FILE NUMBER: _____

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)

MEMORANDUM OF ARGUMENT

MOORE BARRISTERS
Professional Corporation
393 University Avenue, Suite 1600
Toronto, Ontario M5G 1E6

David C. Moore
Tel.: (416) 581-1818 Ext. 222
Email: david@moorebarristers.ca
Fax: 416-581-1279

Kenneth G. G. Jones
Tel.: (416) 581-1818 Ext. 224
Email: kenjones@moorebarristers.ca
Fax: 416-581-1279

Counsel for the Applicant The
Catalyst Capital Group Inc.

GOWLING WLG (CANADA) LLP
Barristers & Solicitors
160 Elgin Street, Suite 2600
Ottawa, Ontario K1P 1C3

D. Lynne Watt
Tel.: 613-786-8695
Email: lynne.watt@gowlingwlg.com
Fax: 613-788-3509

Agents for the Applicant The
Catalyst Capital Group Inc.

PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Catalyst Capital Group Inc. (hereinafter "**Catalyst**" or the "**Applicant**") seeks leave to appeal to this Court in respect of a narrow but important legal issue—the appropriate legal tests to be applied to determine whether spoliation has occurred in a case involving the admitted destruction of ***electronically stored information*** ("**ESI**") from devices whose contents were material to the issues in an action which was both contemplated, and later, underway, when the alleged spoliation occurred.

2. At trial, the Honourable Mr. Justice Newbould (hereinafter "**Justice Newbould**" or the "**Trial Judge**") held that spoliation had not been established. On appeal, the Court of Appeal for Ontario ("**OCA**") held that it was unnecessary to consider the legal issues raised by the Appellant in relation to this conclusion, because of the findings made by the Trial Judge.

3. It is respectfully submitted that the Courts below erred in law in the decisions they reached about the spoliation issues advanced by Catalyst. It is further submitted that the issues raised by the proposed appeal relate to the appropriate legal tests applicable to claims of spoliation involving ESI and that these issues are of considerable public importance—especially since these issues have not previously been considered by this Court, and because of the increasing prevalence and importance of ESI in commercial litigation. These circumstances warrant leave to appeal being granted in this case.

B. Facts – The Context in which the Spoliation Issues Occurred

4. The underlying action was based upon a claim for breach of confidence.

5. Catalyst contended that material, confidential information regarding its intended acquisition of a telecommunications company, WIND Mobile Inc., had been improperly communicated by a former employee, Brandon Moyse ("**Moyse**"), to a Catalyst competitor, West Face Capital Inc. ("**West Face**"). Its claims were succinctly summarized by the OCA in the following manner:

> [1] The appellant, The Catalyst Capital Group Inc. ("Catalyst"), and the respondent, West Face Capital Inc. ("West Face"), two investment management firms, made separate efforts to acquire WIND Mobile Inc. ("WIND") in 2014. In early August, it appeared that Catalyst and the principal shareholder of WIND had reached an agreement for the sale of

> WIND to Catalyst. Within days, that agreement had fallen apart and West Face, along with other entities (the "consortium") had come forward with a new, and eventually, successful bid for WIND. The consortium and West Face later sold WIND for a very substantial profit to Shaw Communications.
>
> [2] In this lawsuit, Catalyst alleged that West Face effectively "stole" the WIND deal from Catalyst by improperly using confidential information West Face obtained about Catalyst's strategies in respect of its negotiations for the purchase of WIND. According to Catalyst's claim, the confidential information came from the respondent, Brandon Moyse ("Mr. Moyse"). He had worked for Catalyst as an analyst for about two years until May 2014 when he quit Catalyst to go to work for West Face.
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> [3] Mr. Moyse had worked on the WIND file while at Catalyst, although the extent of his involvement in the file was a matter of dispute in the evidence. He also actively pursued employment with West Face while at Catalyst and while involved in Catalyst's attempts to acquire WIND.
>
> [4] In the lawsuit, Catalyst alleged that the misuse of confidential information by West Face and Mr. Moyse caused damage to Catalyst. Catalyst also sought an accounting of the profits made by West Face and the consortium when Shaw Communications purchased WIND from the consortium.[1]

6. In addition, Catalyst sued West Face and Moyse for spoliation. This claim was also succinctly summarized by the OCA:

> [5] In addition to the claims based on the misuse of confidential information, Catalyst sued West Face and Mr. Moyse for spoliation. This claim arose out of Mr. Moyse's destruction of what Catalyst claimed was relevant evidence contained on Mr. Moyse's cellphone and his personal computer. Catalyst advanced spoliation as a distinct tort claim, alleging damages equal to Catalyst's costs in pursuing the misuse of confidential information claim. Catalyst also advanced spoliation as an evidentiary rule available to assist Catalyst in proving the misuse of confidential information by West Face and Mr. Moyse.[2]

7. Plaintiffs in such cases are normally met with general denials and are forced to rely upon circumstantial evidence to prove their case alleging such causes of action, as outlined by Justice Guthrie in *Matrox Electronic Systems Ltd. v. Gaudreau*, [1993] Q.J. No. 1228 (S.C.) at para. 94:

> In cases involving confidential business information misuse can rarely be proved by convincing direct evidence. In most cases employers must construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convince it that it is more probable than not that what employers alleged happened, did in fact take place. Against this often delicate construct of circumstantial evidence there

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[1] Reasons of the OCA, Application for Leave to Appeal record ("**Leave Record**"), Tab 8.
[2] Reasons of the OCA, Leave Record, Tab 8 (underlining added).

> frequently must be balanced the testimony of employees and their witnesses who directly deny everything.

8. In this context, the spoliation issues and their impact upon the credibility of the defendant Moyse were very important to the overall result in this case.

9. The spoliation issues arose out of the intentional destruction of ESI by Moyse on several occasions prior to trial. There was an extensive record establishing such conduct, much of which was summarized in paragraph 10 of the March 22, 2018 Reasons for Decision of the OCA:

> [10] On the first issue, whether Mr. Moyse had provided confidential information about Catalyst's strategies in respect of the acquisition of WIND to West Face, Catalyst relied heavily on inferences it claimed should be drawn from Mr. Moyse's conduct while he was pursuing employment with West Face, immediately after he left Catalyst to join West Face, and after this litigation was commenced. That evidence included the following:
>
> - Mr. Moyse deliberately provided Catalyst's confidential information to West Face when he was trying to get a job with West Face. This information did not relate to WIND.
> - **Mr. Moyse erased emails that showed he provided that confidential information to West Face;**
> - **Mr. Moyse erased all of the contents of the BlackBerry Catalyst had provided to him for work purposes before he returned it to Catalyst after he quit;**
> - Mr. Moyse made inaccurate and potentially misleading statements in affidavits filed on preliminary motions in this litigation;
> - **Mr. Moyse deleted his internet browsing history from his personal computer and installed programs to scrub the computer registry where deletions could otherwise be detected, in the face of a court order requiring that he turn his computer over to his lawyer so that the computer could be forensically examined for the purposes of this litigation.**[3] [Bolding added.]

10. The first act of spoliation committed by Moyse came to light during the interlocutory proceedings which culminated in a decision of Honourable Mr. Justice Lederer dated November 10, 2014, in which the Court granted an injunction in favor of Catalyst. In that decision, Justice Lederer stated the following with respect to Moyse's erasure of emails showing that he had provided confidential information to West Face:

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[3] Reasons of the OCA, Leave Record, Tab 8.

> [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.[4] [Underlining added.]

11. The second act of spoliation occurred shortly thereafter, when Moyse decided to wipe clean the contents of his Blackberry cell phone, which had been provided to Moyse and had been paid for by Catalyst during his employment.

12. The third and fourth acts of spoliation came to light much later and were based upon Moyse's conduct in relation to a consent order of the Honourable Mr. Justice Firestone dated July 16, 2014 ("**Firestone Order**").

13. In the Firestone Order, the Court had granted, among other things, the following relief:[5]

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

14. The undisputed record before the Trial Judge established that, despite the terms of the Firestone Order quoted above:[6]

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[4] Decision of Justice Lederer, November 10, 2014, Leave Record, Tab 15.
[5] Order of Firestone J., dated July 16, 2015, Leave Record, Tab 14.
[6] Reasons of Justice Newbould, Leave Record, Tab 4, at paras 143, 144, 148 and 149.

(1) Just before the Firestone Order, Moyse purchased computer software for the purpose of deleting ESI from his computer. After the Firestone Order, Moyse used that software to delete his entire browsing history before turning the computer over to his counsel for forensic imaging;

(2) On the morning when the Firestone Order was granted, Moyse purchased a second software product which included a professional grade scrubbing program called "Secure Delete";

(3) Moyse installed this program on his computer and accessed the "Secure Delete" program the night before he turned his computer to his lawyer pursuant to the Firestone Order;

(4) As a result of the above acts, the entire internet browsing history on Moyse's computer was deleted. In addition, the experts called at trial could not determine whether any additional ESI had been wiped through use of the Secure Delete program.

PART II – STATEMENT OF ISSUES

15. Are the errors of law asserted by the Applicant regarding the manner in which the Trial Judge and the OCA dealt with the spoliation issues reasonably arguable?

16. Are the issues sought to be raised on appeal to this Court of sufficient public importance to warrant leave to appeal being granted?

PART III – STATEMENT OF ARGUMENT

A. Errors of Law Committed by the Trial Judge

17. In dealing with Catalyst's allegations of spoliation, the Trial Judge applied the following framework:

(1) The missing evidence must be relevant;

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

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

(4) It must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.[7]

18. It is respectfully submitted that in determining that spoliation had not been proved, the Trial Judge made several legal errors in his application of the above framework.

19. First, the Trial Judge erred in law by failing to apply established legal principles regarding the use of circumstantial evidence.

20. In this regard, the Trial Judge himself accepted the following rule relied upon by Catalyst regarding the use of evidence to draw inferences:

> The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence. The first step in the inference-drawing process is that the primary facts which provide the basis for the inference must be established by the evidence. Inferences can be drawn on the basis of reasonable probability.[8]

21. Justice Newbould also accepted the principles set out in *R. v. Morrisey* (1995), 22 O.R. (3d) 514, in which the OCA gave the following guidance as to when, in law, it is appropriate to draw such inferences:

> 52. A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):
>
> > **These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law**.[9] [Bolding and underlining added.]

22. The above legal principles applied to all of the issues in this case—including Catalyst's claim that spoliation had occurred.

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[7] *Nova Growth Corp. et al. v. Andrezej Roman Kepinski*, 2014 ONSC 2763 at para 35; *McDougall v. Black & Decker Canada Inc.* (2008), 440 AR 253 at para 18 (C.A.).
[8] Reasons of Justice Newbould, Leave Record, Tab 4, para. 74.
[9] Reasons of Justice Newbould, Leave Record, Tab 4, para. 75.

23. Accordingly, it is respectfully submitted 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. As noted above, while the spoliation allegation focused on Moyse's wiping of his personal computer the week before handing it over for third party inspection pursuant to the Firestone Order, and the installation of professional grade scrubbing software the night before the turn-over, there was a substantial body of evidence relevant to assessing this conduct, including all of the facts summarized by the OCA and listed in paragraph 9 above.

24. Rather than consider the totality of all of this evidence as a whole, the Trial Judge reviewed some (but not all) of the relevant circumstances individually, and concluded that to draw the inferences argued by Catalyst with respect to the components of the spoliation would be impermissible speculation and conjecture, with no evidentiary support.[10] It is respectfully submitted that these were errors of law that tainted his entire analysis.

25. Second, the Trial Judge repeatedly stated in his reasons that Moyse's actions had not resulted in the destruction of ***any*** relevant evidence:

- This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history.[11] [Underlining added.]
- Nor has Catalyst established that any evidence that might be relevant to this litigation was destroyed by the wiping of Mr. Moyse's internet browsing history.[12] [Underlining added.]
- I accept that Mr. Moyse had no intent to destroy relevant evidence on his BlackBerry, and there is no evidence that any relevant evidence was destroyed.[13] [Underlining added.]

26. In so holding, the Trial Judge failed to appreciate that the contents of Moyse's browsing history—whether it contained evidence to support the conclusions urged by Catalyst, or whether it confirmed a completely benign browsing history—was highly probative of the issues in this case. To be sure, if, as Catalyst contended, Moyse's internet browsing history revealed attempts

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[10] Reasons of Justice Newbould, Leave Record, Tab 4, paras 162, 157, 146 and 166.
[11] Reasons of Justice Newbould, Leave Record, Tab 4, para. 144.
[12] Reasons of Justice Newbould, Leave Record, Tab 4, para. 147.
[13] Reasons of Justice Newbould, Leave Record, Tab 4, para. 165.

by Moyse to access or to use confidential information belonging to Catalyst (through his Dropbox or otherwise), or to investigate ways to wipe ESI off his computer leading up to his installation of the Secure Delete scrubber, such evidence would have been very probative to the causes of action advanced by Catalyst and the assessment of Moyse's overall credibility. Conversely, if Moyse's browsing history did not reveal any inappropriate activity, this too would have been probative.

27. In other words, there is no doubt that the contents of Moyse's forever lost browsing history—inculpatory or benign—were relevant to the issues in the case at bar. This is supported by the reasoning set out in the recent Alberta Court of Queen's Bench case of *Gray v. McNeill*:

> I find that Mary-Jane Gray's actions in erasing the laptop computer a few days before her examination amounted to spoliation. I heard from counsel that prior to the examination, counsel for both parties had come to an agreement that the laptop would be examined. Based on this, I find Mary-Jane engaged in a deliberate act to destroy evidence so that it was not available in the ongoing legal proceedings. She was not merely wiping evidence of Michelle Molly's private life but also evidence which could prove or disprove whether and when the 2011 Will was created on the laptop computer, the central issue in this case. It also potentially could have prevented the parties from the need to proceed to trial. The spoliation creates a presumption that the evidence on the computer would have been unfavourable to Mary-Jane.[14] [Underlining added.]

28. In considering this submission, it is respectfully submitted that Moyse's deletion of ESI from his computer was no trivial mistake. Litigants are entitled to advance cases based upon all of the relevant evidence—good, bad or indifferent to their competing positions. This makes intelligent analysis of the pros and cons of a party's position possible, and encourages a realistic assessment of a case—particularly one based upon circumstantial evidence—before trial. Similarly, courts are entitled to expect that cases be tried with the benefit of all of the relevant evidence that is reasonably available. In this case, this included Moyse's browsing history proximate to the key events that were in dispute.

29. In the case at bar, the parties had agreed to a court order for a full imaging of Moyse's computer in its entirety—unadulterated and undiminished by deletions unilaterally and secretly

[14] *Gray v. McNeill*, [2016] A.J. No. 1216 (Q.B), at para 125.

decided upon by Moyse. As found by the OCA, Moyse's intentional deletion of ESI from his computer was a serious breach of the Firestone Order:

> [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.[15] [Underlining added.]

30. Instead of taking that breach into account, the Trial Judge appeared to accept the explanations proffered by Moyse that because the order in question did not expressly state that Moyse's computer must be turned over for forensic imaging "as is", it was reasonable and permissible for Moyse to decide for himself what parts of the ESI on his computer could be deleted.[16] This was wrong. The plain meaning and intent of paragraph 5 of the Firestone Order was that all of the ESI on Moyse's computer was relevant and must be made available to all parties for such use at trial as they deemed necessary.[17]

31. It was a fundamental error of law—not a factual finding—for the Trial Judge to fail to recognize the probative value of Moyse's browsing history, and the significance of Moyse's deletion of that ESI—whatever it would have shown.

32. Third, the Trial Judge wrongly imposed an onus on Catalyst to identify specific pieces of evidence lost as a result of the loss of ESI intentionally erased by Moyse's actions.

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[15] Reasons of the OCA, Leave Record, Tab 8, paras 52-53.
[16] Reasons of Justice Newbould, Leave Record, Tab 4, paras 141-144.
[17] Order of Justice Firestone, Leave Record, Tab 14; Reasons of the OCA, Leave Record, Tab 8, para. 53.

33. The nature and significance of the onus imposed upon Catalyst is evident from the following passages in the Trial Judge's Reasons for Decision:

- Thus there must be specific evidence of a particular piece of evidence that was destroyed.[18] [Underlining added.]
- Catalyst has not established that Mr. Moyse looked at any documents in his Dropbox account dealing with Catalyst's WIND initiative or that he did so in order to discuss them with West Face. Nor has Catalyst established that any evidence that might be relevant to this litigation was destroyed by the wiping of Mr. Moyse's internet browsing history.[19] [Underlining added.]
- I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. There is no evidence to contradict his statements as to why he deleted his internet browsing history.[20] [Underlining added.]
- Without cogent evidence that Mr. Moyse managed to remove from his computer the evidence that he had used the Secure Delete function, there is no cogent evidence that he used the Secure Delete program in the first place to delete any documents from his computer. I find that Catalyst has not established that Mr. Moyse used the Secure Delete program to delete to delete any relevant evidence.[21] [Underlining added.]
- In summary, I find that Catalyst has not established that Mr. Moyse intentionally destroyed evidence in order to affect the outcome of this litigation.[22] [Underlining added.]

34. The deletion of evidence by Moyse made it impossible to establish exactly what specific aspects of his browsing history evidence had been deleted. It is respectfully submitted that in the circumstances of this case—as will often be the case in spoliation involving intentional deletion of ESI—it was an error of law to impose this onus on Catalyst.

35. Fourth, it is respectfully submitted that the Trial Judge erroneously injected an unwarranted element of specific intent into step (4) of the framework articulated in paragraph 17 above, rather than focusing upon the effects of Moyse's destruction of ESI and the recklessness of his conduct. In his reasons for judgment, the Trial Judge stated as follows:

> I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. **There is no evidence to contradict his statements as to why he deleted his**

[18] Reasons of Justice Newbould, Leave Record, Tab 4, para. 138.
[19] Reasons of Justice Newbould, Leave Record, Tab 4, para. 147.
[20] Reasons of Justice Newbould, Leave Record, Tab 4, para. 144.
[21] Reasons of Justice Newbould, Leave Record, Tab 4, para. 163.
[22] Reasons of Justice Newbould, Leave Record, Tab 4, para. 166.

> **internet browsing history**. He was a young man at the time who had a very close relationship with his girlfriend who is now his fiancée. He did not want his internet searching to become part of the public record. **In deleting this history, he did not intend to breach the order of July 16, 2014 or to destroy any evidence relevant to this litigation.** This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history.[23] [Emphasis added.]

36. It is respectfully submitted that this passage, read with the balance of the Trial Judge's reasons dealing with spoliation, reflects a holding by the Trial Judge that proof of spoliation requires subjective "specific intent" on the part of the alleged spoliator to act in a dishonest manner.

37. It is submitted that it is far from settled that the law requires specific, blameworthy intent to the degree required by the Trial Judge. It is further submitted that—regardless of where the onus lay—if Moyse acted in a manner that had the effect of destroying probative evidence, or was reckless as to whether his conduct caused that to occur, that is sufficient.

38. In considering whether, as a matter of law, proof of specific intent to the degree required by the Trial Judge is necessary to establish spoliation, it is respectfully submitted that principles in the criminal law and contempt of court case law are relevant.

39. In the criminal law context, specific intent offences require that the accused intend a particular consequence to satisfy the *mens rea* requirement for a finding of guilt. In contrast, "general intent" offences only require the performance of the illegal act and do not require that the accused intended any particular consequence or possessed actual knowledge of the consequences of his act.[24]

40. Proving specific intent is difficult because it requires evidence that a person intended to bring about a certain consequence with his or her actions. In *R. v. Tatton*,[25] Justice Moldaver explained that determining an accused's intention can be an obtuse exercise unless the accused engaged in conduct that was obviously intentional or reckless.

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[23] Reasons of Justice Newbould, Leave Record, Tab 4, para. 144.
[24] *R. v. Tatton*, 2015 SCC 33, at para. 26.
[25] 2015 SCC 33, at para. 54.

41. In *Carey v. Laiken,* 2015 SCC 17, a recent decision determining what must be proved to establish civil contempt, this Court rejected the contemnor's argument that the evidence must show an intent to interfere with the administration of justice. At paragraph 38 of that decision this Court held that such a request raised the test "too high."

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

43. A requirement to prove specific dishonest intent for spoliation leads to the very mischief that the Supreme Court of Canada warned (in reasoning very apt to the case at bar) could flow from a heightened intention requirement for civil contempt:

> […] requiring contumacious intent would open the door to mistakes of law providing a defence to an allegation of civil contempt. It could also permit an alleged contemnor to rely on a misinterpretation of a clear order to avoid a contempt finding, which would significantly undermine the authority of court orders.[26]

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

45. The above arguments were raised in the OCA, where Catalyst also noted the existence of Ontario decisions about spoliation that do not require proof of the type of blameworthy intent adopted by the Trial Judge.[27]

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[26] *Carey v. Laiken,* 2015 SCC 17, at para. 42.
[27] Extracts from Catalyst factum in the OCA, Leave Record, Tab 20.

46. In this regard, in *Cheung (Litigation Guardian of) v. Toyota Canada Inc.*,[28] Her Honour Justice Hoy (as she then was) concluded as follows:

> As to whether any sanctions can be imposed for spoliation prior to trial in the absence of evidence of intentional destruction or alteration through bad faith, in reliance on the courts inherent jurisdiction, it seems to me that in appropriate circumstances the court should be able to impose such sanctions.

47. Similarly, in the case of *Dickson* v. *Broan-Nuton Canada Inc.*, 2007 Carswell Ont. 9931, Her Honour Justice Himel referred to differences in the Canadian jurisprudence, and was not satisfied that spoliation required proof of the type of blameworthy intent to the degree applied in some of the cases:

> **40** The Court of Appeal in *Spasic* referred to a decision of the Divisional Court, *Rintoul v. St. Joseph's Health Centre*, [1998] O.J. No. 4074 (Div. Ct.), which stated that "the foreseeable trend is to view 'spoliation' as an evidentiary rule that raises a presumption, and not as a stand-alone independent tort." This approach has been followed in *Cheung v. Toyota Canada Inc.* [2003] O.J. No. 411 (Sup. Ct. Jus.), *Drouillard v. Cogeco Cable Inc.*, [2005] O.J. No. 3166 (Sup. Ct. Jus.), and *Carrel v. Randy Laur Burner Service*, [2004] O.J. No. 70, 2004 CarswellOnt 66(Sup. Ct. Jus.).
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> **41** It appears that a slightly different approach to the spoliation of evidence issue has been advanced in the province of British Columbia. The plaintiff cites *Dyk v. Protec Automotive Repairs*, 1997 CarswellBC 1872 (B.C.S.C) where the court found that the destruction of evidence must be "indicative of fraud or an intent to suppress the truth" for the spoliation inference to apply: see para. 11. The requirement of an "intention to suppress the truth" was adopted in *Burrill v. Ford Motor Co. of Canada Ltd.*, [2006] O.J. No. 4059, 2006 CarswellOnt 6218 (Sup. Ct. Jus.). The plaintiff argues that the spoliation inference should not apply in this case since there is no evidence of a fraudulent intention or an intention to suppress the truth.
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> **42** I am not convinced that the Ontario jurisprudence requires evidence of an intention to defraud in order for the spoliation inference to apply. The Ontario Court of Appeal did not discuss these requirements in *Spasic* and the decision in *Burrill* appears to have imported the concept from the British Columbia case law. [Underlining added.]

[28] 2003 O.J. No. 411 (S.C.J.), at para. 23 (underlining added).

48. In the result, as recognized in paragraphs 98-99 of the factum filed on Moyse's behalf in the OCA,[29] there are conflicting cases as to the level and specificity of wrongful intent required to establish spoliation.

49. The conflicts and uncertainty in the Canadian law about this issue are not unique.

50. In the United States there is a substantial body of jurisprudence which suggests that a lesser degree of intent is sufficient to establish spoliation.

51. In one of the leading American cases dealing with electronic spoliation, *Zubulake v. UBS Warburg LLC*, the plaintiff sought an adverse inference instruction to be given to the jury after evidence appeared to have been destroyed by the defendant. Prior to the commencement of litigation, the defendant's in-house counsel instructed its employees to preserve some documents, but not back up tapes. Other employees ignored the instructions given and failed to retain relevant emails, even after the litigation commenced.[30]

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

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

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

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

53. The test in *Zubulake* is largely the same as that used by the Trial Judge in the case at bar. However, under *Zubulake*, negligence is sufficient to establish a "culpable state of mind":

> In this circuit, **a "culpable state of mind" for purposes of a spoliation inference includes ordinary negligence**. [Emphasis added, footnotes omitted.][31]

54. In *Residential Funding Co. v. DeGeorge Financial Corp.*, 306 F.3d 99 (USCA, 2nd Circuit 2002), the Second Circuit of the Court of Appeals affirmed that a culpable state of mind is established by showing that evidence was "destroyed knowingly, even without intent to

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[29] Extract from Moyse factum before the OCA, Leave Record, Tab 21.
[30] *Zubulake v. UBS Warburg LLC*, 229 FRD 422 (SDNY, 2004) at para 1 (*Zubulake*).
[31] *Zubulake*, at para. 7.

[breach a duty to preserve it], or negligently." The Court's reasoning is based on the premise that "each party should bear the risk of its own evidence":

> It makes little difference to the party victimized by the destruction of evidence whether that act was done willfully or negligently. The adverse inference provides the necessary mechanism for restoring the evidentiary balance. The inference is adverse to the destroyer not because of any finding of moral culpability, but because the risk that the evidence would have been detrimental rather than favorable should fall on the party responsible for its loss.[32]

55. These cases conclude that it is not necessary to prove specific intent to dishonestly destroy evidence to establish spoliation. To impose such a requirement would severely hamper the purpose behind the doctrine of spoliation. The Court's observation in *Zubulake*, where spoliation was found on the basis of the defendant's failure to preserve relevant documents, applies to the current case:

> At the end of the day, however, the duty to preserve and produce documents rests on the party. Once that duty is made clear to a party, either by court order or by instructions from counsel, that party is on notice of its obligations and acts at its own peril.[33]

56. In *The Pension Committee of the University of Montreal Pension Plan v. Bank of America Securities LLC et al*., 685 F.Supp 2d 456 (SDNY, 2010), the judge who heard *Zubulake* revisited her conclusions regarding the mental culpability required to establish spoliation, and confirmed that specific dishonest intent was unnecessary.

57. While there is another body of law in the United States that holds that a higher standard of specific intent is required, numerous academic writings on spoliation in the context of ESI[34] show the intensity of the debate about these principles and the absence (as in Canada) of a definitive pronouncement on this issue from the highest court in that country.

58. It is further submitted that the Trial Judge's analysis of subjective, specific intent is further flawed by a misapprehension of the legal effect and interpretation of the consent order

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[32] *Residential Funding Co. v. DeGeorge Financial Corp.*, 306 F.3d 99 (USCA, 2nd Circuit 2002), citing *Turner v. Hudson Transit Lines Inc.*, 142 FRD 68, 75 (SDNY, 1991).
[33] *Zubulake*, at para. 11.
[34] See list of U.S. articles, Affidavit of N. Reinkeluers, Leave Record, Tab 22, at Exhibits "H and "I."

referred to above. As noted previously, on July 16, 2014, Moyse consented to the Firestone Order that required him to preserve his electronic records, including on his personal electronic devices, pending the creation of a forensic image of those devices. The Firestone Order was intended to prevent Moyse from destroying evidence of his electronic conduct in the months spanning his first meeting with West Face and the commencement of the action given that it had already been established that Moyse had communicated Catalyst's confidential information (the investment memos) to West Face.

59. Instead, after consenting to the Firestone Order, Moyse committed the very act Catalyst was seeking to prevent: he intentionally deleted his internet browsing history, launched a program to wipe all traces of his browsing history from his hard drive and cleaned his computer's registry. As found by the OCA, this conduct was a serious breach of the Firestone Order.[35] Contrary to Justice Newbould's apparent acceptance of Moyse's alleged mistake about this order, and his conclusion that any finding of spoliation would be impermissible speculation, it is submitted that this conduct alone was sufficient to ground a finding of spoliation. In *Zubulake*, the Court found spoliation after a defendant issued an incomplete litigation hold. In this case, Moyse's misconduct was far more severe: he intentionally deleted electronic records in the face of the Firestone Order and launched a military-grade scrubber the night before his computer was to be forensically imaged pursuant to that order. As the U.S. Second Circuit Court of Appeals held in *Residential Funding*, *supra*, an adverse inference is justified to restore the evidentiary balance.

60. It is submitted that, for all intents and purposes, the combined impact of the legal errors committed by the Trial Judge emasculated the principles of spoliation. It is further submitted that applying the spoliation framework in this manner—in cases involving the destruction of ESI—has a wide ranging impact on all cases where ESI is important to the decision-making process of the trier of fact.

61. This is because of the nature of the evidence in issue: once altered or destroyed, certain types of electronic records and data cannot be reconstructed. This is exactly what happened in

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[35] Reasons of the OCA, Leave Record, Tab 8, at para. 53.

this case. Neither Catalyst nor the court can ever determine what electronic evidence was destroyed.

B. The Ontario Court of Appeal Did Not Address the Above Legal Issues

62. On March 23, 2018, the OCA issued reasons for its decision to dismiss Catalyst's appeal from the trial decision dismissing its claims.[36]

63. The OCA's reasons referred to the Trial Judge's examination of the evidence relating to Moyse's conduct, and to the onus placed on Catalyst by the Trial Judge, referred to above:

> 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.[37]

64. Against this backdrop, the OCA did not deal with any of the errors of law which Catalyst argued had been committed by the Trial Judge in his disposition of the spoliation issues at trial.

65. Rather, the Court was of the view that the Trial Judge's finding of fact that no relevant evidence had been destroyed was determinative, and made it unnecessary to deal with the legal issues sought to be raised:

> [44] Counsel argued that the trial judge erred in holding that an adverse evidentiary inference could be drawn against the respondents as a result of Mr. Moyse's destruction of relevant evidence only if the appellant established that Mr. Moyse and/or West Face destroyed that evidence for the specific purpose of affecting the outcome of the litigation. Counsel submitted that the adverse inference was appropriately drawn if relevant evidence was destroyed in the face of pending or reasonably foreseeable litigation.
>
> [45] The appellant's argument faces an insurmountable factual hurdle. Any inference that may be drawn against the respondents can arise only after a finding that Mr. Moyse destroyed relevant evidence. The trial judge found as a fact that Mr. Moyse did not destroy relevant evidence (paras. 147, 165). The appellant has not established any basis upon which this court can interfere with that factual finding. That finding puts an end to any argument that Mr. Moyse's deletion of

[36] Leave Record, Tab 8.
[37] Reasons of the OCA, Leave Record, Tab 8, at para. 26 (underlining added).

> data from his computer and cellphone supports an adverse inference against Mr. Moyse or West Face.
>
> [46] As this argument runs aground on the trial judge's factual finding, we need not consider the merits of the substance of the argument. We should not be taken as agreeing that the appropriate evidentiary approach to evidence that a party to a proceeding destroyed relevant evidence should be functionally different from the approach to be taken to other kinds of circumstantial evidence.[38]

66. It is respectfully submitted that the OCA fell into the same errors made by the Trial Judge. For the reasons set out above, it is respectfully submitted that the contents of Moyse's browsing history was relevant—whatever it would have shown if not destroyed—and the parties and the Court were improperly deprived of that evidence by Moyse's conduct.

67. Moreover, it is respectfully submitted that the OCA dealt with the spoliation issues in the wrong order. Before relying upon any findings by the Trial Judge, it is respectfully submitted that the OCA should have first considered the legal arguments as to whether the Trial Judge had made those findings as a result of applying the wrong legal principles. If so, the resulting "findings" were flawed and could not shield the decision of the Trial Judge from appellate review.

68. In the result, none of the legal issues raised in relation to spoliation were dealt with on the merits by the OCA. It is submitted that it was erroneous for the OCA to have failed to do so and that this result implicitly rewards Moyse for the "serious breach" of the Firestone Order which the OCA found had occurred.

C. PUBLIC IMPORTANCE

69. Spoliation is an area of the law which has become increasingly important in recent years. Within a general framework of principles, differences and uncertainties exist as to the applicable legal tests which should be applied to determine, in a given case, whether spoliation has occurred, and as to the appropriate principles in relation to intent, causation and onus of proof.

70. While the principles of spoliation have their origins over 100 years ago, the context in which such principles arise has changed dramatically over the past 25 years. During this period,

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[38] Reasons of the OCA, Leave Record, paras. 43-46 (footnote omitted).

the use and relevance of electronic evidence has become more and more prevalent and increasingly important.[39]

71. In today's business environment, the use and storage of electronic data and records have become dominant. Moreover, such records—and their evidentiary significance—are materially different from hard copy records and other physical evidence which traditionally has been the context in which spoliation issues have been decided.

72. In recent years, there have been a large number of spoliation cases decided across Canada at various levels of Provincial Courts.[40] Over 30 cases dealing with spoliation and ESI were cited in the facta filed with the OCA, but only one was decided by the Supreme Court of Canada: *St. Louis v. R.* (1896), 25 S.C.R. 649. This 1896 case has been described in some of the current case law as being the leading spoliation authority at the Supreme Court of Canada level. Since 1896, the Supreme Court of Canada has granted leave to appeal in one case directly involving the existence of the tort of spoliation, but that case was settled and the appeal never proceeded: *Endean v. Canadian Red Cross*, [1998] SCCA No. 260 (SCC Case No. 266679). In addition, there has been a plethora of case comments and publications by the legal profession in Canada reflecting the increasing importance of ESI.[41]

73. In the United States, although differences remain in the case law at the Federal Appellate levels, several Courts have conducted detailed reviews and analyses of the principles that are appropriate where spoliation issues arise in respect of electronic evidence.[42]

74. The case at bar provides an opportunity for the Supreme Court of Canada to consider and provide an overall legal framework to determine issues of spoliation in cases involving ESI. This would benefit Courts, legal counsel and litigants across Canada. Such guidance could include answers to the following questions:

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[39] Affidavit of N. Reinkeluers, Leave Record, Tab 22, at paras 7-9, Exhibits "D"-"G".
[40] Affidavit of N. Reinkeluers, Leave Record, Tab 22, at Exhibit "B".
[41] Affidavit of N. Reinkeluers, Leave Record, Tab 22, at Exhibits "C"-"G".
[42] Affidavit of N. Reinkeluers, Leave Record, Tab 22, at Exhibits "H and "I".

(1) Are trial judges required to consider the cumulative effect of the circumstantial evidence regarding the conduct of the spoliator upon the general framework applicable to spoliation?

(2) Where ESI has been lost through intentional misconduct of the alleged spoliator and cannot be recovered, is it appropriate to impose an onus on the party alleging spoliation to demonstrate the loss of a particular piece of evidence, or should relevance be presumed?

(3) What are the appropriate principles to apply where the alleged spoliator has intentionally destroyed ESI in violation of a Court order requiring that it be forensically imaged for use at trial?

(4) What is the requisite level of intent required where ESI has been intentionally destroyed? Is it necessary to show wilful, specific intent to act dishonestly, or does gross negligence or recklessness suffice?

PART IV – SUBMISSION ON COSTS

75. In the event leave to appeal is granted, Catalyst submits that the costs of this application and the costs orders made by the courts below should be dealt with by the panel of the Court hearing the appeal on the merits.

PART V – ORDER SOUGHT

76. The Applicant seeks:

(a) an order extending the time for filing this application for leave to appeal, and

(b) an order granting leave to appeal from the decision and orders of the Ontario Court of Appeal herein, with the costs of this application and of the proceedings below to be determined by the panel of this Court hearing the appeal, if leave is granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of August, 2018.

Lynne Watt as Agent
for: David C. Moore

Lynne Watt as Agent
for: Kenneth G. G. Jones

Moore Barristers P.C.
393 University Avenue, Suite 1600
Toronto, Ontario M5G 1E6
T. 416-581-1818
F. 416-581-1279
E. david@moorebarristers.ca
E. kenjones@moorebarristers.ca
Counsel for the Applicant

PART VI – TABLE OF AUTHORITIES

Authority	**Para. Nos.**
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PART VII – STATUTES, REGULATIONS AND RULES

(None.)

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