

**IN THE SUPREME COURT OF CANADA  
(ON APPEAL FROM THE ONTARIO COURT OF APPEAL)**

BETWEEN:

**THE CATALYST CAPITAL GROUP INC.**

Applicant  
(Appellant)

and

**BRANDON MOYSE AND WEST FACE CAPITAL INC.**

Respondents  
(Respondents)

---

**AFFIDAVIT OF DAVID C. MOORE  
(Sworn August 27, 2018)**

---

I, David C. Moore, of the City of Toronto, make oath and say as follows:

1. This affidavit is sworn (i) in response to certain allegations and submissions contained in the Responses to the Extension Application, received from Moyse and West Face on August 17 and 20 respectively, and (ii) to correct certain errors and omissions contained in the aforementioned materials.
2. As to the allegation of delay and the argument that no explanation for the delay had been provided, I confirm that at all material times it was my understanding and belief that in order to file the Leave Application, it was necessary to include the issued and entered orders of the Court of Appeal in that application ("OCA Orders"). In fact, as soon as these orders became available, they were added to the Application which was then immediately filed with this Court.
3. I communicated the above belief on numerous occasions to opposing counsel, who apparently had the same understanding. In this regard, during the discussions and negotiations which resulted in the issuance of a \$2,000,000.00 Letter of Credit in favour of West Face, I agreed that I would immediately file the Leave Application after the problems encountered in

connection with the issued and entered orders were resolved. This was my intention and this is exactly what happened.

4. As a result, long before the finalization of the Letter of Credit, I had assembled the necessary materials to file the Leave Application. I had caused this to be done so that that application could immediately be served and filed as soon as soon as I received the issued and entered orders that were included in the Leave Application. As a result, the Leave Application materials were sent to Ottawa on the next business day after my receipt of the OCA Orders, namely Tuesday, August 7, 2018. They were served and filed the following day following some reformatting and correction of a few typographical errors.

5. I acknowledge that my belief, as cited above, was mistaken. It arose from my knowledge of the practice of the Ontario Divisional Court and the Ontario Court of Appeal, where issued and entered orders are normally required to be included with leave application materials. However the consequences of this mistake do not and did not cause any prejudice because even if the Leave Application had been filed earlier, my understanding is that it would have been deemed incomplete and would not have been submitted to the Court unless and until the issued and entered OCA Orders were provided.

6. As to the allegation that I was slow or otherwise failed to act reasonably with respect to the issuance of the OCA Orders, during the period between May 17 and June 6, 2018, referred to in Mr. Carlson's affidavit, West Face and its counsel were aware that during that time frame I and co-counsel were fully engaged (i) with respect to extensive document productions being demanded by West Face, and (ii) preparing a factum with respect to West Face's May 7, 2018 Amended Counterclaim for the purpose of a full day motion scheduled for June 15, 2018. This information was conveyed to West Face counsel at a meeting on May 24, 2018. Attached hereto and marked as Exhibit "A" is a true copy of a series of email exchanges between West Face's counsel and me, which reflects the fact that immediately upon completion of the factum which West Face's counsel was pressing me to deliver, I provided counsel with my comments to the draft OCA Orders to enable them to be issued and entered.

7. Subsequently, consistent with my approach to numerous other demands, deadlines and filings involving West Face during the relevant period, I fully cooperated and made proactive

suggestions from time to time about how to resolve the ongoing, unexpected difficulties encountered in attempting to obtain the issued and entered orders. Contrary to what is asserted in the Responses, I do not believe the orders could have been obtained earlier. This is based upon discussions I had with both opposing counsel in which I offered to arrange an appointment with Justice Doherty if the difficulties continued (no one wanted to proceed in this manner) and in which opposing counsel drew my attention to a July 25, 2018 decision of the Ontario Court of Appeal in the case of *Schnarr v. Blue Mountain Resorts Limited*, 2018 ONCA 668. A copy of that decision is attached as Exhibit “B” hereto. Paragraph 6 thereof contains a direction from the Full Panel which make it clear that the position that I and opposing counsel had been taking throughout—namely that three separate orders were required—was correct:

[6] The other issue regarding costs, that we alluded to above, arises from the draft orders submitted by counsel. On April 25, 2018, this court released its decision regarding costs as between the parties. Our March 28, 2018 reasons had dealt with costs as they related to the interveners. Our decision on costs is a determination separate and apart from the determination of the merits of the appeals (and cross-appeal). Counsel have drafted a single order incorporating both the date of the merits decision and the date of the costs decision. That is improper. Rather, what is required is for two formal orders to be taken out. The first order should deal with the merits, and the costs as they relate to the interveners, and the second order should deal with the issue of costs as they relate to the parties, with each order bearing the respective date when those decisions were released.

[Underlining added.]

8. It is my understanding and belief that it was this direction which made it possible to finally persuade the Court of Appeal staff to issue and enter the OCA Orders. As soon as the Court of Appeal staff indicated a willingness to do this, I again provided opposing counsel with my endorsement on the orders in question. This was necessary because the Court of Appeal staff had required certain minor changes in the previously agreed upon orders. Attached hereto and marked as Exhibits “C” and “D” are true copies of my email providing my consent and an email string reflecting the frustration of all counsel with the process in late July.

9. With respect to the prejudice alleged in the Responses, at all material times I was unaware of any prejudice and I do not believe such exists.

10. In the case of West Face, on May 30, 2018, I immediately answered Mr. Milne-Smith’s email (reproduced as exhibit F to Mr. Carlson’s affidavit). For some reason, this response is not

contained in Mr. Carlson's affidavit. In it, I disagreed with the allegation that any prejudice existed and explained why Catalyst had not been able to responsibly consider the possibility of an application for leave to appeal until the reasons for the decision of the Ontario Court of Appeal were forthcoming. Attached hereto and marked as Exhibit "E" is a copy of the email string containing my response, as well as Mr. Milne-Smith's answer. As appears from this string, Mr. Milne-Smith did not take issue with my email, and simply answered, "Understood."

11. The above reflects that throughout the only concern ever expressed to me by West Face counsel was the potential impact of Catalyst's Leave Application on West Face's ability to collect the costs ordered by the Courts below. This concern, and any possible prejudice arising from it, was and is fully answered by the \$2,000,000.00 Line of Credit.

12. I should add that the matters referred to in the affidavit of Philip de L. Panet, attached as Exhibit P to Mr. Carlson's affidavit, were never raised by West Face counsel with me as being the basis of any concern or prejudice. The contents of that affidavit relate to certain injunctive relief being sought by Catalyst in 2016, which, if granted, would have impacted West Face's ongoing operations and investment activities. No such circumstances or facts exist now. I am unaware of any impact whatsoever of the Leave Application upon West Face's activities or investments and I am sure that if there were any grounds to assert such current prejudice, same would have been raised by Mr. Milne-Smith with me (they never were) or made the subject of a current affidavit attesting to such prejudice.

13. As to the prejudice asserted by Mr. Moyses, no prejudice were ever disclosed to me by his counsel. In light of Mr. Moyses's affidavit, I made inquiries regarding the Ontario Securities Commission procedures with Mr. Garth Foster of the Faskens firm, whose practice is focused on investment funds, registration and regulatory compliance. As a result, I obtained a full copy of the 34 page form referred to in Mr. Moyses's affidavit, and an extract of same is attached as Exhibit "F". I also discussed the OSC procedure with Mr. Foster. As a result of these inquiries, I understand and believe as follows:

- (1) the processing of the completed form normally takes 4-8 weeks;
- (2) in processing such applications, OSC Staff undertake searches for the purpose of identifying any court proceedings or decisions involving the applicant;

(3) in addition to the question identified in paragraph 18 of Mr. Moyses affidavit (which is item 15(1) in the form) the form also contains the following question at item 15(2):

Have you or a firm where you are or were a partner, director, officer or major shareholder ever been a defendant or respondent in any civil proceeding in which fraud, theft, deceit, misrepresentation or similar misconduct is, or was, successfully established in a judgment?

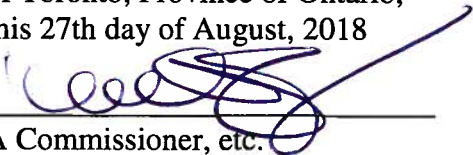
14. Based on the foregoing, I further believe that assuming that allegations involving the improper disclosure of confidential information were the subject of a continuing lawsuit, and would trigger the need to answer "yes" to the question identified in Mr. Moyses affidavit, the findings contained in the judgments of the Honourable Mr. Justice Lederer and the Court of Appeal herein would require an affirmative answer to the second question set out above. These judgments find (i) that Moyses had wrongfully provided West Face with confidential, proprietary information belonging to Catalyst and (ii) had committed a serious breach of a Court Order. Attached as Exhibits "G" and "H" are true copies of extracts from the above decisions, making these findings.

15. In other words, regardless of the Leave Application herein, Moyses would be required to answer "yes" to item 15(2), failing which he would run the risk of non-disclosure to the OSC when they ascertained the existence of the above findings through the normal course searches referred to above.

16. As a result of the above, in addition to the reasons set out in the Reply Submissions, I do not believe that the granting of an extension of time to enable the Leave Application to be considered on its merits has resulted or would result in any prejudice to Mr. Moyses.

17. This affidavit is sworn in support of the request, contained in the Reply Submissions being filed with the Court, that the Extension and Leave Applications be considered together, in accordance with this Court's normal practice.

SWORN BEFORE ME at the City )  
of Toronto, Province of Ontario, )  
this 27th day of August, 2018 )

  
A Commissioner, etc.

K.G. JONES

  
\_\_\_\_\_  
DAVID C. MOORE

This is Exhibit "A" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018



---

A Commissioner, etc.

## David Moore

---

**From:** Milne-Smith, Matthew [MMilne-Smith@dwpv.com]  
**Sent:** Tuesday, June 05, 2018 6:05 PM  
**To:** Carlson, Andrew; David Moore  
**Cc:** 'Robert.Centa@paliareroland.com'; 'Kris.Borg-Olivier@paliareroland.com'; 'denise.cooney@paliareroland.com'  
**Subject:** RE: Outstanding Judgments of the Court of Appeal

David,

Please provide us your authority to execute the consent to these judgments on Catalyst's behalf. Failing that, we will need to attend at the Court of Appeal, and we will seek our costs of doing so.

Please also advise when we will receive your factum.

Matt

**Matthew Milne-Smith** | [Bio](#) | [vCard](#)  
T 416.863.5595  
[mmilne-smith@dwpv.com](mailto:mmilne-smith@dwpv.com)

---

## DAVIES

155 Wellington Street West  
Toronto, ON M5V 3J7  
[dwpv.com](http://dwpv.com)

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

---

**From:** Carlson, Andrew  
**Sent:** June 5, 2018 3:56 PM  
**To:** "David Moore" ([david@moorebarristers.ca](mailto:david@moorebarristers.ca))  
**Cc:** Milne-Smith, Matthew; 'Robert.Centa@paliareroland.com'; 'Kris.Borg-Olivier@paliareroland.com'; 'denise.cooney@paliareroland.com'  
**Subject:** RE: Outstanding Judgments of the Court of Appeal

Hi David,

I am writing to advise that we are in the process of submitting the attached judgments to be issued and entered by the Court of Appeal.

Regards,

-Andrew

---

**From:** Carlson, Andrew  
**Sent:** May 29, 2018 8:13 AM  
**To:** 'David Moore' ([david@moorebarristers.ca](mailto:david@moorebarristers.ca))  
**Cc:** Milne-Smith, Matthew; [Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com); [Kris.Borg-Olivier@paliareroland.com](mailto:Kris.Borg-Olivier@paliareroland.com); [denise.cooney@paliareroland.com](mailto:denise.cooney@paliareroland.com)  
**Subject:** Outstanding Judgments of the Court of Appeal

Hi David,

I am just following up on the three outstanding judgments to be obtained from the Ontario Court of Appeal in the Moyse Action. I first provided the attached drafts to you approximately two weeks ago, and it's now been a few days since your meeting with Mr. Riley on Friday, May 25, at which you indicated that you would be obtaining client instructions regarding these judgments. Please take the few minutes necessary today to provide us with any comments you may have as I intend to submit these to the Court tomorrow.

Thank you,

-Andrew



## David Moore

---

**From:** David Moore  
**Sent:** Tuesday, June 05, 2018 6:08 PM  
**To:** 'Milne-Smith, Matthew'  
**Cc:** Carlson, Andrew

I haven't read your email just now but the factum is on its way to you, albeit with some possible typos that we may have missed and that we will fix overnight if they exist.

**\*\*\* Please update your records with our new firm name and email address as set out below. Our address, telephone and fax numbers remain the same. \*\*\***

---

David C. Moore  
Moore Barristers  
Professional Corporation  
393 University Avenue, Suite 1600  
Toronto, Ontario M5G 1E6  
Tel. No. (416) 581-1818 Ext. 222  
Fax No. (416) 581-1279  
e-mail: [david@moorebarristers.ca](mailto:david@moorebarristers.ca)  
Web: [www.moorebarristers.ca](http://www.moorebarristers.ca)

**CONFIDENTIALITY NOTE:** This message contains information which may be privileged or confidential, or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby NOTIFIED that any dissemination, distribution, retention, archiving, or copying of this communication is strictly prohibited. If you have received this e-mail in error, please notify us immediately by return e-mail or by telephoning the number given above, and delete the original message.

## David Moore

---

**From:** David Moore  
**Sent:** Tuesday, June 05, 2018 6:10 PM  
**To:** 'Milne-Smith, Matthew'; Carlson, Andrew  
**Attachments:** Catalyst Factum-final for execution.pdf

Here is the factum in the form in which it will be signed, subject only to possible corrections of typos and the like (if any) that we may have missed

**\*\*\* Please update your records with our new firm name and email address as set out below. Our address, telephone and fax numbers remain the same. \*\*\***

---

David C. Moore  
Moore Barristers  
Professional Corporation  
393 University Avenue, Suite 1600  
Toronto, Ontario M5G 1E6  
Tel. No. (416) 581-1818 Ext. 222  
Fax No. (416) 581-1279  
e-mail: [david@moorebarristers.ca](mailto:david@moorebarristers.ca)  
Web: [www.moorebarristers.ca](http://www.moorebarristers.ca)

**CONFIDENTIALITY NOTE:** This message contains information which may be privileged or confidential, or exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent responsible for delivering the message to the intended recipient, you are hereby NOTIFIED that any dissemination, distribution, retention, archiving, or copying of this communication is strictly prohibited. If you have received this e-mail in error, please notify us immediately by return e-mail or by telephoning the number given above, and delete the original message.

## David Moore

---

**From:** David Moore  
**Sent:** Tuesday, June 05, 2018 6:14 PM  
**To:** 'Milne-Smith, Matthew'; Carlson, Andrew  
**Subject:** FW: Emailing: A. Index to Amended FASODCC.docx, B. Annotated Amended FASODCC of West Face.pdf  
**Attachments:** A. Index to Amended FASODCC.docx; B. Annotated Amended FASODCC of West Face.pdf

---

Here are the 2 Appendices referred to at the beginning of the Factum, one of which I mentioned yesterday. We will deliver hard copies of the whole package (with the schedule of cases etc etc) duly signed tomorrow morning.

The whole process has taken substantially longer than I intended or expected and I repeat my apologies for that.

David Moore

## David Moore

---

**From:** David Moore  
**Sent:** Wednesday, June 06, 2018 9:04 AM  
**To:** 'Milne-Smith, Matthew'; Carlson, Andrew  
**Cc:** 'Robert.Centa@paliareroland.com'; 'Kris.Borg-Olivier@paliareroland.com'; 'denise.cooney@paliareroland.com'  
**Subject:** RE: Outstanding Judgments of the Court of Appeal  
**Attachments:** Catalyst 411--Moyses Court of Appeal Judgment on the Merits endorsed by Moore Barristers.pdf; Catalyst 411--Moyses Court of Appeal Judgment dismissing Leave to Appeal Trial Costs endorsed by Moore Barristers .pdf; Catalyst 411--Moyses Court of Appeal Judgment for Costs of the Appeals endorsed by Moore Barristers.pdf

Further to our exchanges last night, please find attached an annotated version of the 3 orders of the Court of Appeal, on which I have endorsed my approval as to form and content.

If the changes are acceptable, and if it is necessary that my approval be endorsed on the back page of these orders, as you have done, I am content that you do so on my behalf.

If we need to discuss my proposed changes, please call me this morning.

Thank you,

David Moore

---

**From:** Milne-Smith, Matthew [<mailto:MMilne-Smith@dwpv.com>]  
**Sent:** Tuesday, June 05, 2018 6:05 PM  
**To:** Carlson, Andrew; David Moore  
**Cc:** 'Robert.Centa@paliareroland.com'; 'Kris.Borg-Olivier@paliareroland.com'; 'denise.cooney@paliareroland.com'  
**Subject:** RE: Outstanding Judgments of the Court of Appeal

David,

Please provide us your authority to execute the consent to these judgments on Catalyst's behalf. Failing that, we will need to attend at the Court of Appeal, and we will seek our costs of doing so.

Please also advise when we will receive your factum.

Matt

**Matthew Milne-Smith** | [Bio](#) | [vCard](#)  
T 416.863.5595  
[mmilne-smith@dwpv.com](mailto:mmilne-smith@dwpv.com)

---

## DAVIES

155 Wellington Street West  
Toronto, ON M5V 3J7  
[dwpv.com](http://dwpv.com)

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

---

**From:** Carlson, Andrew  
**Sent:** June 5, 2018 3:56 PM

**To:** "David Moore" ([david@moorebarristers.ca](mailto:david@moorebarristers.ca))

**Cc:** Milne-Smith, Matthew; 'Robert.Centa@paliareroland.com'; 'Kris.Borg-Olivier@paliareroland.com'; 'denise.cooney@paliareroland.com'

**Subject:** RE: Outstanding Judgments of the Court of Appeal

Hi David,

I am writing to advise that we are in the process of submitting the attached judgments to be issued and entered by the Court of Appeal.

Regards,

-Andrew

---

**From:** Carlson, Andrew

**Sent:** May 29, 2018 8:13 AM

**To:** 'David Moore' ([david@moorebarristers.ca](mailto:david@moorebarristers.ca))

**Cc:** Milne-Smith, Matthew; [Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com); [Kris.Borg-Olivier@paliareroland.com](mailto:Kris.Borg-Olivier@paliareroland.com); [denise.cooney@paliareroland.com](mailto:denise.cooney@paliareroland.com)

**Subject:** Outstanding Judgments of the Court of Appeal

Hi David,

I am just following up on the three outstanding judgments to be obtained from the Ontario Court of Appeal in the Moyse Action. I first provided the attached drafts to you approximately two weeks ago, and it's now been a few days since your meeting with Mr. Riley on Friday, May 25, at which you indicated that you would be obtaining client instructions regarding these judgments. Please take the few minutes necessary today to provide us with any comments you may have as I intend to submit these to the Court tomorrow.

Thank you,

-Andrew

This is Exhibit "B" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018



---

A Commissioner, etc.

**COURT OF APPEAL FOR ONTARIO**

**CITATION: Schnarr v. Blue Mountain Resorts Limited, 2018 ONCA 668**

**DATE: 20180725**

**DOCKET: C63305 and C63351**

**Doherty, Brown and Nordheimer JJ.A.**

**BETWEEN**

**David Schnarr**

**Plaintiff (Respondent)**

**and**

**Blue Mountain Resorts Limited**

**Defendant (Appellant)**

**AND BETWEEN**

**Elizabeth Woodhouse**

**Plaintiff (Appellant/**

**Respondent by cross-appeal)**

**and**

**Snow Valley Resorts (1987) Ltd. aka Snow Valley (Barrie), Snow Valley Barrie,  
Snow Valley Ski Resort, Snow Valley, 717350 Ontario Ltd.**

**Defendants (Respondents/**

**Appellants by cross-appeal)**

**John A. Olah, for the appellant, Blue Mountain Resorts Limited**

**Edward Chadderton and Jeffrey Belesky, for the respondents/appellants by  
cross-appeal, Snow Valley Resorts (1987) Ltd. aka Snow Valley (Barrie), Snow**

Valley Barried, Snow Valley Ski Resort, Snow Valley, and 717350 Ontario Ltd.  
(collectively, "Snow Valley")

Paul J. Pape, Shantona Chaudhury, and Evan Rankin, for the respondent, David Schnarr and for the appellant/respondent by cross-appeal, Elizabeth Woodhouse

Heard: February 7-8, 2018

On appeal from the orders of Justice Ria Tzimas of the Superior Court of Justice, dated January 6, 2017 with reasons reported at 2017 ONSC 114, and of Justice John McCarthy of the Superior Court of Justice, dated January 13, 2017 with reasons reported at 2017 ONSC 222.

#### ADDENDUM

[1] On March 28, 2018, this court released its decision allowing both appeals and the cross-appeal, setting aside the two orders below, and remitting the matters back to the Superior Court of Justice to proceed in accordance with this court's reasons.

[2] Subsequent to the release of our reasons, counsel advised in writing that certain issues had arisen with respect to taking out the formal orders. Specifically, three issues were of concern:

1. Whether the "no order as to costs" provision could incorporate both the parties and the interveners or whether they had to be dealt with separately.
2. Whether the court's conclusion regarding s. 93(2) of the *Consumer Protection Act, 2002*, S.O. 2002, c. 30, Sched. A should be reflected in the formal order.



3. Whether the court's conclusion regarding the effect of the respective waivers should be reflected in the formal order and, if so, how that conclusion should be worded.

[3] In terms of the first issue, we would agree with counsel that the "no order as to costs" can be reflected in the orders as relating to both the parties and to the interveners, but for a separate issue that we identify below. If all of the costs had been determined at the same time, a simple provision that there be no order for costs of the appeal either for or against any party including the interveners would suffice.

[4] The second and third issues can be dealt with together. The simple answer to those issues is that neither of these conclusions ought to be reflected in the formal order. A formal order reflects the ultimate disposition of a proceeding. It does not reflect the reasons for that disposition. Absent a request for a formal declaration, conclusions regarding issues raised in a proceeding ought not to be reflected in the formal order. For example, if a court concludes that the defendant was negligent and awards damages as a consequence, the formal order does not say that the defendant was negligent. It simply says that the defendant is ordered to pay to the plaintiff damages in a set amount.

[5] In this case, therefore, the formal order ought not to reflect the interpretation that this court applied to s. 93(2) nor should it reflect the conclusion that we

reached regarding the applicability of the respective waivers. Those conclusions are reflected in our reasons and the parties can make submissions as to the consequences of those conclusions if, and when, necessary as the proceedings continue. Indeed, we note that counsel appear to be in agreement that it is open to the plaintiffs to make other arguments as to why they might not be bound by the waivers. All that the formal orders will record is that the appeals (and cross-appeal) were allowed and the matters remitted back to the Superior Court of Justice.

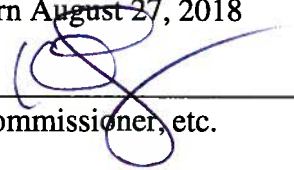
[6] The other issue regarding costs, that we alluded to above, arises from the draft orders submitted by counsel. On April 25, 2018, this court released its decision regarding costs as between the parties. Our March 28, 2018 reasons had dealt with costs as they related to the interveners. Our decision on costs is a determination separate and apart from the determination of the merits of the appeals (and cross-appeal). Counsel have drafted a single order incorporating both the date of the merits decision and the date of the costs decision. That is improper. Rather, what is required is for two formal orders to be taken out. The first order should deal with the merits, and the costs as they relate to the interveners, and the second order should deal with the issue of costs as they relate to the parties, with each order bearing the respective date when those decisions were released.

[7] With these directions, we assume that counsel will now be able to redraft the formal orders accordingly and have them taken out. However, if further issues

remain, counsel can arrange an appointment with Justice Nordheimer to settle the orders.

"Doherty J.A."  
"David Brown J.A."  
"I.V.B. Nordheimer J.A."

This is Exhibit "C" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018



---

A Commissioner, etc.

## David Moore

---

**From:** David Moore  
**Sent:** Thursday, August 02, 2018 10:58 AM  
**To:** 'Carlson, Andrew'; Robert.Centa@paliareroland.com; Kris.Borg-Olivier@paliareroland.com; denise.cooney@paliareroland.com  
**Cc:** Milne-Smith, Matthew  
**Subject:** RE: Court of Appeal - Moyses Action  
**Attachments:** Catalyst 410--Moyse Court of Appeal orders approved as to form and content.pdf

Further to our discussion just now, here are the orders with my approval endorsed on them.

---

**From:** Carlson, Andrew [<mailto:acarlson@dwpv.com>]  
**Sent:** Thursday, August 02, 2018 9:54 AM  
**To:** David Moore; [Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com); [Kris.Borg-Olivier@paliareroland.com](mailto:Kris.Borg-Olivier@paliareroland.com); [denise.cooney@paliareroland.com](mailto:denise.cooney@paliareroland.com)  
**Cc:** Milne-Smith, Matthew  
**Subject:** Court of Appeal - Moyses Action

David, Rob, Kris and Denise,

After further discussions this morning, I have been advised that the Court of Appeal will have the attached orders issued and entered today, provided that I submit copies endorsed as to form and content by all counsel.

Could you please write your endorsement on these as to form and content and send them back to me?

These are the same as the Word versions I sent to you all last Friday.

-Andrew

**Andrew Carlson** | [Bio](#) | [vCard](#)  
T 416.367.7437  
[acarlson@dwpv.com](mailto:acarlson@dwpv.com)

---

## DAVIES

155 Wellington Street West  
Toronto, ON M5V 3J7  
[dwpv.com](http://dwpv.com)

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

This is Exhibit "D" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018



---

A Commissioner, etc.

## David Moore

---

**From:** Carlson, Andrew [acarlson@dwpv.com]  
**Sent:** Tuesday, July 31, 2018 6:01 PM  
**To:** David Moore; Milne-Smith, Matthew  
**Subject:** RE: Court of Appeal Update

No, that's great David, thank you. I confirm that I'm just going to send them the three orders; I'm not going to add to the confusion and send the combined one. We are all agreed that three is the right approach (and Justice Doherty agrees to!)

-Andrew

**Andrew Carlson** | [Bio](#) | [vCard](#)  
T 416.367.7437  
acarlson@dwpv.com

---

## DAVIES

155 Wellington Street West  
Toronto, ON M5V 3J7  
[dwpv.com](#)

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

---

**From:** David Moore [mailto:david@moorebarristers.ca]  
**Sent:** July 31, 2018 5:58 PM  
**To:** Milne-Smith, Matthew; Carlson, Andrew  
**Subject:** RE: Court of Appeal Update

Perhaps what follows has been overtaken by events and/or discussions in which case I apologize.

It's not clear to me (because of the initial email in the string below) whether in addition to sending 3 separate orders, the intent is still to send them another alternative—namely one order (as contemplated in the first email in the string below), and to let OCA staff choose. And if so what form that single order would take. I don't think we should do that.

I have no problem with the form of the 3 separate orders. That is clearly what is correct, as confirmed by the June 25 Blue mountain case that Rob Centa has mentioned--paragraph 6 of that decision (attached for ease of reference) makes it 100% (as we all knew) that 3 separate orders are required. So that's what should be sent to them, in my view.

If we need to discuss (hopefully not) just flip me an email.

---

**From:** Milne-Smith, Matthew [mailto:MMilne-Smith@dwpv.com]  
**Sent:** Tuesday, July 31, 2018 5:29 PM  
**To:** Carlson, Andrew; David Moore  
**Subject:** RE: Court of Appeal Update

David, absent any objection we're just going to submit these tomorrow morning. The Orders have no substantive differences from ones you have previously approved. The differences are purely aesthetic issues that the Court of Appeal requested.

**Matthew Milne-Smith** | [Bio](#) | [vCard](#)  
T 416.863.5595  
[mmilne-smith@dwpv.com](mailto:mmilne-smith@dwpv.com)

---

## DAVIES

155 Wellington Street West  
Toronto, ON M5V 3J7  
[dwpv.com](http://dwpv.com)

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

---

**From:** Carlson, Andrew  
**Sent:** July 31, 2018 12:32 PM  
**To:** 'David Moore' ([david@moorebarristers.ca](mailto:david@moorebarristers.ca))  
**Cc:** Milne-Smith, Matthew  
**Subject:** RE: Court of Appeal Update

David,

I'm sorry I keep missing your calls – I'm in and out of calls and meetings all week. If it's about the attached orders I think the most efficient route is for you to simply mark-up the attached in tracked changes or hand-writing, or just confirm that you are fine with the attached if that is the case.

If it's about the letter of credit then I understand you are dealing with Matt and Scott Hyman now.

Thanks,

-Andrew

---

**From:** Carlson, Andrew  
**Sent:** July 27, 2018 11:16 AM  
**To:** Milne-Smith, Matthew; 'David Moore' ([david@moorebarristers.ca](mailto:david@moorebarristers.ca)); [Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com)  
**Cc:** [denise.cooney@paliareroland.com](mailto:denise.cooney@paliareroland.com); [Kris.Borg-Olivier@paliareroland.com](mailto:Kris.Borg-Olivier@paliareroland.com)  
**Subject:** RE: Court of Appeal Update

All,

Further to my message below, I've attached the three new forms of order. The aesthetic changes the court required were:  
-naming every judge separately as "The Honourable";  
-using only one date at the top right (of course, this is "cured" by going back to three orders);  
-listing every single thing filed by each party separately (I believe I have done so, but please double check that I've captured your client's materials).

Please let me know if you have any final comments.

-Andrew

---

**From:** Milne-Smith, Matthew  
**Sent:** July 27, 2018 9:09 AM  
**To:** Carlson, Andrew; 'David Moore' ([david@moorebarristers.ca](mailto:david@moorebarristers.ca)); [Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com)  
**Subject:** RE: Court of Appeal Update

Unbelievable.



---

**From:** Carlson, Andrew

**Sent:** July 27, 2018 9:08 AM

**To:** 'David Moore' ([david@moorebarristers.ca](mailto:david@moorebarristers.ca)); [Robert.Centa@paliareroiland.com](mailto:Robert.Centa@paliareroiland.com); Milne-Smith, Matthew

**Subject:** Court of Appeal Update

David, Rob, and Matt,

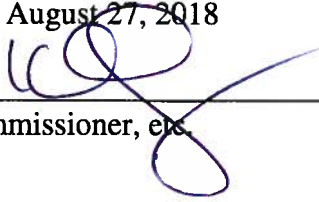
The Court of Appeal contacted me to tell us that our order needed to be separated into two formal orders. I managed to speak with someone this morning – Amina Shah – and explained the history of this matter, namely that all counsels' view was that three formal orders was appropriate, but that our attempts to file three separate orders had been rejected, and that we'd been told to combine them into just one order.

In any event, Amina and I agreed that I would make some cosmetic changes requested by the Court, and send the Court back both: (i) one combined order; and (iii) three separate orders, so that the Court staff could decide which route they prefer.

I will work on those and circulate them later this morning.

-Andrew

This is Exhibit "E" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018



---

A Commissioner, etc.

## David Moore

---

**From:** Milne-Smith, Matthew [MMilne-Smith@dwpv.com]  
**Sent:** Wednesday, May 30, 2018 4:49 PM  
**To:** David Moore  
**Subject:** Re: Moyse

Understood.

On May 30, 2018, at 4:24 PM, David Moore <[david@moorebarristers.ca](mailto:david@moorebarristers.ca)> wrote:

I do not agree with the conclusions below, but there is no point in debating them. Among other things, in my view it was both reasonable and imperative for Catalyst to receive and review the reasons for decision of the Court of Appeal before it could properly consider whether viable grounds existed on which leave to appeal could be sought.

---

**From:** Milne-Smith, Matthew [<mailto:MMilne-Smith@dwpv.com>]  
**Sent:** Wednesday, May 30, 2018 10:16 AM  
**To:** David Moore  
**Cc:** Carlson, Andrew  
**Subject:** Moyse

David, I just want to be clear with respect to our discussions about your intended motion to extend time and seek leave to appeal in the Moyse action. Catalyst's lateness in this regard is causing prejudice to West Face and we will rely on the passage of time in resisting your various motions.

It is quite clear on the law that the relevant date for commencing timelines was the date of the Court's decision on February 21, not the date of the reasons a month later. Catalyst is therefore coming up on six weeks late in its filing, with no justification of which we are aware.

Yours very truly,

Matt

**Matthew Milne-Smith** | [Bio](#) | [vCard](#)  
T 416.863.5595  
[mmilne-smith@dwpv.com](mailto:mmilne-smith@dwpv.com)

---

## DAVIES

155 Wellington Street West  
Toronto, ON M5V 3J7  
[dwpv.com](http://dwpv.com)

DAVIES WARD PHILLIPS & VINEBERG LLP

This email may contain confidential information which may be protected by legal privilege. If you are not the intended recipient, please immediately notify us by reply email or by telephone. Delete this email and destroy any copies.

This is Exhibit "F" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018

  
\_\_\_\_\_  
A Commissioner, etc.

**FORM 33-109F4**  
**REGISTRATION OF INDIVIDUALS AND**  
**REVIEW OF PERMITTED INDIVIDUALS**  
**(section 2.2)**

**GENERAL INSTRUCTIONS**

Complete and submit this form to the relevant regulator(s) or in Québec, the securities regulatory authority, or self-regulatory organization (SRO) if an individual is seeking

- registration in individual categories,
- to be reviewed as a permitted individual.

You are only required to submit one form even if you are applying to be registered in several categories. This form is also used if you are seeking to be reviewed as a permitted individual. A post office box is not acceptable as a valid business location address.

**Terms**

In this form:

"Approved person" means, in respect of a member (Member) of the Investment Industry Regulatory Organization of Canada (IIROC), an individual who is a partner, director, officer, employee or agent of a Member who is approved by IIROC or another Canadian SRO to perform any function required under any IIROC or other Canadian SRO by-law, rule, or policy;

"Canadian Investment Manager designation" means the designation earned through the Canadian investment manager program prepared and administered by CSI Global Education Inc. and so named on the day this Instrument comes into force, and every program that preceded that program, or succeeded that program, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned program;

"CFA Charter" means the charter earned through the Chartered Financial Analyst program prepared and administered by the CFA Institute and so named on the day this Instrument comes into force, and every program that preceded that program, or succeeded that program, that does not have a significantly reduced scope and content when compared to the scope and content of the first-mentioned program;

"Derivatives" means financial instruments, such as futures contracts (including exchange traded contracts), futures options and swaps whose market price, value or payment obligations are derived from, or based on, one or more underlying interests. Derivatives can be in the form of instruments, agreements or securities;

"Major shareholder" and "shareholder" mean a shareholder who, in total, directly or indirectly owns voting securities carrying 10 per cent or more of the votes carried by all outstanding voting securities;

"Sponsoring firm" means the registered firm where you will carry out your duties as a registered or permitted individual; and

"You", "your" and "individual" mean the individual who is seeking registration or the individual who is filing this form as a permitted individual under securities legislation or derivatives legislation or both.

**How to submit this form**

***NRD format***

Submit this form at the National Registration Database (NRD) website in NRD format at [www.nrd.ca](http://www.nrd.ca). If you have any questions, contact the compliance, registration or legal department of the sponsoring firm or a legal adviser with securities law experience, or visit the NRD information website at [www.nrd-info.ca](http://www.nrd-info.ca).

***Format, other than NRD format***

If you are relying on the temporary hardship exemption in section 5.1 of National Instrument 31-102 *National Registration Database*, you may submit this form in a format other than NRD format.

If you need more space, use a separate sheet of paper. Clearly identify the item and question number. Complete and sign the form, and send it to the relevant regulator(s) or, in Québec, the securities regulatory authority, SRO (s) or similar authority. The number of originally signed copies of the form you are required to submit depends on the province or territory, and on the regulator, the securities regulatory authority or SRO.

4. To the best of your knowledge, has any firm, when you were a partner, officer, director or major shareholder, ever been found guilty, pleaded no contest to or been granted an absolute or conditional discharge from a criminal offence that was committed?

Yes  No

If "Yes", complete Schedule K, Item 14.4.

#### Item 15 Civil disclosure

The questions below relate to any jurisdiction of Canada and any foreign jurisdiction.

1. Are there currently any outstanding civil actions alleging fraud, theft, deceit, misrepresentation or similar misconduct against you or a firm where you are or were a partner, director, officer or major shareholder?

Yes  No

If "Yes", complete Schedule L, Item 15.1.

2. Have you or a firm where you are or were a partner, director, officer or major shareholder ever been a defendant or respondent in any civil proceeding in which fraud, theft, deceit, misrepresentation or similar misconduct is, or was, successfully established in a judgment?

Yes  No

If "Yes", complete Schedule L, Item 15.2.

#### Item 16 Financial disclosure

##### 1. Bankruptcy

Under the laws of any applicable jurisdiction, have you or has any firm when you were a partner, director, officer or major shareholder of that firm:

- a) Had a petition in bankruptcy issued or made a voluntary assignment in bankruptcy or any similar proceeding?

Yes  No

If "Yes", complete Schedule M, Item 16.1(a).

- b) Made a proposal under any legislation relating to bankruptcy or insolvency or any similar proceeding?

Yes  No

If "Yes", complete Schedule M, Item 16.1(b).

- c) Been subject to proceedings under any legislation relating to the winding up or dissolution of the firm, or under the *Companies' Creditors Arrangement Act* (Canada)?

Yes  No

If "Yes", complete Schedule M, Item 16.1(c).

- d) Been subject to or initiated any proceedings, arrangement or compromise with creditors? This includes having a receiver, receiver-manager, administrator or trustee appointed by or at the request of creditors, privately, through court process or by order of a regulatory authority, to hold your assets.

Yes  No

If "Yes", complete Schedule M, Item 16.1(d).

This is Exhibit "G" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018



---

A Commissioner, etc.





[20] Similarly, Brandon Moyse knew he had sent material marked "Confidential" and "For Internal Discussion Purposes Only" to West Face. More than that, he knew that the information it contained was confidential and should not have been given to West Face. Having come to this realization, he had deleted the e-mail:

Q. Now, you yourself had actually deleted a copy of that March 27th email from your computer system, right?

A. Yes.

Q. And the reason you chose to delete that particular email, I take it, as opposed to other emails which you didn't delete, was because you thought that there was something perhaps improper about your having sent that email?

A. Upon, further reflection after sending it, yes.

Q. And that is what you thought was wrong about that? That you had disclosed confidential information to West Face?

A. That I had disclosed information to West Face.

Q. And you're not denying that your analysis and the analysis of other people at Catalyst in those memos that you did send to West Face was proprietary and that belonged to Catalyst?

A. I agree it's proprietary.

Q. And you're not denying I take it that the analysis that was performed, in particular – and we'll look in some detail at these presentations or memos. But some of the analysis that was performed was certainly confidential?

A. Yes.

Q. In other words, it wouldn't be known by third parties?

A. Yes.

Q. The, how long did it take you to come to that realization?

A. That I shouldn't have sent it?

---

Q. Yes.

A. I don't remember exactly.

Q. And was around the time that you came to that realization that you thought you might cover your tracks deleting it?

A. No. I deleted it within a week of sending it probably I just don't remember exactly the date.<sup>33</sup>

[21] Yet, in the letter sent, on behalf of Brandon Moyse, on June 5, 2014<sup>34</sup>, nothing was said about this. The letter makes the general assertion to the effect that Brandon Moyes, in performing valuations of companies, did not use "proprietary valuation methodologies" and that while he is aware of "3 to 5 prospective acquisitions", he would not disclose any confidential information concerning them. He said he is prepared to sign a letter confirming he would abide by the confidentiality provisions in his contract of employment, an agreement to which he was already bound.

[22] What is apparent is that both West Face and Brandon Moyse did not provide information or respond to the concerns of Catalyst, in a meaningful way, until the evolution of this motion required them to do so. They waited until Catalyst discovered that information it considered to be confidential had been delivered before acknowledging there was an issue and then proclaimed that, based on their analysis, the material should not be considered to be confidential.

[23] This is to be contrasted to the approach taken by the defendants in *GDL Solutions In. v. Walker*.<sup>35</sup> In that case, a business was sold. As part of the sale, a non-competition provision was negotiated and agreed to. The vendor and others joined a new company that was in direct competition with the business that had been sold. It was alleged that they had misappropriated confidential information. Upon the commencement of the ensuing action, they undertook to and did review their files and "promptly" returned all confidential proprietary information. They undertook to and did preserve the electronic and other records of the employees who had left.<sup>36</sup>

[24] In the case I am to decide, it is a question whether, in the end, the approach adopted by Brandon Moyse and West Face will meet the test that allows a party to obtain equity.

[25] It is important to note that Catalyst is adamant that the investment memos delivered with the March 27, 2014 e-mail were sensitive and confidential.<sup>37</sup> For his part, Brandon Moyse acknowledged that these memos may disclose strategies that Catalyst could employ in a given situation. In his cross-examination, Brandon Moyes did agree that these memos contain information that Catalyst would not want disclosed to a third party.<sup>38</sup> Thomas Dea acknowledged

---

<sup>33</sup> *Cross-examination of Brandon Moyse*, July 31, 2014, at qq. 412-420.

<sup>34</sup> *Supra*, (fn. 5).

<sup>35</sup> [2102] O.J. No. 3768; 2012 ONSC 4378.

<sup>36</sup> *Ibid*, at para. 92.

<sup>37</sup> *Affidavit of James Riley*, sworn July 14, 2014, at para. 12.

<sup>38</sup> *Cross-examination of Brandon Moyse*, July 31, 2014, at qq. 685-691.

This is Exhibit "H" to the  
Affidavit of David C. Moore  
Sworn August 27, 2018

  
\_\_\_\_\_  
A Commissioner, etc.

**COURT OF APPEAL FOR ONTARIO**

**CITATION: The Catalyst Capital Group Inc. v. Moyse, 2018 ONCA 283  
DATE: 20180322  
DOCKET: C62655**

**Doherty, MacFarland and Paciocco JJ.A.**

**BETWEEN**

**The Catalyst Capital Group Inc.**

**Plaintiff (Appellant)**

**and**

**Brandon Moyse and West Face Capital Inc.**

**Defendants (Respondents)**

**Brian H. Greenspan, David C. Moore and Michelle Biddulph, for the appellant**

**Robert A. Centa, Kristian Borg-Olivier and Denise Cooney, for the respondent,  
Brandon Moyse**

**Kent E. Thomson, Matthew Milne-Smith and Andrew Carlson, for the respondent,  
West Face Capital Inc.**

**Heard: February 20 and 21, 2018**

**On appeal from the decision of Justice F. Newbould of the Superior Court of Justice, dated August 18, 2016, dismissing Catalyst's action, reported at 2016 ONSC 5271, and an application for leave and, if leave is granted, an appeal from the costs decision of Justice F. Newbould, dated October 7, 2016.**

**REASONS FOR DECISION**

those allegations in the face of substantial evidence refuting the allegations, and in the end “utterly failed” to substantiate any of the claims.

[51] Unfounded allegations like those made by the appellant in this case can warrant the exercise of discretion in favour of costs on a substantial indemnity basis. We see no error in principle in the trial judge’s decision to award costs on a substantial indemnity basis to West Face. We would not grant leave to appeal the order as it relates to West Face.

[52] The trial judge found that the appellant had made an unwarranted attack on the reputation and integrity of Mr. Moyse. He went on, however, to indicate, at para. 18:

However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

[53] The characterization of some of Mr. Moyse’s conduct as “mistakes” is charitable. This is particularly true in respect of his conduct when ordered by the court to turn his personal computer over to his lawyer so that it could be forensically examined. His decision to delete material from the computer without speaking to his lawyer and before turning the computer over to his lawyer was a serious breach of the court order, even given that he did not delete information relevant to the allegations.