Court of Appeal No.: C62655
Superior Court of Justice Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

FACTUM OF THE DEFENDANT/RESPONDENT, BRANDON MOYSE

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PART I. OVERVIEW

1. Brandon Moyse was a 26-year-old junior analyst at The Catalyst Capital Group ("Catalyst"). In May 2014, he resigned from Catalyst and took a job with West Face Capital Inc ("West Face"). A month later, Catalyst sued Mr. Moyse and West Face and sought injunctive relief to prevent Mr. Moyse from working at West Face until the non-competition clause in his Catalyst employment contract expired. Mr. Moyse ultimately worked at West Face for just three weeks in June and July, 2014.

2. In September 2014, West Fact closed a transaction to acquire WIND Mobile Canada ("WIND"), a company that Catalyst had also tried to acquire. Before resigning from Catalyst, Mr. Moyse had worked on that ultimately unsuccessful transaction for the first 10 days Catalyst was pursuing the transaction in May 2014.

3. In response to losing out on the WIND transaction, Catalyst amended its initial claim several times. First, it asserted that Mr. Moyse provided West Face with confidential Catalyst information that West Face used to acquire WIND. Then, it brought a motion asserting that, in violation of a court order, Mr. Moyse had destroyed evidence that he had provided West Face with confidential Catalyst information. Catalyst brought a motion seeking that Mr. Moyse be found in contempt of that order and jailed. It was completely unsuccessful.

4. Catalyst then amended its claim once again, alleging that Mr. Moyse had committed the tort of spoliation, and sought damages which it did not quantify until its closing submissions at trial.

5. Justice Newbould presided over the six day trial of Catalyst's claims. The trial evidence included 39 affidavits, 11,535 pages of evidence, and the examination of 14 live witnesses. Nowhere in this mountain of evidence was there any direct evidence that supported Catalyst's central allegations. Rather, Catalyst faced the uncontradicted evidence of Mr. Moyse that he never destroyed any documents that were relevant to the litigation, and the uncontradicted evidence of all of the West Face witnesses and Mr. Moyse that Mr. Moyse never provided any information concerning WIND to West Face.

6. Unable to point to evidence that supported its case, Catalyst asked the judge to draw inferences (and sometimes inferences on top of inferences on top of inferences), and find in its favour. But Catalyst's speculation was no substitute for evidence, and Justice Newbould made two critical findings of fact:

(a) Mr. Moyse did not provide confidential information about Catalyst's strategy to acquire WIND to West Face; and

(b) Mr. Moyse did not destroy any evidence that was relevant to Catalyst's claim.

7. These findings of fact were fatal to Catalyst's claims. They are amply supported in the record. They are unassailable.

8. On appeal, Catalyst seeks to retry its case. It asks this court to re-weigh the mountain of evidence that was before the trial judge and to draw the inferences that Justice Newbould refused to draw. The trial judge's findings of fact on the two key

issues, and all others, are amply supported by the record, and his assessments of credibility and reliability are entitled to considerable deference. There is no basis to interfere with any of the trial judge's findings of fact.

9. Catalyst also argues on appeal that Justice Newbould erred in his articulation and application of the test for spoliation, although Catalyst urged him to use the very test he applied. The trial judge committed no error of law.

10. The appeal should be dismissed.

PART II. STATEMENT OF FACTS

11. Mr. Moyse accepts as correct the facts set out in paragraphs 18, 19, 18, 22, 23, 38, and 44 of Catalyst's factum, but disagrees with the balance of Catalyst's assertions of fact. At times, Catalyst's factum fails to adequately distinguish between the evidence led at trial and the inferences it invited the judge to draw from the evidence. As addressed below, some of Catalyst's strongly worded assertions are not borne out by the evidentiary record.[1]

A. Mr. Moyse and his role at Catalyst

12. In 2014, Mr. Moyse was just 26 years old, and had earned his Bachelor of Arts degree in Mathematics from the University of Pennsylvania.[2]

13. Mr. Moyse commenced work as an analyst at Catalyst, a Toronto-based investment management firm, on November 1, 2012.[3] Analysts are the lowest level of

[1] See for example paragraphs 42, 58, 78(e), and 135 below.

[2] Affidavit of Brandon Moyse, affirmed June 2, 2016, BM0005359, ("Moyse 2016 Affidavit"), p. 4, para. 10; (Compendium of the Respondent Brandon Moyse ("RCO-BM") Tab 55, page 219); Reasons for Judgment of Justice Newbould dated August 18, 2016 ("Reasons"), para. 32 (RCO-BM Tab 1, page 10).

investment professional at Catalyst.[4] Mr. Moyse conducted financial and qualitative research both on Catalyst's potential investment opportunities, and on portfolio companies it already owned.[5] Catalyst was a hierarchical workplace in which his role was to follow instructions given to him by the partners or Vice-Presidents. Mr. Moyse acknowledged that he was generally aware of the firm's priorities and goals, but he was not engaged in, let alone privy to, specific strategic discussions.[6]

B. Mr. Moyse's work on Catalyst's telecommunications team

14. In March 2014, Catalyst assigned Mr. Moyse to its telecommunications deals team. At that time, Mr. Moyse knew that Catalyst had an investment in the telecommunications company Mobilicity, was interested in building a fourth wireless carrier in Canada (potentially involving WIND), and planned to bid for wireless spectrum in a forthcoming Canadian spectrum auction (ultimately, it did not make a bid). This information was all public knowledge.[7]

15. Mr. Moyse did very little work for the telecommunications team until May 6, 2014, when Catalyst began actively pursuing a deal involving WIND.[8]

16. Catalyst relied heavily at the trial and now again on appeal, on the handful of discrete pieces of work that Mr. Moyse completed in March 2014 in an attempt to

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[3] Exhibit 14 to the Moyse 2016 Affidavit, CCG0018684 (RCO-BM Tab 57, pages 279-287). Reasons para. 2, 34 (RCO-BM, Tab 1, pages 2, 10).

[4] Moyse 2016 Affidavit, p. 5, para. 14 (RCO-BM Tab 55, page 220); Reasons para. 36 (RCO-BM Tab 1, page 10-11).

[5] Moyse 2016 Affidavit, p. 5, para. 15 (RCO-BM Tab 55, page 220-221).

[6] Examination-in-Chief of Brandon Moyse ("Moyse Examination-in-Chief"), 1374:11-24 (RCO-BM Tab 7, page 108).

[7] Reasons para. 40 (RCO-BM Tab 1, page 12); Moyse Examination-in-Chief, 1415:25-1416:7 (RCO-BM Tab 8, pages 109-110); Moyse 2016 Affidavit, pp. 9-10, para. 25 (RCO-BM Tab 55, page 224); De Alba Cross-Examination, 236:9-14 (RCO-BM Tab 9, page 111).

[8] Moyse 2016 Affidavit, para. 29 (RCO-BM Tab 55, page 226).

impute significant knowledge of Catalyst's regulatory strategy to him. Catalyst's submissions are not supported by the evidence and the trial judge declined to draw the inferences urged by Catalyst.

17. In reality, Mr. Moyse worked on only two discrete tasks in March 2014 for the telecommunications deal team. When he completed both tasks, Mr. Moyse had only surface-level knowledge of Catalyst's interest in the telecommunications industry.[9] The majority of Mr. Moyse's time in March 2014 (and indeed between January and May 6, 2014), was spent working on other companies already owned by Catalyst, which required a significant amount of travel outside the office.[10]

18. Mr. Moyse's first WIND-related task was to contribute to the creation of a *pro-forma* financial statement to illustrate what a combined WIND and Mobilicity entity would look like.[11] Mr. Moyse prepared this one page document under the supervision of a Catalyst Vice-President, Zach Michaud.[12] Catalyst tendered no evidence from Mr. Michaud at trial. Mr. Moyse testified that Mr. Michaud told him what data to include for each company in the *pro-forma*. Mr. Moyse then collected the data, which was either publicly available, or known to Catalyst, and then performed basic arithmetic to generate the final product.[13] The trial judge found that Mr. Moyse needed no knowledge

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[9] Moyse 2016 Affidavit, para. 25, 26 (RCO-BM Tab 55, pages 224-225).
[10] Moyse 2016 Affidavit, para. 21 (RCO-BM Tab 55, page 222-223).
[11] Exhibit 22 to the Moyse 2016 Affidavit, CCG0011536 (RCO-BM Tab 58, pages 288-289).
[12] Exhibit 22 to the Moyse 2016 Affidavit, CCG0011536 (RCO-BM Tab 58, pages 288-289).
[13] Moyse 2016 Affidavit, pp.13-16, paras. 34-38 (RCO-BM Tab 55, pages 228-231); De Alba Cross-Examination, 207:6-212:8 (RCO-BM Tab 10, pages 112-117).

of Catalyst's plans or strategy with respect to WIND to complete this assignment, which was consistent with Mr. Moyse's evidence that he had no such knowledge.[14]

19. On March 26, 2014, Mr. Moyse completed his second WIND-related task when he helped create a PowerPoint slide deck for a Catalyst presentation to Industry Canada.[15] Mr. Moyse's role was essentially administrative and lasted only one frantic day.[16] Two of Catalyst's principals, and its Vice-President, generated the content and analysis in the presentation, which Mr. Moyse then incorporated into the slide deck. He was not involved in the discussions or debates generating that content.[17] Given his limited exposure to the file, Mr. Moyse had little knowledge or understanding beyond the text he incorporated into the slides.[18]

20. During this period, Mr. Moyse was not, as Catalyst's witnesses suggested, "intimately aware of, and involved in [Catalyst's] internal analyses concerning the telecommunications industry".[19] Only the self-serving evidence of Catalyst's principals, Gabriel De Alba and Newton Glassman, supported the assertion that Mr. Moyse was "intimately" aware of these analyses, let alone involved in creating them. The contemporaneous documents did not support their evidence. Catalyst produced no

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[14] Reasons, para. 12 (RCO-BM Tab 1, pages 5-6); Moyse 2016 Affidavit para. 38 (RCO-BM Tab 55, page 231)

[15] Exhibit 27, CCG0011564 (RCO-BM Tab 59, page 290) and Exhibit 28, CCG0011565 (RCO-BM Tab 60, pages 291-305) to the Moyse 2016 Affidavit.

[16] Moyse Examination-in-Chief, 1418:19-1419:6 (RCO-BM Tab 11, pages 118-119); Moyse 2016 Affidavit, paras. 39-41 (RCO-BM Tab 55, pages 231-232); Reasons, paras. 42-45 (RCO-BM Tab 1, pages 12-13).

[17] Reasons, para. 49 (RCO-BM Tab 1, page 15).

[18] Reasons, para. 49 (RCO-BM Tab 1, page 15);

[19] Affidavit of Gabriel De Alba sworn May 27, 2016, CCG0028710 ("De Alba Affidavit"), para. 45 (RCO-BM Tab 74, pages 413-414).

documents that showed Mr. Moyse was kept intimately apprised of Catalyst's strategy.[20] Rather, the few documents involving Mr. Moyse from this period suggest Catalyst deliberately did not involve him in discussing or formulating this strategy.[21]

21. Mr. Moyse had no other involvement in Catalyst's telecommunications team until a month and a half later, on May 6, 2014, when he found out that Catalyst would pursue a transaction involving WIND.[22]

22. Over the 10 days following May 6, Mr. Moyse's involvement focused on early business due diligence on the proposed deal[23] and the creation of a second PowerPoint presentation to the Government of Canada.[24]

23. Catalyst relied heavily at trial, and does so again on appeal, on Mr. Moyse's involvement in the creation of that second PowerPoint slide deck as demonstrating his involvement in Catalyst's regulatory strategy. As with the first PowerPoint slide deck, Mr. Moyse's role was largely administrative. The day before the second presentation was scheduled to take place in May 2014, Catalyst's principals instructed Mr. Moyse to re-create a modified version of the March slide deck based on a hard copy of the March presentation, as well as their comments and changes. He created a new PowerPoint slide deck from this information. Given the hurried manner in which it was created, and

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[20] Reasons, para. 50 (RCO-BM Tab 1, pages 15-16).

[21] For example, in early March 2014 Mr. Moyse sent Mr. De Alba a news article which marked a significant development in the WIND file, which Mr. De Alba then forwarded, with his comments, to a distribution group within Catalyst that did not include Mr. Moyse. Tab 13 (RCO-BM Tab 75, pages 415-416) and Tab 14 (RCO-BM Tab 76, pages 417-421) of Paliare Roland De Alba Cross-Examination Brief.

[22] Reasons, para. 50 (RCO-BM Tab 1, pages 15-16).

[23] Moyse 2016 Affidavit, p. 32-33, paras. 86-91, 92-97 (RCO-BM Tab 55, pages 246-250); Reasons, para. 50 (RCO-BM Tab 1, page 15-16).

[24] Moyse 2016 Affidavit, p. 29, para. 79 (RCO-BM Tab 55, page 244); Exhibit 36, CCG0009517, to the Moyse 2016 Affidavit (RCO-BM Tab 61, pages 306-315).

his largely administrative role, Mr. Moyse put little thought or analysis into creating the PowerPoint slide deck.[25]

24. At this time, Mr. Moyse knew about only two regulatory issues involving WIND:

(a) whether or not the federal government would allow a new wireless entrant to sell its spectrum and/or be purchased by an incumbent; and

(b) the requirement for government approval of a sale of WIND.[26]

25. Mr. Moyse was aware of these issues through the media coverage they received. He believed they were self-evident to anyone with a passing familiarity with the Canadian regulatory framework for the wireless industry. [27]

26. The documentary evidence at trial was consistent with Mr. Moyse's evidence that he was not kept intimately apprised of Catalyst's regulatory strategy during this period.[28]

27. Mr. Moyse left for vacation in Asia with his girlfriend on May 16, 2014, which was only 10 days after he first learned that Catalyst was pursuing a transaction with WIND. While on vacation he had almost no involvement in the WIND file, though he was copied on emails at his Catalyst email address in his absence.[29]

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[25] Moyse 2016 Affidavit, paras. 84-85 (RCO-BM Tab 55, page 246); Reasons, para. 51 (RCO-BM Tab 1, page 16).
[26] Moyse 2016 Affidavit, pp. 26-27, para. 70 (RCO-BM Tab 55, page 241).
[27] Moyse 2016 Affidavit, pp. 26-27, para. 70 (RCO-BM Tab 55, page 241).
[28] Reasons, para. 50 (RCO-BM Tab 1, pages 15-16).
[29] Reasons, para. 52 (RCO-BM Tab 1, page 16).

28. Mr. Moyse resigned from Catalyst by email on Saturday, May 24, 2014, the second-to-last day of his vacation.[30] Mr. Moyse did no further work for Catalyst after that date. Catalyst contacted its technology provider to revoke Mr. Moyse's access to Catalyst's servers on Monday, May 26, 2014.[31] After this date, it is undisputed that Catalyst and its advisors did not keep Mr. Moyse advised of Catalyst's strategies or intentions regarding WIND, including discussions with WIND's owners, or the federal government.[32]

29. Prior to turning in his company-issued Blackberry, Mr. Moyse erased the data stored on it. He did so in an effort to delete any personal text messages and photographs that he did not want to hand over to Catalyst, and in the correct belief that his Catalyst emails the only email account set up on the Blackberry would remain on the Catalyst server.[33] Mr. Moyse candidly acknowledged that wiping the Blackberry was a poor decision, a mistake, and that there were other ways of handling his concerns.[34]

C. West Face hires Mr. Moyse

30. In early 2014, Mr. Moyse decided to leave Catalyst because he was not getting the learning opportunities he hoped for when he joined the firm, and because he found the work environment to be oppressive, and lacking in common decency or respect.[35]

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[30] Moyse 2016 Affidavit, p. 38, para. 104 (RCO-BM Tab 55, page 253); Exhibit 52 to the Moyse 2016 Affidavit, CCG0018691 (RCO-BM Tab 63, page 370).
[31] Riley Cross-Examination, 581:23-582:2 (RCO-BM Tab 12, pages 120-121).
[32] Glassman Cross-Examination, 362:19-363:10 (RCO-BM Tab 13, pages 122-123).
[33] Answers to Undertakings given at Riley 2015 Cross-Examination, No. 1 (RCO-BM Tab 77, page 422).
[34] Moyse Examination-in-Chief, 1402:23-1403:20 (RCO-BM Tab 14, pages 124-125).
[35] Moyse Examination-in-Chief, 1373:8-23,1375:4-10 (RCO-BM Tab 15, pages 126-127).

He contacted a number of employers, but his top choice throughout the process was West Face.[36]

31. On March 26, 2014, Mr. Moyse met with Thomas Dea, a partner at West Face, to discuss potential employment opportunities. During their conversation, they did not discuss WIND or the telecommunications industry.[37] Mr. Dea asked Mr. Moyse to provide him with his résumé, a deal sheet, and some writing samples to demonstrate his written communication skills. Mr. Dea specifically asked Mr. Moyse not to include any confidential information from Catalyst in the writing samples.[38]

32. Early the next morning, at 1:47 a.m., Mr. Moyse sent Mr. Dea an email that attached four investment memoranda he had prepared at Catalyst. Despite Mr. Dea's instructions, three of the memos were marked confidential. None involved the telecommunications industry.

33. Mr. Moyse has repeatedly admitted throughout these proceedings, including at trial, that it was an error in judgment to send West Face those memoranda.[39] Shortly after sending the email, he realized that should not have sent the confidential memos and deleted the email from his sent items folder. Again, Mr. Moyse has repeatedly admitted that deleting the sent item was not the appropriate way of addressing this

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[36] Moyse 2016 Affidavit, p. 40, para. 113 (RCO-BM Tab 55, page 255).

[37] Moyse 2016 Affidavit, p. 41, para. 115 (RCO-BM Tab 55, page 256); Exhibit 62, WFC0031090, to the Moyse 2016 Affidavit (RCO-BM Tab 70, pages 385-389); Moyse Examination-in-Chief, 1385:19-1386:2 (RCO-BM Tab 16, pages 128-129).

[38] Moyse 2016 Affidavit, para. 116 (RCO-BM Tab 55, page 256).

[39] Moyse 2016 Affidavit, p. 41, para. 116 (RCO-BM Tab 55, page 256); Moyse April 2015 Affidavit, para. 20 (RCO-BM Tab 78, page 423); Exhibit 63 to the Moyse 2016 Affidavit, WFC0108593, excerpts pp. 1-7, 57-59, 78-80, 102-104, 138-139 (RCO-BM Tab 71, pages 390-407).
Moyse Examination-in-Chief, 1386:21-1387:4 (RCO-BM Tab 17, pages 130-131).

mistake.[40] In his own words, Mr. Moyse acknowledged that deleting the email was "compounding poor decisions."[41]

34. Mr. Moyse had further interviews with West Face and its partners on April 15 and 28, 2014. At no time during these interviews did Mr. Moyse discuss WIND or the telecommunications file with West Face's representatives.[42] In any event, at the time of these interviews, Mr. Moyse was not aware that Catalyst was, or soon would be, actively pursuing WIND.[43] Mr. Moyse received a verbal offer from Mr. Dea on May 16, 2014, and a written employment agreement on May 26, 2014.[44] Mr. Moyse resigned from Catalyst on May 24, 2014. Before Mr. Moyse commenced work at West Face, its General Counsel advised Mr. Moyse that West Face was concerned that he had sent the Catalyst memos to Mr. Dea, and reminded him of the importance of respecting his confidentiality obligations to Catalyst.[45]

35. Before Mr. Moyse commenced work at West Face on June 23, 2014, Catalyst's counsel advised West Face that Catalyst was concerned about Mr. Moyse's work for Catalyst on an active telecom file. In response, West Face put up a confidentiality wall that prohibited Mr. Moyse from discussing WIND with any other investment

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[40] Moyse 2016 Affidavit, p. 42, para. 117 (RCO-BM Tab 55, page 257); Moyse April 2015 Affidavit, para. 30 (RCO-BM Tab 79, pages 424-425).

[41] Moyse Examination-in-Chief, 1387:21-24 (RCO-BM Tab 18, page 132).

[42] Dea Affidavit, June 3, 2016, p. 5, para. 11 (RCO-BM Tab 80, page 426); Griffin Affidavit, June 4, 2016, p. 26, para. 67 (RCO-BM Tab 81, pages 427-428); Griffin Examination-in-Chief, 773:1-10, 778:25-779:14 (RCO-BM Tab 19, page 133-135); Griffin Cross-Examination, 1009:21-1010:8, 1013:7-23 (RCO-BM Tab 20, pages 136-138); Zhu Affidavit, p. 2, para. 3 (RCO-BM Tab 82, page 429); Zhu Cross-Examination at 1306:22-1307:9 (RCO-BM Tab 21, pages 139-140);
See also Burt Examination-in-Chief, 838:10-25 (RCO-BM Tab 22, page 141); Leitner Examination-in-Chief, 877:11-878:4 (RCO-BM Tab 23, pages 142-143).

[43] Moyse 2016 Affidavit, p. 43, para. 120 (RCO-BM Tab 55, page 258).

[44] Reasons, para. 58 (RCO-BM Tab 1, page 18).

[45] Moyse 2016 Affidavt, paras. 129-130 (RCO-BM Tab 55, page 260).

professional.[46] There is no evidence that that confidentiality wall was ineffective or compromised and all of the evidence from the West Face witnesses was to the contrary.[47]

36. Mr. Moyse worked briefly at West Face for three weeks in June and July 2014. Following the Firestone Order (defined below), Mr. Moyse was off work at West Face from July 16, 2014, until Mr. Moyse and West Face agreed to part ways on August 31, 2015.[48]

37. Mr. Moyse never provided any confidential Catalyst information regarding WIND, Mobilicity, Catalyst's regulatory strategy, or its telecommunications strategy to anyone at West Face, or the consortium of successful bidders for WIND.[49]

38. Mr. Moyse first learned that West Face completed a WIND transaction in September 2014 from Twitter. He was surprised by the news, as is clear from the contemporaneous emails sent to his friends when he learned of the transaction.[50] Until the news broke publicly, all he knew about West Face's interest in WIND was that they had put up a confidentiality wall with respect to WIND before he started work.[51]

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[46] Moyse 2016 Affidavit, p. 45, para. 128 (RCO-BM Tab 55, page 260); Exhibit 78 to the Moyse 2016 Affidavit (RCO-BM Tab 72, page 408); Reasons, at para. 63-64 (RCO-BM Tab 1, page 19); see also Dea Trial Affidavit, at paras. 32-33 (RCO-BM Tab 83, page 430).

[47] Griffin Chief, June 8, 2016, pp. 781:22-784:1 (RCO-BM Tab 24, pages 144-147); Dea Examination-in-Chief, June 10, 2016, pp. 1248:21-1253:23 (RCO-BM Tab 25, pages 148-153); Kapoor Examination-in-Chief, June 10, 2016, pp. 1290:19-1296:9 (RCO-BM Tab 26, pages 154-160); Moyse Chief, June 13, 2016, pp. 1416:4-23 (RCO-BM Tab 27, page 161).

[48] Moyse 2016 Affidavit, p. 4, para. 12 (RCO-BM Tab 55, page 219).

[49] Moyse Examination-in-Chief, 1370:3-1371:25 (RCO-BM Tab 28, pages 162-163).

[50] Exhibit 53, BM0004987 (RCO-BM Tab 64, page 371), Exhibit 54, BM0004988 ((RCO-BM Tab 65, pages 372-377), Exhibit 55, BM0004989 (RCO-BM Tab 66, pages 378-379), Exhibit 56, CCG0028632 (RCO-BM Tab 67, page 380), Exhibit 57, BM0004990 (RCO-BM Tab 68, pages 381-382) and Exhibit 58, BM0004991 (RCO-BM Tab 69, pages 383-384) to the Moyse 2016 Affidavit.

[51] Moyse 2016 Affidavit, para. 108 (RCO-BM Tab 55, page 254).

D. Events subsequent to Mr. Moyse's departure

39. On June 25, 2014, Catalyst issued a claim and brought a motion seeking interlocutory injunctive relief including against Mr. Moyse and West Face. As against Mr. Moyse, Catalyst sought primarily injunctive relief prohibiting him from commencing employment at West Face until the non-competition clause in his Catalyst employment agreement expired.[52]

40. On July 16, 2014, the parties attended before Justice Firestone on Catalyst's motion for injunctive relief. The parties ultimately consented to an order (the "Firestone Order"), that, *inter alia*, required Mr. Moyse to:

(a) preserve and maintain all relevant records in his power, possession or control;

(b) deliver a sworn affidavit of documents setting out all documents in his power, possession or control that related to his employment with Catalyst; and

(c) turn over all his personal computer and electronic devices for the taking of a forensic image of the data served on his devices, to be conducted by a professional firm as agreed to between the parties.[53]

41. Mr. Moyse's electronic devices were imaged on July 21, 2014.

42. Catalyst subsequently obtained interlocutory relief before Justice Lederer, with reasons released on November 10, 2014. The court ordered, among other things, that

[52] Statement of Claim, WFC0077899 (RCO-BM Tab 101, pages 471-486).

[53] Moyse 2016 Affidavit, *para.* 137 (RCO-BM Tab 55, pages 263-264); Exhibit 81 to the Moyse 2016 Affidavit, WFC0081954 (RCO-BM Tab 73, pages 409-412).

an Independent Supervising Solicitor ("ISS") be appointed to review the images of Mr. Moyse's devices, pursuant to a protocol to be jointly agreed to by counsel for the parties.[54] Justice Lederer ordered the ISS review "to identify what, if any, material these images may contain that are confidential to Catalyst."[55] Contrary to the submission in Catalyst's factum, Justice Lederer did not find as a fact that Mr. Moyse "could not be trusted to review his documents and determine for himself what should be produced in the action."[56]

43. The ISS reviewed Mr. Moyse's devices and email accounts and released an initial report on February 17, 2015, and an amended report on March 13, 2015. Other than Mr. Moyse's March 27 email to Mr. Dea, which attached the Catalyst memos, and which had already been disclosed to Catalyst, the ISS found no evidence that Mr. Moyse transmitted Catalyst confidential information to West Face.[57] The ISS concluded that:

> We found no further concrete evidence from our review of the files, their surrounding metadata, or Moyse's email material or mobile devices, that confidential information belonging to Catalyst was provided to West Face. That of course does not exclude the possibility that such information was transmitted to West Face in other ways, or that records of other confidential information could have been destroyed through deletion and overwriting, as noted [below].[58]

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[54] Reasons of Justice Lederer dated November 10, 2014, WFC0081958 ("Lederer Reasons") (RCO-BM Tab 4, pages 62-91).

[55] Lederer Reasons (RCO-BM Tab 4, pages 62-91).

[56] Catalyst factum, p. 12, para. 46(d). Tellingly, in support of this assertion, Catalyst relies entirely on the order of Justice Firestone, and makes no reference to Justice Lederer's decision.

[57] ISS Report, Exhibit 12 to the Moyse 2016 Affidavit, WFC0080681, para. 42 (RCO-BM Tab 56, pages 275-276).

[58] ISS Report, Exhibit 12 to the Moyse 2016 Affidavit, WFC0080681, para. 59 (RCO-BM Tab 56, page 278). Mr. Moyse also sent a redacted copy of his employment agreement to West Face. Catalyst takes no issue with this.

44. In addition, the ISS noted that it had identified the presence of a Secure Delete folder on Mr. Moyse's computer.[59]

45. Based on that observation, Catalyst brought a motion to have Mr. Moyse jailed for contempt of the Firestone Order. Catalyst alleged that, in contempt of the Firestone Order, Mr. Moyse had deleted his personal internet browsing history, and that he allegedly bought and used software to "scrub" files from his personal computer immediately prior to delivering it to the ISS.[60] Justice Glustein dismissed Catalyst's contempt motion on July 7, 2015, finding that Catalyst had not proved beyond a reasonable doubt that Mr. Moyse had deleted any relevant files from his computer.[61]

E. Mr. Moyse's deletion of his personal browser history

46. On appeal, Catalyst renews its argument at trial that Mr. Moyse intentionally deleted documents after the Firestone Order in order to hinder Catalyst's ability to prove its case. Mr. Moyse's uncontradicted evidence was that he did not delete any relevant documents.[62] In closing submissions at trial, Catalyst conceded that there was no evidence that Mr. Moyse had deleted documents that no longer existed at either Catalyst or West Face.[63] The trial judge found as a fact that he did not delete a relevant document.[64]

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[59] ISS Report, Exhibit 12 to the Moyse 2016 Affidavit, WFC0080681, para. 48 (RCO-BM Tab 56, page 277).
[60] Endorsement of Justice Glustein dated July 7, 2015 ("Glustein Endorsement"), WFC0028060, para. 61 (RCO-BM Tab 5, page 100).
[61] Order of Justice Glustein dated July 7, 2015 ("Glustein Order"), WFC0082057 (RCO-BM Tab 6, pages 105-107); Glustein Endorsement, WFC0082060, para. 86 (RCO-BM Tab 5, pages 103-104).
[62] Moyse Examination-in-Chief, 1372:1-5,1427:10-1428:2 (RCO-BM Tab 29, pages 164-166).
[63] Reasons, para. 145 (RCO-BM Tab 1, page 43).
[64] Reasons, para. 147 (RCO-BM Tab 1, page 44).

47. Mr. Moyse never hid that he attempted to delete his Internet browsing history from his computer. He had explained that he did so because of his concern that his browsing history would reveal that he had accessed a number of adult entertainment websites.[65] Mr. Moyse did not believe there was anything improper about deleting his browser history: neither the Firestone Order, nor his undertaking to preserve all relevant documents required him to maintain his computer "as is" before delivering it to the ISS or to preserve irrelevant date and files.[66] The question at trial was whether or not Mr. Moyse deleted any relevant documents.

48. Catalyst insisted, without any direct evidence, that by deleting his web browsing history, Mr. Moyse would have deleted records that might have shown his use of a web-based document storage service called Dropbox. There was, however, no evidence that Mr. Moyse ever transferred confidential Catalyst documents regarding WIND to his Dropbox account. The only time Mr. Moyse had used his Dropbox account on his Catalyst computer was before he was on Catalyst's WIND team, and before he interviewed with Mr. Dea.[67]

49. The evidence at trial, and Catalyst's theory, turned on the presence of a folder on Mr. Moyse's computer called Secure Delete. There was, however, no evidence he had even run the program, let alone deleted relevant documents. The folder came to be on

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[65] Moyse 2016 Affidavit, para. 142 (RCO-BM Tab 55, page 265).

[66] Moyse 2016 Affidavit, para. 144 (RCO-BM Tab 55, page 266).

[67] Reasons, para. 146 (RCO-BM Tab 1, page 43-44).

On June 21, 2014, Catalyst's forensic experts created a forensic image of Mr. Moyse's desktop computer and then conducted an analysis of that image. Those images created a record of Mr. Moyse accessing Dropbox using his Catalyst computer, which show that that computer accessed Mr. Moyse's Dropbox through the Internet only once on February 10, 2014, long before he knew that Catalyst had an interest in pursuing a WIND transaction and long before he resigned on May 24, 2014: Exhibits "B" and "E" to the Musters June 2014 Affidavit (RCO-BM Tab 84, pages 431-432 and Tab 85, pages 433-435).

Mr. Moyse's computer after he did some Internet searches on how to ensure a complete deletion of his Internet browsing history. Through these searches, Mr. Moyse came to believe that "cleaning" his computer's registry following the deletion of his Internet history would ensure the permanent deletion of that history.[68] Despite the information gleaned by Mr. Moyse through his online research, but consistent with Mr. Moyse's lack of technological sophistication, both experts at trial agreed that cleaning a computer's registry will not permanently delete a user's Internet browsing history.[69]

50. Mr. Moyse did some further online research for "registry cleaning" products, and ultimately purchased two software products from a company called Systweak: the first called RegCleanPro and the second called Advanced System Optimizer ("ASO"). He made no attempt to hide or dispose of the receipts and left them in plain sight in the inbox of his Hotmail account.[70]

51. On Sunday, July 20, 2014, the day before Mr. Moyse was scheduled to deliver his computer and other devices to his counsel, he opened both the RegCleanPro and ASO software products on his computer. He looked into how each operated. To the best of his recollection, Mr. Moyse ran the RegCleanPro software to clean up the computer registry after he deleted his Internet browser history.[71] He left this software in plain sight on his desktop.

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[68] Moyse 2016 Affidavit, para. 145 (RCO-BM Tab 55 , page 266).

[69] Affidavit of Martin Musters, sworn April 30, 2015 paras. 4-5 ("Musters April 2015 Affidavit") (RCO-BM Tab 86, pages 436-437); Lo 2015 Cross-Examination, p. 27, q. 115 (RCO-BM Tab 30, page 167).

[70] Tab 88 to the Paliare Roland Moyse Examination-in-Chief Brief (RCO-BM Tab 87, pages 438-439).

[71] Moyse 2016 Affidavit, para. 149 (RCO-BM Tab 55, page 267).
The RegCleanPro Log for Mr. Moyse's computer reflects that he ran the RegCleanPro performed a scan at 8:11 p.m. on July 20, 2014: Exhibit "E" to the Affidavit of Kevin Lo, affirmed April 2, 2015 ("Lo Affidavit") (RCO-BM Tab 88, page 440).

52. The forensic evidence also showed that on July 20, 2014, at 8:09 p.m., a folder called Secure Delete was created on Mr. Moyse's computer.[72] Secure Delete was one of many programs included in the ASO suite of products.

53. Mr. Moyse testified that when he was running the RegCleanPro software, he also investigated the ASO software suite to find out what products it offered and what the use of those products would entail.[73]

54. Mr. Moyse's evidence, unshaken on cross-examination, was that he did not:

(a) use the Secure Delete product included in the ASO suite to delete any files; or

(b) delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation.[74]

55. The ISS's forensic expert reached the following conclusion with respect to the Secure Delete Folder found on Mr. Moyse's computer:

> DEI cannot determine whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly cannot express any conclusion on that possibility other than to note that it exists.[75] [emphasis added]

[72] Lo Affidavit, para. 16 (RCO-BM Tab 89, pages 441-442); Exhibit 12, WFC0080681, to the Moyse 2016 Affidavit, para. 45 (RCO-BM Tab 56, pages 276-277).

[73] Moyse 2016 Affidavit, para. 150 (RCO-BM Tab 55, page 267-268).

[74] Moyse Cross-Examination, 1520:22-1521-10 (RCO-BM Tab 31, pages 168-169); Moyse Examination-in-Chief, 1372:6-9 (RCO-BM Tab 32, page 170); Moyse 2016 Affidavit, para. 150 (RCO-BM Tab 55, page 267-268).

[75] Exhibit 12 to the Moyse 2016 Affidavit, WFC0080681, para. 48 (RCO-BM Tab 56, page 277).

56. Mr. Moyse and Catalyst both retained forensic experts, each of whom provided an opinion concerning the presence of the Secure Delete folder on Mr. Moyse's computer.

57. Both experts agreed that the presence of a Secure Delete folder on a device does not mean that the Secure Delete program was used to delete any files or folders. Rather, a Secure Delete folder is created as soon as a user clicks Secure Delete on the ASO menu, but before the product is used for any purpose.[76] The Secure Delete folder is created even if a user does not delete a single file.[77]

58. There was no evidence to support Catalyst's assertion in its factum that it was "highly unlikely that [Secure Delete] was launched by accident".[78] There was certainly no finding by the trial judge to this effect. In fact, there was no finding that Mr. Moyse ever used the Secure Delete program at all (because the program can be "launched" without being "run"), or did anything more than click once on Secure Delete while investigating the ASO suite of products.

F. Trial judge's reasons

59. The evidence in this case was voluminous. The parties filed 39 affidavits and 11,535 pages of evidence in substitution for evidence in chief. Fourteen witnesses were cross-examined over the six day trial. The trial judge had a substantial body of evidence

[76] Lo Affidavit, para. 13 (RCO-BM Tab 90, page 443); Cross-Examination of Martin Musters, May 19, 2015 ("Musters 2015 Cross"), pp. 21-22, 24-25, qq. 78-83, 93 (RCO-BM Tab 33, pages 171-174).
[77] Lo Affidavit, para. 13 (RCO-BM Tab 90, page 443).
[78] Catalyst factum, p. 13, para. 48.

to consider. Justice Newbould dismissed Catalyst's action in its entirety.[79] His detailed and thorough reasons demonstrate his familiarity with the evidence before him.

60. Catalyst acknowledged that it had no direct evidence that Mr. Moyse had provided confidential information to West Face regarding WIND, but asked the court to draw that inference.[80] Justice Newbould accepted Catalyst's submissions as to the applicable legal principles in drawing factual inferences:

> The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence. The first step in the inference-drawing process is that the primary facts which provide the basis for the inference must be established by the evidence. Inferences can be drawn on the basis of reasonable probability.[81]

61. The trial judge cautioned, however, that care must be taken to distinguish between conjecture and speculation:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 1994 CanLII 4004 (NS CA), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):
>
> > These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.[82]

62. Justice Newbould engaged in a careful and detailed review of the evidence before him and concluded that the evidence did not support the inferences Catalyst urged him to draw.

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[79] Reasons, para. 8 (RCO-BM Tab 1, page 3)

[80] Reasons, para. 72 (RCO-BM Tab 1, page 21).

[81] Reasons, para. 74 (RCO-BM Tab 1, page 22).

[82] *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A), 1995 CarswellOnt 18 at para. 52 citing *R. v. White* (1996), 28 C.R. (4th) 160 (N.S.C.A), 1994 CarswellNS 20 (N.S.C.A.) at para. 57.

> The inference which Catalyst asks to be drawn that West Face acquired from Mr. Moyse confidential Catalyst information about its interest and strategy to acquire WIND and about its regulatory strategy and that West Face passed that information on to [other members of the consortium which ultimately purchased WIND] would amount to several witnesses purposely giving false testimony. I cannot make any such finding. To the contrary, I find that Mr. Moyse never communicated to anyone at West Face, either in the interview process or later, anything about Catalyst's dealings with WIND or of Catalyst's regulatory or telecommunications industry strategy regarding its interest in WIND and that [other members of the consortium which ultimately purchased WIND] were never advised of any such information by West Face or Mr. Moyse.[83]

63. Catalyst also claimed that Mr. Moyse had committed the tort of spoliation. Catalyst argued that spoliation, which exists in Canadian law as a rule of evidence, should be recognized as an independent tort. After carefully reviewing the evidence, Justice Newbould concluded that Mr. Moyse had not intentionally destroyed evidence in order to affect the outcome of this litigation.[84] In light of this finding, Justice Newbould did not consider whether or not an independent tort of spoliation exists in Ontario.[85]

64. The trial judge ultimately awarded West Face its costs on a substantial indemnity basis, and Mr. Moyse his costs on a partial indemnity basis. Justice Newbould commented that while there may otherwise be a basis for Mr. Moyse to be awarded costs on a substantial indemnity basis, he was only entitled to recover on a partial indemnity basis because of the steps Mr. Moyse took leading up to and in the early days of this litigation which Mr. Moyse "readily acknowledged" were mistakes.[86]

PART III. ISSUES AND ARGUMENT

65. As against Mr. Moyse, this appeal raises the following issues, which Mr. Moyse submits should be answered as follows:

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[83] Reasons, para. 117 (RCO-BM Tab 1, page 36).
[84] Reasons, para. 166 (RCO-BM Tab 1, page 49).
[85] Reasons, para. 167 (RCO-BM Tab 1, page 49).
[86] Costs endorsement, paras. 15-18 (RCO-BM Tab 3, pages 58-59).

(a) *Did the trial judge err in articulating, or applying the test for the tort of spoliation?*

No. Regardless of the proper test for spoliation, Catalyst's argument must fail on the basis of the trial judge's finding that Mr. Moyse did not destroy any relevant evidence. In any event, no Canadian court has determined the existence of the tort of spoliation in Ontario. The trial judge accepted and applied Catalyst's proposed test, which was consistent with the weight of authority.

(b) *Did the trial judge apply an inconsistent standard of scrutiny to the evidence ?*

No. Catalyst's real complaint is that the trial judge found Mr. Moyse to be more credible than Catalyst's witnesses. Catalyst has failed to identify any inconsistencies in Mr. Moyse's evidence which the trial judge ignored or excused, and/or any clear indication in the trial judge's reasons, or the record, that he applied a different standard of scrutiny to the evidence.

(c) *Did the trial judge commit palpable and overriding errors in his finding that Mr. Moyse did not know Catalyst's confidential regulatory strategy and negotiating positions with respect to VimpelCom?*

No. The trial judge's findings are amply supported by the record, and any error on this point is not overriding, as it would not have affected the outcome in any event.

(d) *Should Catalyst be granted leave to appeal the costs award made in favour of Mr. Moyse, and if leave is granted, should the appeal be granted?*

No. There is no basis to interfere with the trial judge's exercise of discretion in awarding costs to Mr. Moyse.

A. General principles on fact-based appeals

66. Each ground of appeal asserted by Catalyst is a direct or indirect challenge to the trial judge's findings of fact and assessments of credibility. The guiding principles in a fact-driven appeal are well established in the jurisprudence.

67. A trial judge's findings of fact are entitled to significant deference on appeal. An appellate court will not overturn these findings "unless they are infected by palpable and overriding error or are otherwise clearly wrong, unreasonable, or unsupported by the evidence".[87] A palpable error is one which can be plainly seen:[88]

> [T]he palpable and overriding test is met where the findings can be properly characterized as "unreasonable" or "unsupported by the evidence" and they are likely to have affected the result at trial.[89]

68. An appellate court also owes significant deference to the inferences drawn by a trial judge from her or his findings of fact:

> Not infrequently, *different* inferences may reasonably be drawn from facts found by the trial judge to have been directly proven. Appellate scrutiny determines whether inferences drawn by the judge are "reasonably supported by the evidence". If they are, the reviewing court cannot *reweigh the evidence* by substituting, for the reasonable inference preferred by the trial judge, an equally — or even more — persuasive inference of its own. This

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[87] *General Motors of Canada Ltd. v. Johnson*, 2013 ONCA 502 at para. 50, 116 O.R. (3d) 457 (Ont. C.A.).
[88] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 6, [2002] 2 S.C.R. 235.
[89] *General Motors of Canada Ltd. v. Johnson*, 2013 ONCA 502 at para. 51, 116 O.R. (3d) 457 (Ont. C.A.).

> fundamental rule is, once again, entirely consistent with both the majority and the minority reasons in *Housen*.[90] [Emphasis in original]

69. An appellate court may interfere with an inference drawn (or not drawn) by a trial judge only where the inference drawing process itself is palpably in error.[91]

70. An appellate court may not second-guess findings of fact merely because it would place different weight on the trial evidence:

> It is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. Absent palpable and overriding error — that is, absent an error that is "plainly seen" and has affected the result — an appellate court may not upset a fact-finder's findings of fact.[92]

71. The reviewing court's task is not to posit alternative interpretations of the evidence, or to reassess the evidence. The task is to determine whether or not the decision had some basis in the evidence.

72. Deference on appellate review requires the court to abstain from subjecting the decision below to "painstaking scrutiny", because it would be "counterproductive to dissect" minutely a fact-finder's reasons "so as to undermine the fact-finder's responsibility for weighing all of the evidence".[93]

73. Where credibility and reliability are in issue, heightened deference is owed to the trial judge's assessments of credibility. Assessing credibility is a difficult and delicate matter, which does not always lend itself to precise and complete verbalization:

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[90] *L(H) v. Canada (Attorney General)*, 2005 SCC 25 at para. 74, [2005] 1 S.C.R. 401.
[91] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 23, [2002] 2 S.C.R. 235.
[92] *Nelson (City) v. Mowatt*, 2017 SCC 8 at para. 38, 406 D.L.R. (4th) 1 (S.C.C.).
[93] *Noriega v. College of Physicians and Surgeons of Ontario* (Div. Ct.), 2016 ONSC 924 at para. 58, 264 A.C.W.S. (3d) 242 (Div. Ct.).

"[a]ssessing credibility is clearly in the bailiwick of the trial judge and thus heightened deference must be accorded to the trial judge on matters of credibility."[94]

74. Where there are inconsistencies among the parties' witnesses that must be resolved by a credibility assessment, and the trial judge demonstrates she or he is alive to inconsistencies, but accepts a witness's evidence, in the absence of palpable and overriding error, there is no basis for interference.[95]

B. Spoliation

1. Standard of review

75. Mr. Moyse agrees that the articulation of the correct legal test for the tort of spoliation is a question of law.[96] However, the application of that test to the facts is a question of mixed fact and law, and this court must defer to the trial judge's findings in this respect. The standard to be applied is that of palpable and overriding error.[97] In the context of a spoliation case, the Alberta Court of Appeal has commented that appellate courts should generally defer to a trial judge's findings of fact:

> As a general rule, determining whether spoliation has occurred, and what relief should follow, if any, is a matter best left to the trial judge who can consider all of the surrounding facts.[98]

2. The trial judge's finding that Mr. Moyse did not destroy relevant evidence is fatal to Catalyst's position

76. Even if this court were inclined to recognize a novel tort of spoliation, and even if the test for that tort did not require Catalyst to establish Mr. Moyse's subjective intent to

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[94] *C. (R.) v. McDougall*, 2008 SCC 53 at para. 72, [2008] 3 S.C.R. 41.
[95] *C. (R.) v. McDougall*, 2008 SCC 53 at para. 70, [2008] 3 S.C.R. 41.
[96] *Housen v. Nikolaisen*, 2002 SCC 33 at para. 23, [2002] 2 S.C.R. 235.
[97] *1196303 Ontario Inc. v Glen Grove Suites Inc.*, 2015 ONCA 580 at para. 50, 257 A.C.W.S. (3d) 505 (Ont. C.A.).
[98] *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 4, 302 D.L.R. (4th) 661 (Alb.C.A.).

affect the outcome of the litigation, Catalyst's claim would nevertheless fail in the face of Justice Newbould's critical finding that Mr. Moyse did not destroy relevant evidence. Even Catalyst does not suggest that it can recover damages for spoliation absent the intentional destruction of relevant evidence. Catalyst has been unable to identify the relevant documents it claims Mr. Moyse destroyed or how those documents affected its ability to present the case. The trial judge found that the only "documents" that Mr. Moyse deleted were (a) the contents of his Catalyst-issued Blackberry, which he deleted prior to returning it to Catalyst, and (b) the internet browsing history from his personal computer, which he deleted prior to turning it over for forensic imaging.

77. Justice Newbould analyzed in detail the evidence at trial with respect to Mr. Moyse's conduct, including expert evidence with respect to computer forensics.

78. With respect to the deletion of Mr. Moyse's internet browsing history, Justice Newbould made the following findings of fact:

(a) Mr. Moyse deleted his internet browsing history because he did not want his internet search history, which included certain embarrassing content, to become part of the public record;[99]

(b) Catalyst failed to establish that any evidence that might be relevant to the litigation was destroyed when Mr. Moyse deleted his internet browsing history;[100]

[99] Reasons para. 144 (RCO-BM Tab 1, page 43).
[100] Reasons para. 147 (RCO-BM Tab 1, page 44).

(c) Catalyst failed to establish that Mr. Moyse looked at any documents in his Dropbox account dealing with Catalyst's WIND initiative; in fact, the only time he used his Dropbox account on his personal computer was on February 10, 2014, before Mr. Moyse was on the WIND team at Catalyst and long before he decided to leave Catalyst for West Face. Critically, there is no evidence from Mr. Moyse's work computer that Mr. Moyse ever transferred any documents relating to WIND to his Dropbox account;[101]

(d) There is no evidence that Mr. Moyse destroyed any documents that no longer existed either at Catalyst or West Face;[102]

(e) There is no evidence that Mr. Moyse used the Secure Delete program to delete any documents from his computer or to delete any relevant evidence whatsoever. Catalyst argues in its factum that it was an "undisputed fact" that Mr. Moyse "launched a program to wipe his hard drive". To the contrary, Justice Newbould explicitly rejected the evidence of Catalyst's expert on this point and found that there was no cogent evidence that Mr. Moyse ever used the Secure Delete program to delete any documents from his computer. The Secure Delete program creates a record when it deletes files, and no such record was found on Mr. Moyse's computer.[103]

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[101] Reasons, paras. 146-147 (RCO-BM Tab 1, pages 43-44).
[102] Reasons, paras. 145, 150 (RCO-BM Tab 1, pages 43, 44).
[103] Reasons, para. 163 (RCO-BM Tab 1, page 48).

79. With respect to Mr. Moyse wiping his Catalyst-issued Blackberry, a theory of spoliation which was not pleaded, Justice Newbould made the following findings of fact:

(a) The only email address associated with the Blackberry was Mr. Moyse's Catalyst email address, and Catalyst had full access to those emails on its server;[104]

(b) Although Mr. Moyse used the Blackberry once or twice to receive telephone calls from West Face, the logs of those calls were in evidence at trial;[105]

(c) Mr. Moyse had no intent to destroy relevant evidence on his Blackberry, and there is no evidence that any relevant evidence was destroyed.[106]

80. Thus, even leaving aside the question of Mr. Moyse's intent, Justice Newbould found as a fact that no relevant documents or evidence were destroyed when Mr. Moyse deleted his internet search history or wiped his Blackberry.[107] In the face of this finding, Catalyst cannot meet even its own proposed formulation of the appropriate legal test for a novel tort of spoliation.

81. Catalyst has never alleged that West Face destroyed any relevant documents received from Mr. Moyse. Thus, even if Mr. Moyse had been found to have deleted relevant documents, there was no evidence that he ever conveyed such documents to West Face. Had he done so, any such documents would have been produced by West

[104] Reasons para. 164 (RCO-BM Tab 1, page 48).
[105] Reasons para. 165 (RCO-BM Tab 1, page 48).
[106] Reasons para. 165 (RCO-BM Tab 1, page 48).
[107] Reasons, para. 166 (RCO-BM Tab 1, page 49).

Face in the litigation (and none were). As noted by Justice Newbould, Catalyst ultimately conceded in closing argument that "there is no evidence that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face."

3. There is no recognized independent cause of action for spoliation

82. Catalyst argues that "this Court can and should overturn the trial judge's finding that Mr. Moyse did not commit the tort of spoliation."[108] This is a mischaracterization of Justice Newbould's decision. Although he did not find that Mr. Moyse committed the tort of spoliation, Justice Newbould's decision was also clear that:

(a) The tort of spoliation has not been recognized as a free-standing tort in Canada, and

(b) In light of his findings of fact that Mr. Moyse had not destroyed any relevant evidence, it was unnecessary for him to consider whether an independent tort of spoliation exists in Ontario.

83. While Catalyst pleaded spoliation as a free-standing cause of action, spoliation is more commonly known as a rule of evidence, whereby in circumstances where evidence is intentionally lost, destroyed, concealed, or mutilated by a party, a rebuttable presumption arises that the destroyed evidence was harmful to the spoliator's case. [109]

84. It is important to note that no Canadian court has ever recognized the existence of an independent tort of spoliation. In any event, recognizing the existence of a tort would be inappropriate, and unnecessary, in the context of this case.

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[108] Appellant's factum at para. 106.

[109] *St. Louis v. R.* (1896), 25 S.C.R. 649, 1896 CanLII 65 (SCC) at pp. 652-653.

85. Courts in the United States of America are divided on whether or not spoliation exists as an independent tort. Many American jurisdictions have rejected spoliation as an independent tort for policy reasons that apply with equal force here. In *Cedars-Sinai Medical Center v. Superior Court*,[110] the Supreme Court of California laid out a variety of policy reasons to deny recognition of a tort for spoliation against a defendant in a primary action:

> [T]he conflict between a tort remedy for intentional ... spoliation and the policy against creating derivative tort remedies for litigation-related misconduct;[111] the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases.[112]

86. The court in *Cedars-Sinai* held that existing remedies allow underlying litigation to be decided fairly, and any incremental benefits of an independent spoliation tort are outweighed by policy considerations and costs.[113] In *Foster v Lawrence Memorial Hospital*,[114] the U.S. District Court for the District of Kansas summarized the grounds on which U.S. courts have refused to implement an independent tort for spoliation, which included:

> (1) The availability of alternative remedies such as discovery sanctions and negative inferences;
>
> (2) The uncertainty of the existence or extent of damages;
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> ...
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> (4) Recognition of the tort interferes with a person's right to dispose of his property as he chooses;
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> ...

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[110] *Cedars-Sinai Medical Center v. Superior Court* (1998),18 Cal. 4th 1 (US Cal 1998).

[111] For instance, U.S. courts have declined to recognize causes of action for perjury or embracery on similar grounds.

[112] *Cedars-Sinai Medical Center v. Superior Court* (1998),18 Cal. 4th 1 at p. 8 (US Cal 1998).

[113] *Cedars-Sinai Medical Center v. Superior Court* (1998),18 Cal. 4th 1 at pp. 13-17 (US Cal 1998).

[114] *Foster v. Lawrence Memorial Hospital* (1992), 809 F. Supp. 831 (D Kan 1992).

> (6) The tort may be inconsistent with the policy favoring final judgments; a plaintiff who loses his primary suit may bring a second suit by trying to establish that some relevant piece of evidence was not preserved.[115]

87. The American cases which have recognized a tort of spoliation can be clearly distinguished from this case. In those cases, the court considered a free-standing cause of action to be necessary because otherwise the plaintiff would be unable to establish its underlying claim entirely, or there would be considerable prejudice to the underlying claim due to the undeniable significance of the destroyed evidence. For example, in the U.S., independent torts for spoliation have been established where:

(a) The spoliators first obtained an expert report that a ladder that had collapsed under the plaintiff was not defective and then destroyed that ladder;[116]

(b) The spoliators disassembled, replaced, and lost pieces from an allegedly malfunctioning belt-lift shortly after the plaintiff fell from the belt-lift and suffered injuries;[117]

(c) The spoliators altered the tape of the plaintiff's arrest, which interfered with the plaintiff's action based on false arrest and malicious prosecution;[118] and

(d) The defendant physician disposed of his personal notes documenting the treatment of a patient, which interfered with a plaintiff's suit for negligence

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[115] *Foster v. Lawrence Memorial Hosp* (1992), 809 F. Supp. 831 at p. 837 (D Kan 1992).
[116] *Rizzuto v. Davidson Ladders, Inc.* (2006), 280 Conn. 225.
[117] *Coleman v. Eddy Potash, Inc.* (1995), 120 N.M. 645, reversed by *Delgado v. Phelps Dodge Chino, Inc.* (2001), 131 N.M. 272.
[118] *Hazen v. Municipality of Anchorage* (1986), 718 P. (2d) 456 (Alaska 1986).

and violation of the *Social Security Act* based on the death of the patient.[119]

88. All of these cases are distinguishable from the present case. The plaintiffs in these cases could clearly and with great specificity identify the evidence that was destroyed. The plaintiffs could easily demonstrate both that the destroyed evidence was relevant and highly material to those actions, and that the destruction of that evidence clearly imperilled the plaintiff's ability to prove the case. Catalyst established none of these points.

4. The trial judge applied the correct legal test for spoliation

89. Catalyst's submissions on this ground of appeal focus on Justice Newbould's articulation of the test for spoliation. At trial, the parties – including Catalyst in its closing submissions – agreed that the proper test for establishing spoliation was the test from *Nova Growth v. Kepinsky*:

(a) the missing evidence is relevant;

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

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

(d) it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.[120]

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[119] *Foster v. Lawrence Memorial Hospital*, 809 F. Supp. 831 (D Kan 1992).
[120] *Nova Growth Corp v. Kepinski*, 2014 ONSC 2763 at paras. 296, 242 A.C.W.S. (3d) 814 (Ont. S. C.).

90. Catalyst now takes the position that Justice Newbould erred in including the fourth element of the test – i.e., that an alleged spoliator, Mr. Moyse was aware that the destroyed documents (whatever those might be) were relevant evidence, and that he destroyed them for the purpose of affecting the litigation.

91. There is no reason to doubt the correctness of the test articulated by Justice Newbould, and in particular the requirement that it is reasonable to infer that the alleged spoliator destroyed the evidence in order to affect the outcome of the litigation. That test is entirely consistent with Canadian precedent. Moreover, the *Rules of Civil Procedure* already permit a party to seek discovery-related sanctions where a party fails to disclose relevant documents, without requiring any intent requirement. That is the appropriate response to discovery violations regarding the loss or destruction of documents absent an intent to affect the litigation.

(a) The McDougall *case*

92. In *McDougall v. Black & Decker Canada Inc.,*[121] the Alberta Court of Appeal stated that spoliation cannot be made out simply on the basis that evidence has been destroyed, but further requires evidence of an intention that the evidence was destroyed in order to affect the litigation.[122] Justice Newbould relied on that decision in his reasons.

Catalyst closing submissions, para. 368

[121] *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353, 302 D.L.R. (4th) 661 (Alb. C.A.) [*McDougall*].

[122] *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 18, 302 D.L.R. (4th) 661 (Alb. C.A.).

93. Catalyst takes issue with that authority, arguing that the Alberta Court of Appeal did not cite a precedent for its articulation of the spoliation test and that the Court's version of the test was *obiter*.[123] Catalyst's skepticism of *McDougall* is misplaced. The case is a leading authority on spoliation in Canada which has been cited favourably on over 30 occasions (at least 14 of which were by Ontario courts), and the decision has been followed directly in Ontario at least five times since 2011.[124]

94. The reasons in *McDougall* also belie Catalyst's claim that the Alberta Court of Appeal "cited no precedent for its test".[125] To the contrary, the Alberta Court of Appeal conducted a broad survey of existing Canadian spoliation cases, including the very cases that Catalyst cites in its factum.[126] The court explained that its initial articulation of the test[127] was based on its reading of the seminal Supreme Court of Canada spoliation case *St. Louis v. R.*[128] and that its more comprehensive comments were a summary of the existing Canadian cases on the topic.[129]

95. The Alberta Court of Appeal's reasoning and its articulation of the test are both sound and widely accepted, including its requirement that "a reasonable inference can

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[123] Appellant's factum at paras. 72-73.

[124] *Blais v. Toronto Area Transit Operating Authority*, 2011 ONSC 1880, 105 O.R. (3d) 575 (Ont. S.C.); *Wight v. Pickering Automobiles Inc.*, 2011 ONSC 7602, 213 A.C.W.S. (3d) 509 (Ont. S.C.); *Nova Growth Corp v. Kepinski*, 2014 ONSC 2763 at paras. 295-96, 242 A.C.W.S. (3d) 814 (Ont. S.C.); *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at para. 306, 219 A.C.W.S. (3d) 725 (Ont. S.C.); *Leon v. Toronto Transit Commission*, 2014 ONSC 1600 at para. 9, 238 A.C.W.S. (3d) 659 (Ont. S.C.) aff'd in *Leon v. Toronto Transit Commission* (Div. Ct.), 2016 ONSC 3394, 267 A.C.W.S. (3d) 747 (Div. Ct.).

[125] Appellant's factum at para. 73.

[126] The Court in *McDougall* considered both *Cheung (Litigation Guardian of) v. Toyota Canada Inc.* (2003), 29 C.P.C. (5th) 267 (Ont. S.C.), 2003 CarswellOnt 481 (Ont. S. C.) and *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (Ont. C.A.), 2000 CanLII 17170 (ON CA), cases on which the Appellants rely at paras. 79-86 of their factum.

[127] *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 18, 302 D.L.R. (4th) 661 (Alb. C.A.).

[128] *St. Louis v. R.* (1896), 25 S.C.R. 649, 1896 CanLII 65 (SCC).

[129] *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 29, 302 D.L.R. (4th) 661 (Alb. C.A.).

be drawn that the evidence was destroyed to affect the litigation" in order to make out spoliation.[130] There is no reason not to apply this version of the test for spoliation—especially considering that Catalyst urged Justice Newbould to apply the *McDougall* test and relied heavily on the case in its closing submissions.[131]

(b) The Spasic *case*

96. Catalyst then relies on this court's decision in *Spasic Estate v. Imperial Tobacco Ltd.* to establish that spoliation does not, and should not, require proof of what it describes as "specific intent". In that case, this court overturned a motion judge's holding that there was no cause of action for spoliation, and that the plaintiff's claim should be permitted to proceed to trial. Catalyst relies on the following passage from *Spasic*:

> As I stated earlier, I view the plaintiff's claim based on the tort of spoliation as an additional, or alternative, claim to be considered only if it is established that the destruction or suppression of evidence by the respondents results in the inability of the plaintiff to establish the other nominate torts pleaded in the statement of claim.[132]

97. Neither this passage nor any other statement in *Spasic* purports to establish the elements of a test for spoliation. *Spasic* contains no consideration or discussion of the level of knowledge or intention required to establish spoliation. Although Catalyst argues that this court "did not apply heightened intent"[133] in *Spasic* (as it submits Justice Newbould wrongly did), it ignores that this court merely held that the claim for the tort of

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[130] *McDougall v. Black & Decker Canada Inc.*, 2008 ABCA 353 at para. 18, 302 D.L.R. (4th) 661 (Alb. C.A.).

[131] Reasons at para 136 (RCO-BM Tab 1, page 41); Catalyst closing submissions paras. 366-369, 372-373.

[132] *Spasic Estate v. Imperial Tobacco Ltd* (2000), 49 O.R. (3d) 699 (Ont.C.A.), 2000 CanLII 17170 (ON CA) at para. 21, cited in Appellant's factum at para. 80.

[133] Appellant's factum at para. 79.

spoliation should not be struck from the pleadings. The court did not articulate or "apply" any spoliation test whatsoever. In fact, the court declined to say whether an independent tort of spoliation even exists in Canada.[134] In this context, *Spacic* does not support an argument that this court has already decided that there is no requirement or subjective intent.

(c) The Dickson *case*

98. Catalyst also relies on *Dickson v. Broan-Nutone Canada Inc.*[135] for the proposition that spoliation does not require evidence of intent to suppress the truth.[136] In that case, the defendant argued that the evidentiary principle of spoliation should apply. Justice Himel concluded that the presumption of an adverse inference had been rebutted in that case.

99. While Justice Himel in that case was "not convinced" that spoliation in Ontario requires evidence of fraudulent intent,[137] both before and since *Dickson* was released in 2007, her view has been the distinctly minority view in Ontario courts, with numerous Ontario cases concluding that either fraudulent intent, bad faith, or a deliberate

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[134] *Spasic Estate v. Imperial Tobacco Ltd* (2000), 49 O.R. (3d) 699 (Ont. C.A.), 2000 CanLII 17170 (ON CA) at para. 24 ("Cameron J. and counsel for the respondents referred to the substantial body of case law in the United States which has accepted and rejected the tort of spoliation. The very few Canadian cases which have considered the question are far from definitive. Accordingly, the trial judge is free to consider the appellant's claim based on the tort of spoliation as if it were a claim at first instance").

[135] *Dickson v. Broan-Nuton Canada Inc.*, 2007 CarswellOnt 9931 (Ont. S.C.), [2007] O.J. No. 5114 (Ont. S. C.), aff'd without comment on the spoliation issue in *Dickson v. Broan-Nuton Canada Inc.*, 2008 ONCA 734, 170 A.C.W.S. (3d) 430 (Ont. C.A.).

[136] Appellant's factum at para. 87.

[137] *Dickson v. Broan-Nuton Canada Inc.*, 2007 CarswellOnt 9931 (Ont. S.C.) at para. 42, [2007] O.J. No. 5114 (Ont. S. C.).

calculation to affect the outcome of the litigation are necessary to make out spoliation.[138]

(d) Catalyst's floodgates argument should be rejected

100. Catalyst argues that requiring a party to show a spoliator's subjective intent to affect the outcome of the litigation will "eliminate" the possibility of a finding of spoliation because a would-be spoliator "can always claim" that they did not intend to destroy relevant evidence.[139] Catalyst says that "proving specific intent is difficult" and thus the subjective intention requirement should be dropped altogether.

101. This approach ignores the actual wording of the test from *McDougall* as it was applied by the trial judge. The party arguing spoliation only needs to demonstrate that it

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[138] See e.g. *Gutbir v. University Health Network,* 2010 ONSC 6752 (CanLII) at para. 23 (spoliation "requires that the destroyer did so in order to influence the litigation"), 195 A.C.W.S. (3d) 1035 (Ont. S.C.); *Muskoka Fuels v. Hassan Steel Fabricators Ltd.* (2009), 182 A.C.W.S. (3d) 369 (Ont. S.C.), 2009 CanLII 63125 (ON SC) at para. 5 (pleadings should not be struck for spoliation unless it is "beyond doubt that this was a deliberate act done with the clear intention of gaining an advantage in the litigation"); *Burrill v. Ford Motor Co. of Canada Ltd.* (2006), 151 A.C.W.S. (3d) 1084 (Ont. S.C.), 2006 CarswellOnt 6216 at para. 125 (accepting that spoliation required "intentional act of the party or the party's agent indicative of fraud or an intent to suppress the truth" and rejecting spoliation claim for lack of evidence of such intention); *Leon v. Toronto Transit Commission,* 2014 ONSC 1600 at paras. 9-10 ("Spoliation in law, however, does not occur merely because evidence has been destroyed. Rather, it occurs where a party has intentionally destroyed evidence relevant to ongoing or contemplated litigation in circumstances where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation... The unintentional destruction of evidence is not spoliation"), 238 A.C.W.S. (3d) 659 (Ont. S.C.); *Stilwell v. World Kitchen Inc.,* 2013 ONSC 3354 at paras. 56, 65 ("the authorities also make it clear that an adverse inference does not arise merely because evidence has been destroyed... [A]pplication of the spoliation doctrine still requires evidence of the requisite intention"), 229 A.C.W.S. (3d) 303 (Ont. S.C.); *Enterprise Excellence Corp. v. Royal Bank* (2002), 116 A.C.W.S. (3d) 102 (Ont. S.C.), 2002 CanLII 49637 (ON SC) at para. 74 (adopting comment from *Dawes v. Jajcaj* (1995), 15 B.C.L.R (3d) 240 (B.C.S.C.) that "the Court must at least be satisfied that the object in issue was intentionally destroyed through bad faith and not as a result of mere negligence"); *Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660 at para. 306 ("it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation"), 219 A.C.W.S. (3d) 725 (Ont. S.C.); *Nova Growth Corp v. Kepinski*, 2014 ONSC 2763 at para. 326 (spoliation claim rejected as plaintiffs failing to establish "that relevant documents were specifically destroyed... with the intention of affecting the outcome of the litigation"), 242 A.C.W.S. (3d) 814 (Ont. S.C.).

[139] Appellant's factum at para. 78.

is "reasonable to infer" the requisite intent.[140] Asking the party claiming spoliation to establish the reasonableness of such an inference does not give the alleged spoliator carte blanche to destroy evidence with impunity. Asking the trial judge to consider the reasonableness of such an inference in all of the circumstances is a sound approach.

102. Catalyst's inflammatory suggestion that electronic data spoliation claims will invariably be defeated by a party who merely claims a so-called "porn defence" has no merit.[141] While an alleged spoliator may claim a lack of intention, it falls to the trial judge to determine whether such a claim is believable—a determination trial judges make every day in a variety of settings. In this case Justice Newbould found that Moyse had no intention to affect the litigation. That is not a reversible error.

(e) Availability of discovery-related sanctions

103. The *Rules of Civil Procedure* already allow a party to obtain pretrial relief with respect to another alleged party's destruction of evidence without requiring proof of intent. The *Rules* provide the court with a broad discretion to sanction a party that fails to disclose relevant documents that are not favourable to the party's case, including revoking or suspending a party's right to initiate or continue an examination for discovery, dismissing a party's claim, striking a party's defence, or making any such order as is just.[142]

104. Moreover, the Sedona Canada Principles expressly deal with potential sanctions for a party's failure to meet its production obligations:

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[140] Reasons at para 136 (RCO-BM Tab 1, page 41).
[141] Appellant's factum at para. 100.
[142] *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, Rule 30.08(1), 30.08(2).

> Sanctions should be considered by the court where a party will be materially prejudiced by another party's failure to meet any obligation to preserve, collect, review or produce electronically stored information.[143]

105. The range of sanctions available is proportionate to the nature of the nondisclosure, and its significance to the action. For instance, in one American case, as a result of the plaintiff's intentional destruction of evidence, the court recommended that plaintiff be precluded from presenting any expert evidence concerning alleged defects in the vehicle that was the subject of the plaintiff's action.[144]

106. Catalyst could have, but did not seek pretrial relief from the court with respect to Mr. Moyse's alleged failure to disclose documents related to his web browsing history, without being required to show that he intended to destroy those documents.

5. Catalyst's proposed remedy is improper

107. Catalyst led no evidence at trial with respect to its damages for any spoliation. For the first time in its oral closing submissions at trial, and now again on appeal, Catalyst argues that Mr. Moyse should be required to bear Catalyst's costs of the trial.[145] It further argues that the breach of confidence issue should be re-tried.

108. In jurisdictions that have accepted spoliation, damages are the most difficult aspect of spoliation claims to establish because one cannot guarantee the outcome of a claim even with all relevant evidence available, and because the value of destroyed

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[143] The Sedona Working Group, "The Sedona Canada Principles Addressing Electronic Discovery Second Edition" (2016), 17:1 Sed Con J 203 at p. 220.
[144] *Headley v. Chrysler Motor Corp.*, 141 F.R.D. 362 (D. Mass. 1991).
[145] Reasons para. 35 (RCO-BM Tab 1, page 10).

evidence is difficult to quantify. Thus, damages are often calculated by "reasonable estimate."[146]

109. In this case, even if spoliation were made out, any damages award against Mr. Moyse should be nominal, and the proposed re-trial should be rejected out of hand. Catalyst's underlying claim against West Face for breach of confidence was weak, and was overwhelmed at trial by mountains of compelling evidence marshalled by West Face demonstrating that it had not received any confidential information about WIND belonging to Catalyst. Even if Catalyst had been able to prove that Mr. Moyse had passed on relevant confidential information to West Face, it would still have had to establish misuse by the party to whom it was communicated, and Catalyst's loss. West Face led extensive evidence explaining the basis on which it completed the WIND transaction, all of which Justice Newbould found to be credible. Further, Justice Newbould held that Catalyst would have been unable to close the deal in any event.[147] Catalyst's claim would have failed regardless.

C. Issue Two: the trial judge properly assessed the witnesses' credibility

1. Applicable principles

110. Mr. Moyse agrees that it is "an error of law for a trial judge to apply a higher or stricter level of scrutiny to the evidence of the defence than to the evidence of the Crown".[148] However, this court has observed that this "different standards of scrutiny" argument is rarely successful for two related reasons:

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[146] *Holmes v. Amerex Rent-A-Car*, 710 A. (2d) 846 at p. 853 (DC 1998).
[147] Reasons, paras. 127-131 (RCO-BM Tab 1, pages 38-40).
[148] *R. v. Gravesande*, 2015 ONCA 774 at para. 18, 128 O.R. (3d) 111 (Ont. C.A.).

> [C]redibility findings are the province of the trial judge and attract a very high degree of deference on appeal; and appellate courts invariably view this argument with skepticism, seeing it as a veiled invitation to reassess the trial judge's credibility determinations.[149]

111. In cases where an appellant has succeeded in this type of argument, the reviewing court engages in a clear and detailed analysis of both parties' evidence, including articulating the logical inferences that flow from a trial judge's conclusions but that may have been unexpressed in the reasons below and seeing where these conflict.[150] Catalyst's factum includes no such submissions.

112. Another common element of a successful argument on appeal is where the trier of fact found both parties' evidence to suffer from similar defects, but ignored such defects or recharacterized them in a positive light for one party but not the other.[151]

113. Catalyst's argument is a thinly-veiled invitation to reassess the trial judge's credibility determinations. Stripped to its essence, Catalyst's complaint is that the trial judge found Mr. Moyse to be more credible than Catalyst's witnesses. Critically, Catalyst has failed to identify:

(a) Any inconsistencies in Mr. Moyse's evidence which the trial judge ignored or excused;

(b) A clear indication in the trial judge's reasons, or the record, that he applied a different standard of scrutiny to Catalyst's witnesses than to Mr. Moyse's evidence; or

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[149] *R. v. Aird*, 2013 ONCA 447 at para. 39, 307 O.A.C. 183 (Ont. C.A.).
[150] See e.g. *R. v. Norman* (1993), 16 O.R. (3d) 295 (Ont. C.A.), 1993 CarswellOnt 140 (Ont. C.A.) at paras. 28, 34, 35, 51, 52.
[151] See e.g. *R. v. Gravesande*, 2015 ONCA 774 at paras. 23, 24, 39, 41, 128 O.R. (3d) 111 (Ont. C.A.).

(c) Any reason to displace the deference due to a trial judge's credibility assessments.

2. Inconsistencies in Catalyst's evidence

114. Catalyst submits that the trial judge applied an inappropriate level of scrutiny to the inconsistencies in its own witnesses' evidence. Critically, it has not identified any inconsistencies, let alone similar inconsistencies, in Mr. Moyse's evidence which the trial judge ignored or excused. This ground of appeal fails on this basis alone.

115. In any event, the trial judge's rejection of Catalyst's witnesses' evidence on the basis of these inconsistencies is entitled to deference. Catalyst seeks to re-argue the significance of each of these specific examples, which this court has expressly held is not its role.[152]

116. Catalyst cites four examples of Mr. Glassman's evidence to which the trial judge allegedly applied an overly stringent level of scrutiny. Mr. Moyse adopts West Face's submissions in its factum that the trial judge's findings with respect to these four examples are amply supported by the record, and entitled to deference.[153]

117. Catalyst also submits that the trial judge applied an inappropriate level of scrutiny to Mr. De Alba's evidence when he concluded that Mr. De Alba "overstated matters and refused to concede points he should have". Specifically, it argues that the trial judge erred in refusing to accept Mr. De Alba's evidence that Mr. Moyse was a "critical" part of Catalyst's telecommunications deal team. Mr. De Alba's evidence with respect to Mr.

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[152] *Waxman v. Waxman* (2004), 132 A.C.W.S. (3d) 1046 (Ont. C.A.), 2004 CanLII 39040 (ON CA) at paras. 275-277.

[153] Factum of the Defendant (Respondent) West Face Capital Inc. at paras. 74-82.

Moyse's role on the WIND team was intended to demonstrate Mr. Moyse's importance to the Catalyst WIND team, in order to argue that Mr. Moyse had a deep understanding of Catalyst's WIND position.[154]

118. The trial judge found, however that Mr. De Alba exaggerated ("blew up by far") [155] what Mr. Moyse had done as a member of the team. His finding is amply supported by the record. As set out above, Mr. Moyse's contributions to the team consisted of:

(a) Contributing to a *pro-forma* showing a combined WIND and Mobilicity entity, which was a simple exercise based on public information or information already known to Catalyst and required no knowledge of Catalyst's WIND strategy;[156]

(b) Providing essentially administrative support in the creation of two slide decks for presentations Catalyst made to Industry Canada;[157] and

(c) Business due diligence during the first ten days of a potential WIND transaction before he left on vacation and resigned.[158]

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[154] Reasons para. 12 (RCO-BM Tab 1, page 5-6).

[155] Reasons para. 12 (RCO-BM Tab 1, page 5-6).

[156] Exhibit 22 to the Moyse 2016 Affidavit, CCG0011536 (RCO-BM Tab 58, pages 288-289); Moyse 2016 Affidavit, p. 13-16, paras. 34-38 (RCO-BM Tab 55, pages 228-231); De Alba Cross-Examination, 207:6-212:8 (RCO-BM Tab 10, pages 112-117).

[157] Moyse Examination-in-Chief, 1418:19-1419:6 (RCO-BM Tab 11, pages 118-119); Moyse 2016 Affidavit, paras. 39-41 (RCO-BM Tab 55, pages 231-232); Moyse 2016 Affidavit, para. 45-52 (RCO-BM Tab 55, pages 234-236); Moyse 2016 Affidavit, paras. 84-85 (RCO-BM Tab 55, page 246).

[158] Moyse 2016 Affidavit, p. 32-33, paras. 89-91 (RCO-BM Tab 55, pages 247-248); Moyse 2016 Affidavit, p. 31-33, paras. 86-91 (RCO-BM Tab 55, pages 246-248); Moyse 2016 Affidavit, p. 35, paras. 95-97 (RCO-BM Tab 55, pages 250-251); Moyse 2016 Affidavit, p. 33-35, paras. 92-94 (RCO-BM Tab 55, pages 248-249); Exhibit 45 to the Moyse 2016 Affidavit CCG0010041 (RCO-BM Tab 62, pages 316-369).

119. In his evidence at trial, Mr. De Alba greatly exaggerated Mr. Moyse's role. As just one example, Mr. De Alba testified that Mr. Moyse, who was Catalyst's most junior employee and had just joined Catalyst telecommunications team, was involved in the creation of three options which Catalyst presented to the federal government for developing a viable fourth national telecommunications carrier.[159] This evidence was simply not credible, and contradicted Mr. Glassman's own evidence that Mr. Moyse was not the architect of Catalyst's strategy in dealing with the federal government, but that instead he, Mr. Glassman, was the chief architect, and the other architects were Mr. De Alba and Mr. Riley. [160]

120. The trial judge was entitled to reject Mr. De Alba's evidence with respect to Mr. Moyse's role, and his findings in this respect are entitled to deference.

3. The trial judge appropriately scrutinized Mr. Moyse's evidence

121. Catalyst relies on comments made in the course of the trial judge's costs endorsement to support its argument that the trial judge "assumed that Moyse ... had no reason to tell anything but the truth".[161] It submits that the trial judge "never" considered Mr. Moyse's conduct in the events leading up to the litigation in assessing his credibility, and that he applied a "much more lenient level of scrutiny" to Mr. Moyse's evidence. Catalyst also argues that the trial judge "characterized Moyse's past

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[159] Paliare Roland De Alba Cross-Examination Brief, Tab 35, pp. 7, 8, 9. (RCO-BM Tab 91, pages 444-446); De Alba Cross-Examination, 221:10-24 (RCO-BM Tab 34, page 175).
See also: De Alba Affidavit, para. 60 (RCO-BM Tab 92, pages 447-448), where Mr. De Alba's evidence was that Mr. Moyse "led" the creation of the PowerPoint presentation. He suggested Mr. Moyse was involved in developing the substantive content and analysis contained in that presentation, and understood Catalyst's strategic approach.

[160] Glassman Cross-Examination, 388:22-389:10 (RCO-BM Tab 35, pages 176-177).

[161] Appellant's factum at para. 117.

transgressions as 'youthful mistakes'", though the trial judge did not use any such phrase in his reasons.[162]

122. Contrary to Catalyst's submission, the trial judge turned his mind to the mistakes Mr. Moyse had made both leading up to and at the outset of this litigation, and considered each of them in detail.[163] Justice Newbould noted that while Mr. Moyse had acknowledged his errors, these various mistakes nevertheless "raised a question of why he had done those things and whether his explanations were to cover up improper activity in providing confidential Catalyst information regarding WIND to West Face".[164] Given these questions, Justice Newbould expressly stated that he gave a "critical eye to all of Mr. Moyse's evidence".[165]

123. Justice Newbould wrote that he was particularly careful when considering Mr. Moyse's evidence on the critical question of whether Mr. Moyse passed on confidential information to West Face:

> I have considered the evidence of Mr. Moyse carefully, particularly as he made some mistakes in providing confidential documents to West Face during his interview process and then deleted the email from his computer shortly afterwards when he realized it was a mistake to have done so. What he did later that has given rise to the spoliation allegation against him was done out of a personal concern not involving WIND or Catalyst and while it was a mistake which he acknowledges, I do not draw an inference of a general inclination to destroy relevant evidence or that his evidence should be disregarded. I viewed his evidence as being honestly given.[166]

124. Catalyst also submits that the trial judge erred in refusing to find that Mr. Moyse deliberately misled the court in an earlier affidavit. Mr. Moyse candidly acknowledged at

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[162] Appellant's factum at para. 145.
[163] Reasons, para. 15 (RCO-BM Tab 1, pages 6-7).
[164] Reasons, para. 15 (RCO-BM Tab 1, pages 6-7).
[165] Reasons, para. 15 (RCO-BM Tab 1, pages 6-7).
[166] Reasons, para. 83 (RCO-BM Tab 1, pages 24-25).

trial that his evidence of his involvement in the events at issue in this action had evolved since his initial affidavits.[167] It is to Mr. Moyse's credit that he acknowledged errors and mischaracterizations in his previous evidence. The trial judge carefully considered, and rejected Catalyst's submission at trial that Mr. Moyse had, in his earlier affidavits, sought to deliberately mislead the court, and his finding in this respect is entitled to deference.[168]

125. There is no merit to Catalyst's submissions on this point. The trial judge noted the problematic elements of Mr. Moyse's evidence, expressly stated that he was giving a "critical eye" to all of Mr. Moyse's evidence, and considering the effect of those elements on the balance of his evidence, and explained why, at the end of the day, he made the findings that he did.[169]

D. No palpable and overriding error in factual findings

126. Catalyst submits that the trial judge erred in making several critical factual findings, and that these were palpable and overriding errors. Indeed, Catalyst has set out a laundry list of alleged factual errors in Schedule C to its factum. Those alleged errors are as immaterial and inaccurate as they are numerous. None of those errors, even considered together, rise to the level of palpable and overriding error. Mr. Moyse's response to this catalogue is set out in Schedule "C" to this factum.

127. With respect to Mr. Moyse, Catalyst submits that the trial judge erred in holding that Mr. Moyse "knew nothing confidential" about its WIND strategy. This is a straw

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[167] Moyse Examination-in-Chief, 1522:3-1523:4 (RCO-BM Tab 36, page 178-179).
[168] Reasons, para. 16 (RCO-BM Tab 1, page 7); Reasons, footnote 2 (RCO-BM Tab 1, page 15).
[169] Reasons, paras. 15-16 (RCO-BM Tab 1, pages 6-7).

person argument. The trial judge did not find that Mr. Moyse had "no knowledge" of Catalyst's confidential regulatory strategy or negotiations with federal government officials.[170] Mr. Moyse's evidence was not that Mr. Moyse "knew nothing" about Catalyst's confidential information with respect to WIND. Mr. Moyse candidly acknowledged that he possessed Catalyst confidential information with respect to WIND.

128. Put at its highest, Catalyst appears to be arguing that the trial judge erred in finding that Mr. Moyse's role in the presentations to Industry Canada was largely "administrative",[171] and that from these documents, Mr. Moyse was not intimately aware of Catalyst's negotiating strategy with the government on regulatory matters, or with VimpelCom on the purchase for WIND.[172]

1. The trial judge's findings are supported by the record

129. The trial judge's findings that Mr. Moyse's role in the PowerPoint presentations was largely administrative were amply supported by the record:

(a) Mr. Moyse's own evidence with respect to the first presentation was that his role was largely administrative. He described how Mr. De Alba, Mr. Riley, and Mr. Michaud generated the content and analysis which was contained in this presentation, and Mr. Moyse's contributions involved layout and data input, and the creation of two tables based on publicly

[170] Appellant's factum at para. 165.
[171] Reasons, paras. 44-45, 51 (RCO-BM Tab 1, pages 13, 16).
[172] Reasons, paras. 48 (RCO-BM Tab 1, pages 14-15).

available information (one of which was the *pro-forma* described above).[173]

(b) Mr. Moyse's evidence of his role in the creation of the slide deck was consistent with the surrounding circumstances, the documentary evidence, and common sense.[174]

(c) At times Mr. Glassman's evidence, perhaps inadvertently, resembled Mr. Moyse's account, and the trial judge relied on Mr. Glassman's evidence in this respect in accepting Mr. Moyse's account.[175]

130. The trial judge's finding that Mr. Moyse's role in the second slide deck presented to Industry Canada was largely administrative was again amply supported by the record:

(a) Mr. Moyse's evidence was that he performed a largely administrative function in the creation of the second slide deck.[176]

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[173] Moyse Examination-in-Chief, 1418:19-1419:6 (RCO-BM Tab 11, pages 118-119); Moyse 2016 Affidavit, paras. 39-41 (RCO-BM Tab 55, pages 231-232).

[174] Mr. De Alba agreed on cross-examination that:

(a) Mr. De Alba, Mr. Glassman, and Mr. Riley all had much greater experience in the telecommunications file than Mr. Moyse did: De Alba Cross-Examination, 217:16-218:4 (RCO-BM Tab 37, pages 180-181);

(b) Mr. Moyse did not attend the presentation in Ottawa, which one would have expected had he "led" its creation: De Alba Cross-Examination, 216:7-12 (RCO-BM Tab 38, page 182);

(c) there are no emails or other documents assigning him any research tasks with respect to the PowerPoint: D

(d) there are no documents reflecting work performed by Mr. Moyse, other than the pro-forma, which got incorporated into the PowerPoint: de Alba Cross-Examination, 216:13-217:9 (RCO-BM Tab 39, pages 183-184);

[175] Reasons, para. 45 (RCO-BM Tab 1, page 13); Glassman Examination-in-Chief, 323:3-21 (RCO-BM Tab 40, page 185)

[176] Moyse 2016 Affidavit, p. 29, para. 79, 84-85 (RCO-BM Tab 55, pages 244. 246); Exhibit 36 to the Moyse 2016 Affidavit, CCG0009517 (RCO-BM Tab 61, pages 306-315).

(b) Mr. Moyse's evidence was that he added the handwritten changes made by Mr. De Alba, Mr. Michaud, or Mr. Riley, and had a limited understanding of the contents of the presentation given his limited knowledge of Catalyst's regulatory priorities, and the hurried manner in which it was created.[177]

131. There is no merit to Catalyst's submission that Mr. Moyse himself "created" the PowerPoint presentations which set out in detail Catalyst's regulatory strategy, and the regulatory concessions it would require from the federal government.[178] The inference Catalyst urges upon this court is inconsistent with Catalyst's own evidence at trial, which was that Mr. Moyse was not the architect of Catalyst's strategy in dealing with the federal government. Rather, Mr. Glassman, was the chief architect, along with Mr. De Alba and Mr. Riley.[179]

132. The suggestion that Mr. Moyse played any greater role than this in the PowerPoint's creation, and had any role in the creation of the underlying regulatory strategy, was simply not credible, and the trial judge's finding on this point is entitled to deference.

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[177] Moyse 2016 Affidavit, paras. 84-85 (RCO-BM Tab 55, page 246).
As with the first PowerPoint presentation, there is no contemporaneous documentation assigning any tasks to Mr. Moyse or suggesting that he played any role in formulating the research or analysis, other than the contributors which he acknowledged. Moreover, the few contemporaneous documents with respect to this presentation make clear that Catalyst expressly did not consider Mr. Moyse to be the "team lead". On May 12, 2014, when he was seeking a copy of the presentation in advance of the meeting, Mr. Glassman did not email Mr. Moyse asking for a copy of it, but a series of other Catalyst professionals and advisors involved in the telecommunications file. It defies logic that he would not have emailed the person who was "leading" the presentation to ask where it was. Paliare Roland De Alba Cross-Examination Brief, Tab 48 (RCO-BM Tab 93, pages 449-450); De Alba Cross-Examination, 226:2-19 (RCO-BM Tab 41, page 186).
[178] Appellant's factum at para. 166.
[179] Glassman Cross-Examination, 388:22-389:10 (RCO-BM Tab 35, pages 176-177).

133. Catalyst relies on another document which sets out, in some level of detail, Catalyst's regulatory strategy: a series of emails between Mr. Glassman and Mr. De Alba with respect to the WIND deal, and the government's approach to the deal, on which Mr. Moyse was copied.[180] Mr. Moyse candidly acknowledged that this email increased his understanding of Catalyst's strategy,[181] however, that did not mean that he possessed the same level of sophistication and understanding as Mr. Glassman and Mr. De Alba.[182]

134. Given the nature of the Catalyst organization, and Mr. Moyse's role, it was not necessary for Mr. Moyse to be involved in the strategic decisions made by Catalyst's principals, and Justice Newbould found he was not.[183]

135. Catalyst submits in its factum that Mr. Moyse was "clearly privy" to Catalyst's "litigation strategy", which involved litigation relating to the federal government approach to the 2008 spectrum licenses, which Mr. Glassman believed would be successful and force the Government to give concessions. Catalyst did not produce a single document that supported this claim and cannot and does not cite a single piece of evidence from trial that would support this inference.[184] Mr. Moyse's evidence was that the first time he learned of this strategy was upon reading Mr. Glassman's and Mr. De Alba's affidavits at trial. There is no basis to set aside the trial judge's finding on this point.

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[180] Moyse 2016 Affidavit, p. 27-29, paras. 73-78 (RCO-BM Tab 55, pages 242-243).
[181] Moyse 2016 Affidavit, para. 77 (RCO-BM Tab 55, page 243).
[182] Moyse 2016 Affidavit, para. 78 (RCO-BM Tab 55, pages 243-244), where Mr. Moyse denies Mr. Glassman's allegations that he would have understood a number of very specific aspects of Catalyst's regulatory strategy from this email: (Glassman Affidavit, at paras. 33-34, RCO-BM Tab 94, page 451-453)
[183] Reasons, para. 39 (RCO-BM Tab 1, pages 11-12).
[184] Appellant's factum at paras. 171-176.

2. Any error was not overriding

136. Even if the trial judge erred in these findings, which Mr. Moyse submits he did not, his error cannot be described as "overriding". Catalyst submits that upon concluding that Mr. Moyse did not have knowledge of Catalyst's regulatory strategy, this "ended" the trial judge's "analysis of whether there was a breach of confidence". This mischaracterizes Justice Newbould's reasons. In fact, any factual errors by the trial judge with respect to Mr. Moyse's knowledge of Catalyst's regulatory strategy could not have been overriding. Even assuming a different finding, it could not have altered his conclusion that Catalyst's claim in breach of confidence failed because :

(a) Mr. Moyse did not provide West Face with confidential Catalyst information about Catalyst's interest and strategy to acquire WIND;[185]

(b) Even if he did, such information was not used by West Face in its acquisition from VimpelColm of its interest in WIND;[186] and,

(c) In any event, any misuse by West Face did not cause Catalyst any detriment or damage.[187]

E. Costs appeal

137. The awarding and fixing of costs is highly discretionary and is to be afforded significant deference.[188] Accordingly, s.133(b) of the *Courts of Justice Act* prohibits appeals as to costs, absent leave of the court.[189]

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[185] Reasons, para. 117 (RCO-BM Tab 1, page 36).
[186] Reasons, para. 125 (RCO-BM Tab 1, page 38).
[187] Reasons, para. 126 (RCO-BM Tab 1, page 38).
[188] *Feinstein v. Freedman*, 2014 ONCA 205 at para. 52, 119 O.R. (3d) 385 (Ont. C.A.).

138. This court has repeatedly indicated that "leave to appeal a costs order will be granted sparingly".[190] In *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, this court quoted the following summary of the test for leave to appeal from an order of costs:

> Leave to appeal a costs order will not be granted save in obvious cases where the party seeking leave convinces the court that there are "strong grounds upon which the appellate court could find that the judge erred in exercising his discretion."[191]

139. This court went on to observe that costs awards will be set aside on appeal only where the trial judge has made an "error in principle", or if the costs award is "plainly wrong".[192]

1. The Costs Endorsement should be upheld

140. Catalyst has not established any grounds for this court to interfere with Justice Newbould's proper exercise of his discretion to award Mr. Moyse his costs. Its request for leave to appeal the Costs Endorsement should be denied.

141. Catalyst submits that Justice Newbould "ignored" the fact that Mr. Moyse engaged in "questionable conduct", and that Mr. Moyse should not have been awarded any costs.[193] However, it is plain that Justice Newbould did not ignore Mr. Moyse's mistakes in this litigation. Justice Newbould specifically held that Mr. Moyse should

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[189] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(b).

[190] *Feinstein v. Freedman*, 2014 ONCA 205 at para. 52, 119 O.R. (3d) 385 (Ont. C.A.). See also: *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597 at para. 25, 164 A.C.W.S. (3d) 25 (Ont. C.A.).

[191] *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597 at para. 24, 164 A.C.W.S. (3d) 25 (Ont. C.A.) citing *Brad-Jay Investments Ltd. v. Szijjarto* (2006), 218 O.A.C. 315 (Ont. C.A.), 2006 CarswellOnt 8188 (Ont. C.A.) at para. 21.

[192] *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597 at para. 26, 164 A.C.W.S. (3d) 25 (Ont. C.A.) citing *Hamilton v. Open Window Bakery Ltd.* (2003), 2004 SCC 9 at para. 27, [2004] 1 S.C.R. 303.

[193] Appellant's factum at para. 200.

receive a lesser amount of costs (a partial instead of a substantial indemnity award) as a result of those mistakes.[194] It was within Justice Newbould's discretion to award Mr. Moyse substantial indemnity costs even though he made certain mistakes in the litigation, and it was clearly within his discretion to award partial indemnity costs.[195] There is no merit to Catalyst's submission.

142. In the Costs Endorsement, Justice Newbould observed that, from the beginning, Catalyst ignored Mr. Moyse's position (and that of West Face's witnesses) that no confidential information was ever shared by Mr. Moyse with West Face. Instead, Catalyst elected to launch a "full scale attack" on Mr. Moyse's reputation and integrity.[196] He found that these allegations alone caused Mr. Moyse "great difficulty", including with respect to his employment.[197] Ultimately, the allegations against Mr. Moyse were dismissed in their entirety. Further, Justice Newbould noted, Catalyst sought general damages against Mr. Moyse, the quantum of which it did not particularize until its closing submissions, in a case involving a claim against West Face in excess of $500 million.[198]

143. In light of this context, Justice Newbould found that, but for the mistakes described above, Catalyst should pay Mr. Moyse's costs on a substantial indemnity basis. Given Mr. Moyse's mistakes, however, Justice Newbould awarded him his costs

[194] Costs Endorsement at para. 18, (RCO-BM Tab 3, page 59).

[195] See e.g. *Alan Clausi Professional Corp. v. Bullock*, 2016 ONSC 8094 at paras. 3-6, 45-52, 275 A.C.W.S. (3d) 52 (Ont. S. C.), where the court awarded the defendant substantial indemnity costs despite acknowledging that the defendant made a mistake which may have lengthened the proceedings; and *Farzana v. Abdul-Hamid*, 2015 ONSC 4985 at para. 20, 256 A.C.W.S. (3d) 290 (Ont. S. C.), where the court held that partial indemnity costs may be awarded to a party despite unreasonable behaviour demonstrated by that party.

[196] Costs Endorsement at paras. 16-17, (RCO-BM Tab 3, pages 58-59).

[197] Costs Endorsement at para. 15, (RCO-BM Tab 3, page 58).

[198] Costs Endorsement at para. 17, (RCO-BM Tab 3, pages 59-59).

only on a partial indemnity basis. In exercising his discretion in this manner, Justice Newbould referred to and applied the appropriate principles, and relied on recent jurisprudence, including of this court, which establishes that unfounded allegations of improper conduct may justify an elevated costs award against an unsuccessful plaintiff.[199] This finding is entitled to a high degree of deference by this court.[200]

144. Mr. Moyse submits that Catalyst has failed to establish any grounds to conclude that Justice Newbould erred in exercising his discretion to award costs, let alone strong grounds. Accordingly, leave to appeal the Costs Endorsement must be denied. In the alternative, if leave is granted, Catalyst's appeal as to costs should be dismissed for the same reasons.

PART IV. ADDITIONAL ISSUES

145. Mr. Moyse raises no additional issues.

PART V. ORDER SOUGHT

146. Mr. Moyse respectfully requests that Catalyst's appeal and motion for leave to appeal the costs order be dismissed against him in their entirety, with costs.

147. Mr. Moyse estimates his counsel will require 90 minutes for oral argument. An order under subrule 61.09 (2) is not required.

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[199] Costs Endorsement at paras. 3-4, (RCO-BM Tab 3, pages 55-56), citing: *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. C.J.), 1992 CarswellOnt 437 (Ont. C.J.); *Re Bisyk (No. 2)* (1980), 32 O.R. (2d) 281 (Ont. S.C.), 1980 CanLII 1843 (ON SC); *Davies v. Clarington (Municipality)*, 2009 ONCA 722, 100 O.R. (3d) 66 (Ont. C.A.); and *Thoughtcorp Systems Inc. v. Tanju* (2009), 177 A.C.W.S. (3d) 55, 2009 CanIII 22577 (ON SC).

[200] *Feinstein v. Freedman*, 2014 ONCA 205 at para. 52, 119 O.R. (3d) 385 (Ont. C.A.).

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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SCHEDULE "A"

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17. *Nova Growth Corp v. Kepinski*, 2014 ONSC 2763, 242 A.C.W.S. (3d) 814 (Ont. S. C.).

18. *Blais v. Toronto Area Transit Operating Authority*, 2011 ONSC 1880, 105 O.R. (3d) 575 (Ont. S.C.).

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34. *R. v. Gravesande*, 2015 ONCA 774, 128 O.R. (3d) 111 (Ont. C.A.).

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SCHEDULE "B"

STATUTES, REGULATIONS, AND BY-LAWS

1. *Rules of Civil Procedure*, R.R.O. 1990 Reg. 194, Rule 30.08(1), 30.08(2).

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

(a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or

(b) if the document is not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (1); O. Reg. 504/00, s. 3.

Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;

(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (2).

2. *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 133(b).

Leave to appeal required

133 No appeal lies without leave of the court to which the appeal is to be taken,

(a) from an order made with the consent of the parties; or

(b) where the appeal is only as to costs that are in the discretion of the court that made the order for costs. R.S.O. 1990, c. C.43, s. 133.

Court of Appeal File No.: C62655
Court File No.: CV-14-507120

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Appellant

-and-

BRANDON MOYSE et al.
Defendants/Respondents

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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