 MR. DIPUCCHIO: It's right at the last
25 page of that big package. It's the email that

1 Mr. Moyse sent and it's the attachments --

2 THE COURT: Oh, I see.

3 MR. DIPUCCHIO: -- to that email, Your
4 Honour. It's called "Detailed deal experience -
5 completed transactions."

6 THE WITNESS: This is the first time
7 I've seen this document.

8 BY MR. DIPUCCHIO:

9 Q. That's fair, that's fair. And
10 you'll agree with me that the experience that
11 Mr. Moyse is saying he has includes, for example,
12 building waterfall models for each of Homberg's 50
13 plus operating companies. Do you see that right at
14 the top?

15 A. Yes.

16 Q. Leading the due diligence process
17 including on-site visits to companies' real estate
18 holdings, and then representing Catalyst at
19 management/advisory meetings and reviewing data
20 room materials. Do you see that at the second
21 bullet point?

22 A. Yes.

23 Q. He says he's drafted press
24 releases, investor presentations, media scripts, in
25 the third bullet point?

1 A. Yes.

2 Q. And then providing ongoing support
3 through negotiation stages by modelling Catalyst's
4 and other stakeholders' returns under different
5 scenario/deal structures, including combinations of
6 payments, in cash, new shares, new debt,
7 convertible notes and tracking shares. Do you see
8 that?

9 A. Yes.

10 Q. And then he tells you about his
11 day-to-day responsibilities at Advantage Rent A
12 Car, right? Where he describes himself as the
13 day-to-day deal team leader. Do you see that?

14 A. Okay.

15 Q. And I presume you'll agree with me
16 that the credentials that he has are quite
17 impressive?

18 A. I was going off his credentials on
19 his resume. I mean, clearly we thought good enough
20 to hire him. I'm not going to dispute that.

21 Q. And he had done quite a bit of
22 high-level work?

23 A. Again, I'm seeing this for the
24 first time so I'm not sure what the -- is there a
25 question?

1 Q. Well, did you understand that from
2 his resume and from your discussion with him?

3 A. We had primarily hired him to do
4 debt transactions, negotiated financings and
5 secondary market debt. The most important
6 component of that was in terms of the observable
7 experience he had, obviously was working at credit
8 oriented shops, but also the fact that he'd done
9 his training in leveraged finance, I believe it was
10 at CFSB in the US and so we thought --

11 Q. That's Credit Suisse?

12 A. Yes. So we thought his skills
13 would be very much applicable to the alternative
14 credit fund, the credit vehicle that we had.

15 Q. And certainly his experience at
16 Catalyst would have been applicable to the
17 alternative credit fund?

18 A. It could be. Certainly -- I mean,
19 general investment experience. I don't profess to
20 understand their investment strategies and how
21 they're set up, I just don't know, but certainly I
22 think any background investment experience, work
23 experience, a quality shop like that, you know,
24 that would be valuable.

25 MR. DIPUCCHIO: Your Honour, I'm about

1 to turn to another complete area. Should we break
2 here for the day?

3 THE COURT: That's fine. Can you tell
4 me what's on tap for tomorrow?

5 MR. MILNE-SMITH: So, actually, Your
6 Honour, I wanted to address timing for tomorrow.
7 The issue we have tomorrow is we have two witnesses
8 coming in from New York, Mr. Burt and Mr. Leitner,
9 who are under some time constraints. Mr. Burt has
10 to actually fly to Europe --

11 THE COURT: Is there anybody in New
12 York who is not under a time constraint?

13 MR. MILNE-SMITH: It's just these two.
14 Everybody else is flexible. But we need to get
15 them both in tomorrow morning because they both
16 have to fly out, Mr. Burt to Europe actually and
17 Mr. Leitner back to a function in New York tomorrow
18 night.

19 So what we were hoping to do is to have
20 them go first tomorrow morning, sort of put Mr.
21 Griffin on hold and complete Burt and Leitner who I
22 think both of us agree are going to be relatively
23 short, and then come back to Mr. Griffin.

24 THE COURT: Is that agreeable to you?

25 MR. DIPUCCHIO: It is a bit awkward

1 just because of my line of questioning to this
2 witness to then examine Leitner first. I don't
3 want to derail anything, Your Honour. I'll
4 accommodate if that's the request, but it does
5 present me with a little bit of a problem since I'm
6 in the middle of my cross.

7 THE COURT: I understand. How long do
8 you think you'll be in cross?

9 MR. DIPUCCHIO: I'm going to say I'll
10 probably be another hour and a half to two hours.

11 THE COURT: If we start at 9:30, that
12 takes us to 11:00. Who is going to be first?

13 MR. MILNE-SMITH: Mr. Burt.

14 THE COURT: Why can't Leitner go after
15 lunch?

16 MR. MILNE-SMITH: Because he needs to
17 be able to catch a flight, I think, by two o'clock.

18 THE COURT: Why?

19 MR. MILNE-SMITH: To get back to New
20 York for an event.

21 THE COURT: What's the event?

22 MR. MILNE-SMITH: I don't know. We
23 have -- he's in the hotel now.

24 THE COURT: Well, you'd better talk it
25 through with counsel. I don't like to upset

1 arrangements, but I appreciate what Mr. DiPucchio
2 is telling me.

3 MR. MILNE-SMITH: As do I.

4 THE COURT: I think you'd better have a
5 chat with these fellows to just see how important
6 it is. All right. We'll come back at -- we can
7 start at 9:30 sharp, okay?

8 -- Whereupon court adjourned at 5:00 p.m.

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REPORTER'S CERTIFICATE

I, KIMBERLEY A. NEESON, RPR, CRR,
CSR, CCP, CBC, Certified Shorthand Reporter,
Realtime Systems Administrator, certify;

That the foregoing proceedings were
taken before me at the time and place therein set
forth, at which time the witness was put under oath
by me;

That the testimony of the witness
and all objections made at the time of the
examination were recorded stenographically by me
and were thereafter transcribed;

That the foregoing is a true and
correct transcript of my shorthand notes so taken.

Dated this 5th day of October, 2016.

A handwritten signature in blue ink, reading "Kim Neeson", is written over a horizontal line.

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