SCC File No. 38232

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

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

APPLICANT
(Appellant)

-and-

BRANDON MOYSE AND WEST FACE CAPITAL INC.

RESPONDENTS
(Respondents)

RESPONSE TO THE APPLICATION FOR LEAVE TO APPEAL
(BRANDON MOYSE, RESPONDENT)
(Pursuant to Rule 27 of the *Rules of the Supreme Court of Canada)*

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PART I. OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. This application for leave to appeal should be dismissed. It raises no issues of public importance. It raises no questions of law. It turns entirely on the trial judge's findings of fact and his findings of mixed fact and law. The Court of Appeal for Ontario ("OCA") was correct to dismiss the appeal and to do so without calling on the respondents.

2. In the underlying claim, the applicant, The Catalyst Capital Group Inc. ("Catalyst") alleged that the respondent, Brandon Moyse, provided West Face Capital Inc. ("West Face") with confidential Catalyst information that West Face used to acquire WIND Mobile Canada ("WIND"). Catalyst subsequently amended its claim and alleged that Moyse had committed spoliation.

3. In its closing submissions at trial, unable to point to any direct evidence that supported its case, Catalyst asked the trial 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 the trial judge made two critical findings of fact:

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

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

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

5. On appeal to the OCA (Doherty, MacFarland and Paciocco JJ.A.), Catalyst asked the OCA to re-weigh the mountain of evidence that was before the trial judge and to draw the inferences that he refused to draw. The OCA held that there was no basis to interfere with any of the trial judge's conclusions and dismissed the appeal.

6. Catalyst now seeks leave to appeal to this Court solely on the basis that the trial judge erred in his application of the test for spoliation. The proposed appeal turns entirely on findings

of fact or mixed fact and law of interest only to the parties. The proposed appeal raises no issues of public importance. Leave to appeal should not be granted.

B. Statement of Facts

1. Facts with Respect to the Alleged Spoliation

7. The principal act of spoliation alleged by Catalyst in this application concerns Moyse's attempt to delete his Internet browsing history prior to turning over his computer for forensic imaging in accordance with an order of Justice Firestone (the "Firestone Order").

8. Moyse's uncontradicted evidence was that he did not delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation.[1] In closing submissions at trial, Catalyst conceded that there was no evidence that Moyse had deleted documents that no longer existed at either Catalyst or West Face.[2]

9. Moyse never denied or concealed that he attempted to delete his computer's Internet browsing history prior to turning it over. He candidly acknowledged throughout the proceeding that he did so out of a genuine concern that his browsing history would reveal personally embarrassing information which was not relevant to the litigation, including that he had accessed a number of adult entertainment websites.[3]

10. Moyse did not believe there was anything improper about deleting his Internet browsing history: although the Firestone Order required him to preserve and maintain Catalyst-related records and records that related to or were relevant to the matters raised in the action, and to turn over his computer and electronic devices for electronic imaging, it did not require him to preserve irrelevant data and files, or to maintain his computer "as is".[4]

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[1] Examination-in-Chief of Brandon Moyse at Trial, Responding Record of Brandon Moyse Tab 2A, 1372:1-5,1427:10-1428:2.

[2] Reasons for Judgment of Justice Newbould dated August 18, 2016 ("Trial Reasons"), Applicant's Record Tab 4, para. 145.

[3] Affidavit of Brandon Moyse, affirmed June 2, 2016 ("Moyse Affidavit"), Responding Record of Brandon Moyse Tab 2B, para. 142.

[4] Moyse Affidavit, Responding Record of Brandon Moyse Tab 2B, para. 144.

2. The Trial Judge's Findings

11. At trial, all parties agreed that the leading Ontario case *Nova Growth Corp., et al. v. Kepinski et al.* ("*Nova Growth*") correctly articulated the test for Catalyst's claim of spoliation.[5] The trial judge applied that test, which requires the plaintiff to prove that:

(a) the missing evidence be relevant;

(b) the missing evidence was destroyed intentionally;

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

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

12. On the first branch of the test, Catalyst argued at trial without any direct evidence that by deleting his Internet browsing history, Moyse deleted relevant evidence.

13. After carefully reviewing the evidence, the trial judge found that there was no cogent evidence that Moyse had deleted any documents from his computer,[6] and Catalyst had not proved that Moyse destroyed any potentially relevant evidence by deleting his Internet browsing history.[7] The trial judge held that Moyse had not intentionally destroyed evidence in order to affect the outcome of the litigation, and that there was "no basis to find or infer a presumption that Moyse destroyed evidence that would be unfavourable to him."[8]

14. The trial judge also dismissed Catalyst's claims against West Face for misuse of confidential information, and Catalyst does not seek leave to appeal with respect to this cause of action. The trial judge made the following findings:

(a) Moyse never told anyone at West Face anything about Catalyst's confidential strategy to acquire WIND;[9]

(b) even if Moyse had provided any confidential Catalyst information to West Face, such information was not used by West Face to acquire WIND;[10] and

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[5] Trial Reasons, Applicant's Record Tab 4, para. 136.
[6] Trial Reasons, Applicant's Record Tab 4, para. 163.
[7] Trial Reasons. Applicant's Record Tab 4, para. 147
[8] Trial Reasons, Applicant's Record Tab 4, para. 166.
[9] Trial Reasons, Applicant's Record Tab 4, para. 117.

(c) even if West Face had misused confidential Catalyst information to acquire WIND, Catalyst suffered no harm because there was no chance that Catalyst could ever have successfully acquired WIND.[11]

15. The trial judge issued detailed and thorough reasons dismissing Catalyst's action.[12]

3. The Court of Appeal

16. In oral argument Catalyst completely abandoned its reliance on the tort of spoliation advanced at trial and in its written submissions on appeal.[13] It then abandoned its submission that the trial judge had erred by applying the test for spoliation in *Nova Growth*. This concession was reasonable since Catalyst had urged the trial judge to apply the *Nova Growth* test, which is well-established in Canadian law.[14]

17. As the OCA noted in its reasons, Catalyst had, therefore, abandoned its only alleged error of law.[15] Catalyst's appeal now turned entirely on challenges to the fairness of the trial process, and the trial judge's findings of fact and mixed fact and law, which are protected by an extremely deferential standard of review.[16]

18. The OCA dismissed Catalyst's appeal. With respect to the spoliation claim, the OCA held that since the trial judge found that Moyse did not destroy any relevant evidence, Catalyst's

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[10] Trial Reasons, Applicant's Record Tab 4, para. 125.

[11] Trial Reasons, Applicant's Record Tab 4, paras. 126-131.

[12] Trial Reasons, Applicant's Record Tab 4, para. 8

[13] Reasons of the Court of Appeal for Ontario, ("OCA Reasons"), Applicant's Record Tab 8, reasons para. 43.

[14] See *Forsey v. Burin Peninsula Marine Service Centre*, 2014 FC 974 at paras. 108-110; *A.D. Metro v. DW Digital Wireless LP*, 2018 ONSC 3259 at paras. 54-55; *Mbaya v. Borg*, 2018 ONSC 2012 at para. 37; *CGI Information Systems and Management Consultants Inc. v. Canada Post Corporation*, 2014 CarswellNat 8782 (Canadian International Trade Tribunal) at para. 74; Lewis N. Klar, *Remedies in Tort* (looseleaf) (Toronto: Carswell, 1988) at PF 1-4 – PF 1-5 "1.2 Spoliation of electronic evidence" and PF 1-6 "2.1 Elements of Proof Intentional Spoliation of Evidence".

[15] OCA Reasons, Applicant's Record Tab 8, para. 43.

[16] OCA Reasons, Applicant's Record Tab 8, para. 19.

argument that the trial judge should have drawn an adverse evidentiary inference against Moyse on the basis of alleged spoliation faced an "insurmountable factual hurdle".[17]

PART II. STATEMENT OF ISSUES

19. The *Supreme Court Act*, provides that the Court should grant leave to appeal:

> [W]here, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance as to warrant decision by it.[18]

20. The sole issue on this application for leave to appeal is whether or not this particular case raises issues of public importance that ought to be decided by this Court. In Moyse's respectful submission, it does not.

PART III. STATEMENT OF ARGUMENT

A. The Proposed Appeal Raises No Issues of Public Importance

21. The proposed appeal presents none of the usual indicia of public importance:

(a) At most, it is of interest only to the immediate parties, but for the reasons set out below and in the West Face memorandum, cannot affect the result of the trial. It will certainly set no precedent of interest to the public, the bench, or bar.

(b) It raises no novel issues of statutory interpretation or law (constitutional or otherwise).

(c) It will resolve no debates among provincial courts of appeal.

(d) It relates solely to alleged errors of mixed fact and law in the application of an agreed-upon legal test.

22. Leave to appeal should not be granted.

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[17] OCA Reasons, Applicant's Record Tab 8, paras. 44-45.

[18] *Supreme Court Act,* R.S.C., 1985, c. S-26, s. 40(1).

23. Catalyst notes that a number of recent cases have dealt with spoliation and electronically stored information ("ESI"), which is not particularly surprising given the growing significance of ESI in the business and personal lives of Canadians.

24. More importantly, however, Catalyst fails to cite any evidence of conflict or uncertainty as to the applicable test arising out of the application of the settled principles to these new factual circumstances. Indeed, the leading case of *Nova Growth* involved allegations of spoliation involving ESI dating back to the early 2000s. Catalyst cites no cases in which courts have expressed confusion or difficulty with the application of the well-established test to facts involving possible destruction of ESI. The application of legal precedents to different factual circumstances is a routine feature of the common law. Different factual circumstances, without something further, do not suggest an issue of such public importance that this Court should grant leave.

B. Catalyst Has Not Identified Any Errors of Law

25. Catalyst opens its submissions by identifying what it describes as "a narrow but important legal issue" in respect of which it is seeking leave: "the appropriate legal test to be applied to determine whether spoliation has occurred" in respect of the destruction of ESI. Catalyst, however, does not dispute the appropriate legal test. Indeed, Catalyst does not propose any alterations to the accepted test.

26. Catalyst then shifts its argument from "the appropriate legal test" to asserting that "the Trial Judge made several legal errors in his application" of the unchallenged *Nova Growth* test. The application of a legal test to the facts of the case does not generate an error of law. It is generally not the type of decision that generates issues of public importance for which the Supreme Court grants leave to appeal.

C. The Trial Judge Committed No Reversible Errors

27. Catalyst's submissions ultimately amount to a complaint that the trial judge failed to draw the inferences from the evidence that Catalyst asked him to draw, and failed to make the factual findings that Catalyst asked him to make. These various complaints, each of which is addressed below, do not amount to a question of public importance justifying leave to appeal.

1. The Trial Judge's Consideration of the Evidence

28. Catalyst submits that the trial judge erred by failing to apply established legal principles relating to circumstantial evidence. Catalyst asserts that "the Trial Judge was required to identify all of the circumstantial evidence which was relevant to Moyse's conduct in relation to the allegations of spoliation and to consider the cumulative effect of that evidence as a whole".[19]

29. The OCA correctly rejected this submission. The OCA held that the trial judge explicitly considered all of Moyse's conduct, and not merely the deletion of his browsing history, in arriving at his spoliation findings:[20]

> The trial judge was alive to the details of the evidence said to demonstrate Mr. Moyse's dishonesty and the unreliability of his evidence. He appreciated the appellant's argument and the need to carefully and critically examine Mr. Moyse's evidence. The trial judge examined the evidence at length, particularly as it related to the allegation that Mr. Moyse had deliberately deleted material from his personal computer and installed programming to hide that deletion and prevent any recovery of the material. In the end, the trial judge accepted Mr. Moyse's explanations for what he had done, and concluded that it could not be established that Mr. Moyse had actually used the programs he had installed on the computer to hide the deletions.
>
> The trial judge approached Mr. Moyse's evidence by examining the substance of that evidence in the context of the entirety of the evidence. He also considered, as a trial judge is entitled to do, his impressions of Mr. Moyse as he testified. The trial judge took the same approach to Mr. Glassman and other witnesses for the appellant. As often occurs, the same approach to the evidence of different witnesses yielded very different credibility and reliability assessments. Those different assessments are not indicative of any flawed fact-finding process, but instead reflect the essential witness-specific nature of credibility and reliability determinations.

2. The Relevance of Moyse's Browsing History

30. Catalyst also submits that the trial judge failed to appreciate that Moyse's browsing history was "highly probative of the issues in this case" and that "there is no doubt that the contents of Moyse's forever lost browsing history – inculpatory or benign – were relevant to the

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[19] Applicant's Memorandum of Argument, para. 23, underlining in original.

[20] OCA Reasons, Applicant's Record Tab 8, paras. 26-27.

issues in the case at bar".[21] The fundamental problem with this submission, which it also made at trial, is that the trial judge found as a fact that the contents of Moyse's Internet browsing history was not relevant to the litigation. The OCA correctly held that there was no basis to interfere with that factual finding.[22]

31. Catalyst now proposes to argue on appeal, for the first time in this proceeding, that "the plain meaning and intent of paragraph 5 of the Firestone Order" (which provided for the taking of a forensic image of Moyse's computer) "was that all of the ESI on Moyse's computer was relevant". This submission finds no support in the text of the Firestone Order. This submission is also inconsistent with Catalyst's conduct throughout the proceeding, in which it never asserted that all of the information on Moyse's computer is relevant to the proceeding. It is far too late in this proceeding for Catalyst to urge such a novel and expansive definition of relevance.

32. While the OCA characterized Moyse's decision to delete his Internet browsing history as "a serious breach of the [Firestone] order" (that is, of the requirement that Moyse deliver his computer for forensic imaging), it nevertheless accepted that "he did not delete information relevant to the allegations" (in other words, there was no breach of the requirement that Moyse preserve and maintain records relevant to the matters raised in the action).[23] These two holdings are by no means inconsistent with one another.

3. Catalyst's Obligation to Establish that Moyse Destroyed Relevant Evidence

33. Catalyst submits that the trial judge erred by placing the onus on it to establish that Moyse destroyed specific pieces of evidence in order to prove spoliation. Although Catalyst asserts this is an error in law, it cites no cases in support of its assertion that the party alleging spoliation need not identify what was allegedly destroyed. The Catalyst position is contrary to its position at trial and on appeal, and to all the relevant cases, including *Nova Growth*, which it

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[21] Applicant's Memorandum of Argument, at para. 27, underlining in original.
[22] OCA Reasons, Applicant's Record Tab 8, paras. 44-46.
[23] OCA Reasons, Applicant's Record Tab 8, para. 53.

accepts as the controlling authority. The court in that case unambiguously stated that "there must be evidence of a particular piece of evidence that was destroyed".[24]

4. "Specific Intent" in Step 4 of the Spoliation Test

34. Catalyst also argues that the trial judge "erroneously injected an unwarranted element of specific intent into step (4)" of the spoliation test, "rather than focusing upon the effects of Moyse's destruction of ESI and the recklessness of his conduct".[25] As *Nova Growth* makes clear, the intention to interfere with the litigation is an element of spoliation in Ontario. The trial judge added nothing new or controversial to the test.

35. Catalyst contends, among other things, that requiring a plaintiff to prove specific intent to establish spoliation would be too difficult and would invite defendants to evade responsibility simply by asserting a good faith intention to preserve relevant evidence. Yet the overwhelming weight of Canadian and Ontario authority states clearly that either fraudulent intent, bad faith, or a deliberate calculation to affect the outcome of the litigation are necessary to make out spoliation.[26] There is no meaningful conflict or uncertainty in this regard.

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[24] *Nova Growth Corp. et al v. Andrzej Roman Kepinski et al.*, 2014 ONSC 2763 (CanLII) at para. 298.

[25] Applicant Memorandum of Argument, para. 35 (underlining in original)

[26] 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"); *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"); *Nova Growth Corp v. Kepinski*, 2014 ONSC 2763 at para. 326 (spoliation claim rejected as plaintiffs failing to establish "that relevant documents were specifically

36. Catalyst's reliance on *Cheung* is misplaced. The motions judge in *Cheung* explicitly left it to the trial judge to "determine whether intentional destruction through bad faith is required before this adverse inference can be drawn" based on the alleged spoliation. Even the trial judge in *Dickson*, also cited by Catalyst, only stated she was not convinced that evidence of a fraudulent intention is required before finding that, regardless of the necessary level of intent, no adverse inference was warranted.[27]

37. Catalyst has also misstated the law in the United States with respect to the level of intent required to make out spoliation. Catalyst relies on the *Residential Funding*, *Zubulake*, and *University of Montreal* pension plan line of cases to establish a lower level of intention for spoliation.[28] These cases are not good law. On December 1, 2015, a new Federal Rule of Civil Procedure was enacted by Congress which reversed those cases. Rule 37(e) now provides that courts have the power to address the failure to preserve electronically stored information but only where the party that lost the information acted with the intent to deprive another party of the information's use in litigation. The District Courts have concluded that the new rule has overruled and superseded the decision in *Residential Funding* and its progeny.[29]

38. Catalyst asserts that requiring a plaintiff to prove that a defendant intended to affect the litigation makes it impossible for a plaintiff to prove spoliation. This is incorrect. Many intentional economic torts require a plaintiff to prove that a defendant had a specific intent to cause a particular type of harm to the plaintiff. For example, the tort of causing loss by unlawful

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destroyed… with the intention of affecting the outcome of the litigation"), 242 A.C.W.S. (3d) 814 (Ont. S.C.).

[27] *Dickson v. Broan-Nuton Canada Inc.*, 2007 CarswellOnt 9931 (Ont. Sup. C. J.) at para. 42, affirmed *Dickson v. Broan-Nuton Canada Inc.*, 2008 ONCA 734 [*Dickson*].

[28] *Residential Funding Co. v. DeGeorge Financial Corp.*, 306 F.3d 99 (USCA, 2nd Circuit, 2002) [*Residential Funding*]; *Zubulake v. UBS Warburg LLC*, 229 F.R.D. 422 (SDNY, 2004) [*Zubalake*]; *The Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities LLC et al.*[*University of Montreal*], 685 F.Supp 2d 456 (SDNY, 2010).

[29] *Mazzei v. Money Store*, 656 Fed.Appx. 558 (USCA, 2nd Circuit, 2016); *Citibank, N.A. v. Super Sayin' Publishing, LLC, Compound Touring, Inc., 2424, LLC, Kevin R. Foster, II, Foster & Firm, Inc., and Project Twenty One, LLC.*, 2017 WL 462601 (SDNY, 2017); *Bagley v. Yale University*, 318 F.R.D. 234 (Dist. Ct. Conn. 2016); *CAT3, LLC v. Black Lineage, Inc.*, 164 F.Supp.3d 488 (SDNY, 2016).

means requires a plaintiff to prove that, in committing the unlawful act, the defendant intended to cause economic harm.[30]

39. With the proper evidentiary record, there is no impediment to a trial judge concluding that a defendant intended to affect the litigation by destroying relevant evidence. In this case, and on this record, however, the trial judge found Moyse credible, accepted his explanation as to why he deleted his Internet browsing history, and concluded that he had not destroyed relevant evidence.

40. Catalyst's reliance on the criminal law relating to specific intent offences is misplaced. The criminal law offers no support for the proposition that spoliation could be made out simply through the destruction of relevant evidence. Indeed, the *Criminal Code* offence of obstruction of justice includes destroying evidence in the context of a court proceeding only if the accused had the specific intent to obstruct justice.[31] The closest criminal law analogue to civil spoliation, therefore, also requires specific intent to affect the proceeding.

D. The OCA Did Not Err

41. Contrary to Catalyst's submissions, the OCA's approach to Catalyst's spoliation arguments was entirely proper. In oral argument, Catalyst abandoned its argument that the trial judge had applied the incorrect legal test for spoliation. In light of that concession, Catalyst was left with what the OCA characterized as "an insurmountable factual hurdle" – namely, the trial judge's factual finding that Moyse did not destroy relevant evidence (and, thus, the first element of the legal test could not be made out).

42. The OCA considered, and ultimately rejected, Catalyst's attacks upon the trial judge's factual findings. It was left with the inevitable conclusion that the finding that Moyse did not destroy relevant evidence "puts an end to any argument that Mr. Moyse's deletion of data from his computer and cellphone supports an adverse inference against Mr. Moyse or West Face."[32]

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[30] *A.I. Enterprises Ltd v. Bram Enterpises Ltd.*, 2014 SCC 12 at paras. 95-96.
[31] *Criminal Code*, R.S.C., 1985, c. C-46, s. 139.
[32] OCA Reasons, Applicant's Record Tab 8, para. 45.

43. The OCA was not required to conduct a new trial on appeal. Such an approach would be entirely inconsistent with the deference showed to the findings of fact of the trial judge.

E. A Successful Appeal Would Not Affect the Result of the Trial

44. Even if leave were granted, and even if the Supreme Court held that the trial judge should have reached a different conclusion with respect to the spoliation allegation, that conclusion would not affect the outcome of the case.

45. As described above, the heart of Catalyst's action concerned its allegation that Moyse gave confidential Catalyst information to West Face, which misused that confidential information to successfully acquire WIND. The claim against Moyse for alleged spoliation was, in substance, collateral to Catalyst's principal claim.

46. As described above, the trial judge found that:

(a) Moyse never gave any confidential Catalyst information about WIND to anyone at West Face;[33]

(b) Even if Moyse had provided confidential Catalyst information to West Face, such information was not used by West Face to acquire WIND;[34] and

(c) Even if West Face had misused confidential Catalyst information, Catalyst suffered no harm because there was no chance that Catalyst could have successfully acquired WIND.[35]

47. Catalyst does not take issue with these findings in its application before this Court. As West Face argues in greater detail in its submission, it would not be appropriate to grant leave because the outcome of any appeal would not affect the outcome of the underlying action.

PART IV. SUBMISSION ON COSTS

48. Moyse respectfully requests that the Supreme Court award him his costs of the application.

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[33] OCA Reasons, Applicant's Record Tab 8, para. 117.
[34] OCA Reasons, Applicant's Record Tab 8, para. 125.
[35] OCA Reasons, Applicant's Record Tab 8, paras. 126-131.

PART V. ORDER SOUGHT

49. Moyse respectfully requests that the application for leave to appeal be dismissed, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 13th day of September 2018.

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Counsel for the Respondent,
Brandon Moyse

PART VI – TABLE OF AUTHORITIES

Cases **At Paragraph(s)**

Other

PART VII – STATUTES, REGULATIONS AND RULES

Criminal Code, R.S.C., 1985, c. C-46

Obstructing justice

- **139** (1) Every one who wilfully attempts in any manner to obstruct, pervert or defeat the course of justice in a judicial proceeding,
    - **(a)** by indemnifying or agreeing to indemnify a surety, in any way and either in whole or in part, or
    - **(b)** where he is a surety, by accepting or agreeing to accept a fee or any form of indemnity whether in whole or in part from or in respect of a person who is released or is to be released from custody,

  is guilty of
    - **(c)** an indictable offence and is liable to imprisonment for a term not exceeding two years, or
    - **(d)** an offence punishable on summary conviction.

- **Idem**

  (2) Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

- **Idem**

Entrave à la justice

- **139** (1) Quiconque volontairement tente de quelque manière d'entraver, de détourner ou de contrecarrer le cours de la justice dans une procédure judiciaire :
    - **a)** soit en indemnisant ou en convenant d'indemniser une caution de quelque façon que ce soit, en totalité ou en partie;
    - **b)** soit étant une caution, en acceptant ou convenant d'accepter des honoraires ou toute forme d'indemnité, que ce soit en totalité ou en partie, de la part d'une personne qui est ou doit être mise en liberté ou à l'égard d'une telle personne,

  est coupable :
    - **c)** soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;
    - **d)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

- **Idem**

  (2) Est coupable d'un acte criminel et passible d'un emprisonnement maximal de dix ans quiconque volontairement tente de quelque manière, autre qu'une manière visée au paragraphe (1),

(3) Without restricting the generality of subsection (2), every one shall be deemed wilfully to attempt to obstruct, pervert or defeat the course of justice who in a judicial proceeding, existing or proposed,

- **(a)** dissuades or attempts to dissuade a person by threats, bribes or other corrupt means from giving evidence;
- **(b)** influences or attempts to influence by threats, bribes or other corrupt means a person in his conduct as a juror; or
- **(c)** accepts or obtains, agrees to accept or attempts to obtain a bribe or other corrupt consideration to abstain from giving evidence, or to do or to refrain from doing anything as a juror.

d'entraver, de détourner ou de contrecarrer le cours de la justice.

- **Idem**

  (3) Sans que soit limitée la portée générale du paragraphe (2), est censé tenter volontairement d'entraver, de détourner ou de contrecarrer le cours de la justice quiconque, dans une procédure judiciaire existante ou projetée, selon le cas :

  - **a)** dissuade ou tente de dissuader une personne, par des menaces, des pots-de-vin ou d'autres moyens de corruption, de témoigner;
  - **b)** influence ou tente d'influencer une personne dans sa conduite comme juré, par des menaces, des pots-de-vin ou d'autres moyens de corruption;
  - **c)** accepte ou obtient, convient d'accepter ou tente d'obtenir un pot-de-vin ou une autre compensation vénale pour s'abstenir de témoigner ou pour faire ou s'abstenir de faire quelque chose à titre de juré.

Q. Did you ever intentionally delete or destroy any evidence relevant to the matters at issue in this case with the intention of frustrating Catalyst's ability to pursue its case?

A. I did not.

Q. Did you ever use a software program called Secure Delete to delete any documents, files or data from your computer?

A. No.

Q. Did you ever alter, modify or tamper with the Secure Delete log that is resident on your computer?

A. No.

Q. Mr. Moyse, I would like to ask you some questions about -- in general about your job search.

A. Sure.

Q. You testified that you started work at Catalyst Capital on or about November 1st, 2012?

A. That's right.

Q. What were your goals when you started working at Catalyst?

A. At the time, prior to my starting there, I was working in investment banking. I

THE WITNESS: Yes.
BY MR. CENTA:
Q. Having purchased these pieces of software, please describe what you did on July 20th, 2014?
A. Only July 20th I deleted my internet browsing history, I ran the registry cleaner, and I also opened Advanced System Optimizer and noodled around in it.
Q. On July 20th, 2014, did you use Secure Delete to delete any files or folders from your computer?
A. I did not.
Q. Did you delete or alter the Secure Delete log that is on your computer?
A. No.
Q. Did you intend to delete any Catalyst documents or Catalyst confidential information when you deleted your browser history?
A. No.
Q. Did you intend to destroy any evidence relevant to this litigation?
A. No.
Q. Did you intend to destroy any evidence in order to affect the outcome of this

litigation?
A. No.
Q. Also pursuant to the terms of the Firestone order, you were required to produce an affidavit of documents that were in your possession?
A. That's correct.
Q. Did you do that?
A. I did, a few, but I did.
Q. And did you locate a number of Catalyst documents on your computer?
A. Yes.
Q. How did you become aware of the existence of those documents --
THE COURT: You'd better just look up once in awhile.
MR. CENTA: I'm so sorry, Your Honour. I thought I was doing better today.
THE COURT: You had been, but you are starting to revert.
MR. CENTA: Old habits die hard.
THE COURT: Okay, Go ahead.
BY MR. CENTA:
Q. I think I also, because of your intervention, just lost a bet with Ms. Cooney,

prevent Catalyst from accessing such irrelevant information and to ensure that it did not end up in the public record.

144. I therefore decided that, prior to delivering my computer to counsel, I would attempt to delete my Internet browsing history from my computer. I did not and do not believe that there was anything improper about my doing so – neither the undertaking nor the Firestone Order required me to maintain my computer "as is" for the 5 days before I was to deliver the computer or to preserve clearly irrelevant files. The focus of both the undertaking and the Firestone Order was to maintain and preserve documents relevant to this action. If the undertaking or the Firestone Order had required me to maintain the computer "as is", I would not have used it at all prior to the image being taken.

145. Though I am comfortable using my computer and other devices on an everyday basis, I do not have a great deal of advanced knowledge about computers. However, I was aware that the mere act of deleting one's Internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently deleted material. I did some Internet searches on how to ensure a complete deletion of my Internet browsing history, and many websites said that cleaning the registry following the deletion of the Internet history would accomplish this.

146. I then did some further online research for "registry cleaning" products, and ultimately purchased two software products from a company called "Systweak". A print-

on July 16, 2014, that it was possible that my personal computer would have to be turned over to be reviewed for documents relevant to this matter.

141. I was not concerned that my devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit: I had good, reasonable explanations for every Catalyst-related document that would be found on my computer, set out in my previous affidavits, and in any event intended to disclose all such documents in my affidavit of documents, as required under the Firestone Order.

142. I was, however, concerned that an image of my computer hard drive would capture not only the Catalyst documents in my possession, which I agreed were relevant to this proceeding and which I would preserve in any event, but also a raft of irrelevant personal information. In particular, I was troubled that Catalyst would have access to my personal Internet browsing history, which was not relevant to the matters in dispute in this litigation but would be embarrassing to have reviewed by others. I use the Internet on my personal computer for, among other things, recreational online gambling, online gaming, and adult entertainment websites. I was particularly concerned that my personal internet browser history would show that I had accessed adult entertainment websites.

143. I was also concerned that the irrelevant information on the images would somehow become part of the public record through this litigation. At that point it was not clear to me what would happen to the images, which would include this irrelevant personal information. The parties had not agreed to appoint an Independent Supervising Solicitor, nor had a Document Review Protocol been implemented to

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Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 16TH
	)	
MR. JUSTICE JUSTICE FIRESTONE	)	DAY OF JULY, 2014

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff for interim relief, was heard this day at the court house, 393 University Avenue, Toronto, Ontario, M5G 1E6.

On being advised of the consent of the parties to the following interim terms up to and including August 7, 2014, the hearing of the Plaintiff's motion for injunctive relief,

1. THIS COURT ORDERS that pending a determination of an interlocutory injunction or until varied by further Order of this Court, the defendant Brandon Moyse ("Moyse"), or anyone acting on his behalf or at his direction, is enjoined from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of The Catalyst Capital Group Inc. ("Catalyst") and all confidential information and/or proprietary third party information provided to Catalyst.

2. THIS COURT FURTHER ORDERS that until an interlocutory injunction is determined or until varied by further Order of this Court, Moyse is enjoined from engaging in activities competitive to Catalyst and shall fully comply with the restrictive covenants set forth in his Employment Agreement dated October 1, 2012.

3. THIS COURT FURTHER ORDERS that Catalyst shall pay Moyse his West Face Capital Inc. ("West Face") salary throughout this period.

4. THIS COURT FURTHER ORDERS that Moyse and West Face, and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed to by Catalyst.

5. THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power or control (the "Devices") to his legal counsel, Grosman, Grosman and Gale LLP ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Image"), to be conducted by a professional firm as agreed to between the parties.

6. THIS COURT FURTHER ORDERS that the costs of the Forensic Image shall be sent to and borne by Catalyst.

7. THIS COURT FURTHER ORDERS that the Forensic Image shall be held in trust by GGG pending the outcome of the interlocutory motion.

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8. THIS COURT FURTHER ORDERS that prior to the return of the interlocutory motion, Moyse shall deliver a sworn affidavit of documents to Catalyst, including copies of Schedule "A" documents, setting out all documents in his power, possession or control, that relate to his employment with Catalyst (the "Documents"). Moyse shall also advise whether any of the Documents have been disclosed to third parties, including West Face, and the details of any such disclosure.

9. THIS COURT FURTHER ORDERS that the above terms are being agreed to on a without prejudice basis and shall not be voluntarily disclosed by the parties. The parties are agreed and request that the Court hearing the interlocutory motion shall not consider or draw any inference from the terms of this Consent Order.

10. THIS COURT FURTHER ORDERS that the Court File in this matter (Court File No. CV-14-507120) shall be sealed pending the outcome of the interlocutory relief motion.

11. THIS COURT FURTHER ORDERS that costs of this interim relief motion shall be reserved to the judge hearing the interlocutory relief motion.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
JUL 22 2014
PER / PAR:

Justice Firestone

Justice Stephen E. Firestone

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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