

**IN THE SUPREME COURT OF CANADA**  
(On Appeal from the Ontario Court of Appeal)

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 OF THE RESPONDENT,  
WEST FACE CAPITAL INC., TO THE  
APPLICANT'S MOTION FOR LEAVE TO EXTEND TIME**

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## PART I ~ OVERVIEW AND STATEMENT OF FACTS

1. The Catalyst Capital Group Inc. seeks an extension of more than fifteen weeks to seek leave to appeal to this Honourable Court from a judgment of the Ontario Court of Appeal pronounced orally, without even hearing from either of the respondents, on February 21, 2018 (the “**Appeal Decision**”). Catalyst has no reasonable explanation for the delay, which has caused prejudice to the defendant, West Face Capital Inc. Moreover, Catalyst has already been found to have “purposely delayed pursuing its claim against West Face and taken clearly inappropriate proceedings”.<sup>1</sup> The motion for an extension of time should be denied.
2. By delaying its application for leave to appeal for almost four months, Catalyst has extended the \$500 million pall that this breach of confidence litigation has cast over its competitor West Face in relation to West Face’s participation in the purchase and subsequent sale of WIND Mobile Inc. West Face was part of a consortium of four principal investors (the “**Investors**”) who purchased WIND in September 2014 for \$300 million. In March 2016, the Investors sold WIND to Shaw Communications Inc. for \$1.6 billion.
3. Catalyst was one of the unsuccessful bidders for WIND in 2014 at the trial of the case at bar (the “**Moyse Action**”). Catalyst claimed that it was entitled to West Face’s share of the sale proceeds because a former junior analyst for Catalyst, the defendant Brandon Moyse, worked for West Face for less than one month in the Summer of 2014. Catalyst had no evidence that Mr. Moyse passed any confidential information to West Face.

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<sup>1</sup> *Re. Mid-Bowline Group Corp.*, 2016 ONSC 669 at para. 47, West Face Book of Authorities, Tab 3.

4. Catalyst's claim was rejected at every turn. The trial judge dismissed Catalyst's allegations in their entirety and awarded West Face its costs on a substantial indemnity basis. The Court of Appeal then dismissed the appeal from the bench without hearing from either of the respondents. Before this Court, Catalyst has dramatically narrowed its arguments, and seeks only what is essentially an advisory opinion concerning whether the trial judge erred in concluding that Mr. Moyse did not delete relevant evidence. Even if Mr. Moyse had deleted relevant evidence, Catalyst cannot succeed given the trial judge's finding that West Face did not cause Catalyst's failure to acquire WIND.

5. Catalyst has offered no valid explanation for its inordinate delay. Nor is this the first unwarranted extension of time for appeal that Catalyst has requested over the course of this litigation; rather, it is part of a pattern of delay and even abuse of process that courts have repeatedly found Catalyst to have engaged in against West Face.<sup>2</sup> Catalyst has not earned the indulgence of an extra fifteen weeks to postpone its day of reckoning.

## **PART II ~ QUESTION IN ISSUE**

6. The sole issue on this motion is whether Catalyst should be granted a lengthy extension of time to file its application for leave to appeal the Appeal Decision.

7. West Face is aware that the ordinary practice is for such motions to be decided at the same time as the application for leave to appeal. This practice is understandable for cases where a plausible explanation for the delay is offered, and the key issue becomes the merit of the

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<sup>2</sup> *The Catalyst Capital Group Inc. v. Moyse*, 2015 ONCA 784, West Face Book of Authorities, Tab 4; *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 554 (Div. Ct.), West Face Book of Authorities, Tab 5 ; *Re. Mid-Bowline Group Corp*, 2016 ONSC 669, West Face Book of Authorities, Tab 3; *The Catalyst Capital Group v. VimpelCom Ltd.*, 2018 ONSC 2471, West Face Book of Authorities, Tab 7.

application for leave to appeal. This is not such a case. Catalyst has not even attempted to offer an explanation for the vast majority of its delay.

8. The respondents should not be put to the expense of defending the application for leave to appeal on the merits, and this Court should not have to devote scarce resources to such an application by a party that has repeatedly abused the courts' processes. This motion, and the application for leave to appeal, should be dismissed immediately.

### **PART III ~ STATEMENT OF ARGUMENT**

#### **A. The Test for an Extension of Time**

9. The time limits placed on applications for leave to appeal are not mere technicalities. They are meant to "give effect to a basic idea of our legal thinking that, in the interest of society as a whole, litigation must come to an end... and the general principles adopted by the courts in dealing with applications to extend those limits were developed with that in mind".<sup>3</sup>

10. In *R. v. Roberge*,<sup>4</sup> this Court identified six factors to be considered when exercising its discretion in granting extensions of time to seek leave to appeal: (i) whether the applicant formed a *bona fide* intention to seek leave to appeal and communicated that intention to the opposing party within the prescribed time; (ii) whether counsel moved diligently; (iii) whether a proper explanation for the delay has been offered; (iv) the extent of the delay; (v) whether granting or denying the extension of time will unduly prejudice one or the other of the parties; and (vi) the merits of the application for leave to appeal.<sup>5</sup> Catalyst communicated an intention to seek leave to

<sup>3</sup> *Grewal v. Canada (Minister of Employment & Immigration)*, 1985 CarswellNat 43 at para. 36 (F.C.A.) (concurring opinion), West Face Book of Authorities, Tab 1.

<sup>4</sup> *R. v. Roberge*, 2005 SCC 48, West Face Book of Authorities, Tab 2.

<sup>5</sup> *Ibid* at para. 6.

appeal in a timely manner, but fails to satisfy the other five elements of this test, which are addressed in turn below.

## **B. Catalyst's Persistent Pattern of Delay and Abuse of Process**

11. In addition to the six-part test described above, this Court has stated that “the ultimate question is always whether, in all the circumstances and considering the factors referred to above, the justice of the case requires that an extension of time be granted”.<sup>6</sup> The circumstances of this case are unprecedented. Catalyst has unfairly besmirched the reputation of West Face with repetitive, abusive litigation for over four years. An extension of time would undermine the interests of justice.

12. Catalyst’s history of delay and abuse of process in this and related proceedings dates back several years. In July 2015, Catalyst lost an interlocutory motion for injunctive relief against West Face, and for a finding of contempt (arising from the very same spoliation allegations as in this application for leave to appeal) against Mr. Moyse. Catalyst then purported to appeal directly to the Court of Appeal. Counsel for West Face immediately advised Catalyst that it had to seek leave to appeal to the Divisional Court. Catalyst ignored this advice, and proceeded with the purported appeal, forcing West Face to bring a motion to quash, to which Catalyst belatedly consented, almost three months after having been advised that it was appealing to the wrong court.<sup>7</sup> Catalyst had not, however, preserved its rights by seeking leave to appeal to the Divisional Court in a timely manner, and therefore was required to seek an extension of time as well as leave to appeal from that court.

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<sup>6</sup> *Ibid* at para. 6.

<sup>7</sup> *The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 554 at para. 4 (Div. Ct.), West Face Book of Authorities, Tab 5.

13. Catalyst's motions for an extension of time and leave to appeal were dismissed by the Divisional Court. Justice Swinton noted that Catalyst was represented by experienced litigation counsel, had been warned by counsel to West Face, and had no excuse for not seeking leave in a timely manner.<sup>8</sup> She also found that Catalyst's delay was causing prejudice to West Face.<sup>9</sup> West Face had led evidence that Catalyst's delay damaged West Face's reputation, inhibited redemption of investors' funds, wasted expenses on capital that cannot be invested, and reduced West Face's ability to earn management and incentive fees.<sup>10</sup>

14. Catalyst also delayed bringing its second action against West Face alleging damages related to the WIND transaction, this one advancing a theory of inducing breach of contract (the "**Inducing Breach Claim**"). This theory was belatedly advanced by Catalyst at the hearing for approval of the plan of arrangement whereby the Investors sold WIND to Shaw in January 2016. Justice Newbould held that Catalyst had chosen to "lie in the weeds" rather than assert that claim in a timely manner, and this was "troubling indeed and not acting in good faith".<sup>11</sup> Catalyst then chose not to advance the Inducing Breach Claim in the Moyse Action now before this Court, instead waiting another five months before launching the Inducing Breach Claim as a separate action on the eve of trial of the Moyse Action. The Inducing Breach Claim was subsequently dismissed as an abuse of process, as well as on the grounds of issue estoppel and cause of action

<sup>8</sup> *Ibid* at para. 9.

<sup>9</sup> *Ibid* at para. 31.

<sup>10</sup> Affidavit of Philip de L. Panet sworn January 13, 2016 at paras. 33-66, Exhibit "P" to the Affidavit of Andrew Carlson sworn August 14, 2018 [**"Carlson Affidavit"**], West Face Motion Record, Tab 2, p. 137.

<sup>11</sup> *Re. Mid-Bowline Group Corp*, 2016 ONSC 669 at para. 59, West Face Book of Authorities, Tab 3.

estoppel, because it attempted to re-litigate issues decided in the Moyse Action, and raised additional claims that should have been raised in the Moyse Action.<sup>12</sup>

15. Finally, on the eve of the appeal of the Moyse Action before the Ontario Court of Appeal, Catalyst obtained an adjournment of five months to pursue potential “fresh evidence”. This fresh evidence turned out to be a failed “sting” on Justice Frank Newbould, who decided the Moyse Action at trial. An undercover operative retained by Catalyst posed as a potential arbitration client to the newly-retired Justice Newbould and unsuccessfully attempted to elicit comments demonstrating bias against Catalyst’s principal, Newton Glassman. This sordid affair only came to light because of the reporting of a journalist that Catalyst had attempted to suborn into its scheme.<sup>13</sup>

16. In these extraordinary circumstances, “the justice of the case” demands that an extension of time be denied immediately, without considering the application for leave to appeal.

### **C. Counsel Has Not Moved Diligently**

17. It has been almost six months since the Appeal Decision was rendered on February 21, 2018.<sup>14</sup> Catalyst had until April 23, 2018 to file its application. Catalyst missed this deadline by almost four months, and has offered no explanation for its conduct prior to July 4, 2018.

<sup>12</sup> *The Catalyst Capital Group v. VimpelCom Ltd.*, 2018 ONSC 2471, West Face Book of Authorities, Tab 7.

<sup>13</sup> Carlson Affidavit at paras. 42-46, West Face Motion Record, Tab 2, pp. 26-27. See also “Exclusive: The Judge, The Sting, Black Cube and Me,” Exhibit “L” to the Carlson Affidavit, West Face Motion Record, Tab 2, p. 91.

<sup>14</sup> The Court of Appeal rendered judgment on the merits of the appeal from the bench, without hearing from the respondents, on February 21. While the Court of Appeal reserved its judgment on Catalyst’s motion for leave to appeal the trial judge’s costs

18. This is not a case of an unsophisticated or unrepresented litigant. Catalyst is a sophisticated, frequent litigant represented by experienced counsel, and knew exactly what its obligations were. It simply chose not to meet them. Its counsel avers that it decided “before April 9, 2018” to seek leave to appeal. It is unreasonable that Catalyst took four months from that date to actually seek leave to appeal.

19. On May 30, 2018, counsel to West Face sent an email to Catalyst’s counsel informing him that Catalyst was six weeks late in filing the application for leave. Catalyst knew that the deadline had passed, and that West Face would rely on this passage of time in resisting any motion for an extension.<sup>15</sup>

#### **D. Catalyst Has Offered No Valid Explanation for the Delay**

20. The only explanations that Catalyst has offered for its delay are that: (a) it was negotiating the terms of security Catalyst would post to avoid enforcement of West Face’s cost orders; and (b) there were challenges with the registrar’s office of the Court of Appeal in settling the orders from that Court. Neither explanation bears scrutiny.

21. First, Catalyst has offered no explanation for why posting security delayed the filing of its application. Posting security is not a prerequisite for filing an application for leave to appeal; rather, it was negotiated in order to avoid enforcement of the cost judgments.

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decision, leave to appeal the costs issue is not sought from this Court. The Court of Appeal’s Order on the merits, which is the subject of this application for leave to appeal, is dated February 21, 2018. See Exhibit “E” to the Carlson Affidavit, West Face Motion Record, Tab 2, p.51.

<sup>15</sup> Carlson Affidavit at para. 17, West Face Motion Record, Tab 2, p. 17.

22. Second, settling the form of order from the lower court is not a prerequisite for filing an application for leave to appeal. If an order has not been obtained at the time of filing, a placeholder can be (and frequently is) substituted until the order is received.<sup>16</sup>

23. In any event, Catalyst has only itself to blame for the failure to obtain an order earlier. While the Court of Appeal did reject the forms of the orders that West Face had attempted to have issued and entered on July 4, 2018, this does not explain why Catalyst left it to West Face to obtain the necessary orders, and repeatedly delayed in providing comments to West Face on the draft orders.<sup>17</sup>

24. This is not a case where Catalyst worked diligently to file its application in a timely manner, but was subjected to unforeseeable delays. Rather, Catalyst has offered no evidence that it made any effort to file its materials in a timely manner.<sup>18</sup> The issues West Face's counsel dealt with regarding the form of orders at the Court of Appeal have no bearing on Catalyst's inexplicable delay.

25. The explanation for the delay in commencing the application for leave to appeal in *Roberge* involved serious medical issues for two partners at the applicant's counsel's firm, which resulted in counsel being overwhelmed with work. This Court denied the extension, concluding that "much of the delay can be ascribed to a failure to accord necessary priority to this application for leave to

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<sup>16</sup> D. Lynne Watt et al., *Supreme Court of Canada Practice* (Toronto: Thomson Reuters, 2018) at 292, West Face Book of Authorities, Tab 8.

<sup>17</sup> Carlson Affidavit, at paras. 12- 20, 25-29, West Face Motion Record, Tab 2, pp. 15-22.

<sup>18</sup> Carlson Affidavit at paras. 17-18, West Face Motion Record, Tab 2, p. 17.

appeal".<sup>19</sup> Catalyst has not even offered as thin a justification as was rejected in *Roberge*, and its motion for an extension should be denied.

#### **E. The Extent of the Delay is Lengthy**

26. A delay of almost four months is extraordinary. This is not a case where a deadline was missed by a matter of days. Given the lack of any other explanation, it is submitted that Catalyst simply decided that it did not need to trouble itself with this Court's timelines the way ordinary litigants do. This Court should not countenance such behaviour.

#### **F. Granting an Extension of Time Will Prejudice West Face**

27. West Face has previously presented evidence – accepted by Justice Swinton – that delay in this proceeding causes it significant prejudice.<sup>20</sup> Catalyst was aware of this prejudice, and yet made no effort to file this application in a timely manner.

#### **G. The Application for Leave to Appeal Has No Merit**

28. This issue will be addressed in detail in West Face's Memorandum of Fact and Law in response to Catalyst's application for leave to appeal. However, by way of summary, this action was dismissed by Justice Newbould, the senior judge of the Commercial List, a specialized division of the Ontario Superior Court of Justice. He awarded West Face its costs on a substantial indemnity basis because Catalyst had "utterly failed" in its strategy of "playing hardball attacking

<sup>19</sup> *R. v. Roberge*, 2005 SCC 48 at para. 7, West Face Book of Authorities, Tab 2.

<sup>20</sup> Affidavit of Philip de L. Panet sworn January 13, 2016, Exhibit "P" to the Carlson Affidavit, West Face Motion Record, Tab 2, p. 137.

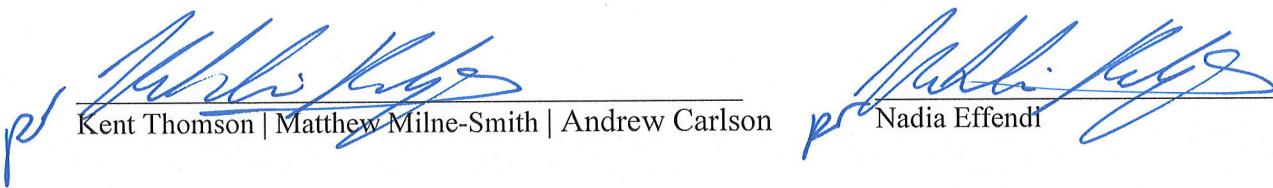
the reputation and honesty of West Face".<sup>21</sup> The Court of Appeal then dismissed the appeal from the bench without even hearing from either of the respondents on the merits.

29. Catalyst now seeks leave to appeal on Justice Newbould's finding of fact that Mr. Moyse did not delete any relevant information. Not only are factual disputes ill-suited for this Court's consideration, but the issue itself can have no bearing on the outcome of the litigation given Justice Newbould's numerous other findings against Catalyst. Mr. Moyse's alleged spoliation is only relevant to the issue of whether he communicated confidential information to West Face; it can have no bearing on whether West Face misused any such information, or whether any such misuse caused harm to Catalyst. Both of these latter issues were also decided against Catalyst and in favour of West Face, and are not the subject of the leave application, rendering the entire question of what Mr. Moyse may have communicated to West Face purely academic. In the circumstances, the application for leave to appeal has no real prospect of success and an extension of time should be denied.

#### PART IV ~ ORDER SOUGHT

30. West Face respectfully requests an order dismissing Catalyst's motion to extend time to file its application for leave to appeal, with costs.

Respectfully submitted and signed in Ottawa, Ontario this 17 day of August, 2018



Kent Thomson | Matthew Milne-Smith | Andrew Carlson | Nadia Effendi

<sup>21</sup>

*The Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285 at para. 10, West Face Book of Authorities, Tab 6.

## PART V ~ TABLE OF AUTHORITIES

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SCC File No: \_\_\_\_\_

**IN THE SUPREME COURT OF CANADA  
(On Appeal from the Ontario Court of Appeal)**

B E T W E E N:

**THE CATALYST CAPITAL GROUP INC.**

Applicant  
(Appellant)

and

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

Respondents  
(Respondents)

**AFFIDAVIT OF ANDREW CARLSON**

I, Andrew Carlson, of the City of Toronto, in the Province of Ontario, AFFIRM:

1. I am a Partner with the law firm of Davies Ward Phillips & Vineberg LLP ("Davies"), counsel for the Respondent, West Face Capital Inc. ("West Face"). Since January 2015, I have been a key member of the Davies litigation team acting on behalf of West Face in various proceedings involving West Face and the Applicant, The Catalyst Capital Group Inc. ("Catalyst"), including the action and appeal underlying these proceedings (the "Moyse Action"). As such, I have personal knowledge of the matters contained in this affidavit.

2. I am swearing this affidavit in response to Catalyst's motion to extend the time limit for filing its application for leave to appeal to the Supreme Court of Canada from the Order of the Ontario Court of Appeal dated February 21, 2018, in which the Court of Appeal dismissed Catalyst's appeal of the trial judgment of Justice Newbould dated August 18, 2016 (the "Trial Judgment").

**A. My Efforts to Obtain the Orders of the Court of Appeal**

3. Contrary to paragraph 4 of the Affidavit of Nicholas Reinkeluers filed by Catalyst, Catalyst's appeal to the Court of Appeal was heard on February 20 and 21, 2018 (and not February 21 and 22, 2018).

4. I attended (and was gowned) at the appeal hearing. Catalyst's counsel on the appeal – Messrs. David Moore and Brian Greenspan – made oral submissions for the entire first hearing day (February 20), and for at least the first hour of the second hearing day (February 21). Following their submissions, the panel of the Court of Appeal dismissed Catalyst's appeal of the Trial Judgment, from the bench, and without calling on counsel for either of the Respondents to make oral submissions on the merits. After dismissing Catalyst's appeal of the Trial Judgment, the panel called on the parties' counsel to make brief oral submissions concerning Catalyst's motion for leave to appeal the trial costs judgment of Justice Newbould dated October 7, 2018 (the "**Trial Costs Judgment**"). At the conclusion of these submissions, the Court of Appeal reserved its decision solely on the motion for leave to appeal the Trial Costs Judgment.

5. The fact of the Court of Appeal's dismissal of Catalyst's appeal of the Trial Judgment on February 21, 2018, from the bench, and without calling on counsel for the Respondents, was reported in both the *National Post* and *The Globe and Mail* that same day. A copy of the *National Post* article dated February 21, 2018, titled: "Appeal judge tosses Catalyst case against West Face without hearing from defence" is attached as **Exhibit "A"**. A copy of *The Globe and Mail* article dated February 21, 2018, titled: "Court dismisses Catalyst challenge without hearing from West Face defence" is attached as **Exhibit "B"**.

6. Both the *National Post* article and *The Globe and Mail* article attributed statements to Catalyst's lawyers or Catalyst itself acknowledging the Court of Appeal's decision. For example, the *National Post* article included the following statement about one of Catalyst's lawyers on the appeal, Brian Greenspan: "Greenspan said he wasn't surprised at the decision, because it's so rare for appeal courts to interfere with the decisions of trial judges". Similarly, *The Globe and Mail* article stated:

Justice David Doherty dismissed the appeal on the second day of hearings Wednesday, saying that it would not be necessary to hear arguments from lawyers for West Face or Mr. Moyse. The three-member panel reserved its decision on costs.

"We accept the conclusion of the court that the high standard to challenge the fact finding by the trial judge was not met," Catalyst said in a statement.

"We await the decision of the Court regarding the costs of the trial proceedings. Based upon the arguments made, we anticipate this decision will likely take into account the Court's observations regarding Catalyst's legitimate concern with the misuse of confidential information and the conduct of Mr. Moyse in the deletion of potentially relevant evidence."

7. Pursuant to section 58(1)(a) of the *Supreme Court Act*, R.S.C., 1985, c. S-26, Catalyst was required to serve and file its notice of application for leave to appeal and all materials necessary for the application within sixty days after February 21, 2018. This period expired Monday, April 23, 2018 (the 61st day after February 21, 2018).

8. More than a month *before* this deadline, on March 22, 2018, the Court of Appeal released its written reasons for decisions in respect of its previous dismissal (on February 21) of Catalyst's appeal of the Trial Judgment. In the same written reasons, the Court of Appeal dismissed Catalyst's motion for leave to appeal the Trial Costs Judgment.

9. As far as I am aware, at no time prior to the April 23, 2018 deadline for filing its application for leave to appeal did Catalyst or its counsel make any effort to have formal orders of the Court of Appeal issued and entered. Catalyst's counsel never provided us with any draft orders nor did they inform us of any communications with the Court of Appeal.

10. On Friday, May 11, 2018, the Court of Appeal issued its Costs Endorsement concerning the costs of the appeal. For the reasons set out therein, the Court of Appeal awarded costs to West Face in the amount of \$200,000, and costs to Mr. Moyse in the amount of \$100,000 (both amounts inclusive of disbursements and HST). A copy of the Court of Appeal's Costs Endorsement dated May 11, 2018 is attached as **Exhibit "C"**.

11. At that point, West Face had an incentive to have the Court of Appeal's orders formally issued and entered so that it could enforce the cost award.

12. On Tuesday, May 15, 2018 (two business days after the Court of Appeal released its Costs Endorsement), I emailed Catalyst's lawyer, David Moore, a draft order reflecting the Costs Endorsement. I asked him to let me know whether he had any comments, or to approve it as to form and content. Mr. Moore did not respond to my email of May 15, so, on Thursday, May 17, 2018, I re-sent him the proposed draft order within the same email thread. This time, I asked Mr. Moore to let us know if he had any comments by the end of the day, so that we could seek to have the order issued and entered. A copy of this email thread is attached as **Exhibit "D"**.

13. That same day (May 17, 2018), I emailed Mr. Moore draft orders regarding: (i) Catalyst's appeal on the merits of the Trial Judgment, and (ii) Catalyst's motion for leave to appeal the Trial Costs Judgment. Shortly after that, in the same email thread, I re-circulated drafts of the above-noted orders with some changes proposed to me by Mr. Moyse's lawyers, who had

responded to me in the interim. I advised Mr. Moore that Mr. Moyse's lawyers were "now signed off on these as to form and content", and I asked Mr. Moore whether he had any comments or whether he was "also signed off". Mr. Moore emailed me back, saying: "I will get back to you tomorrow". Mr. Moore did not get back to me on Friday, May 18, 2018 as he had stated. For this reason, on Tuesday, May 22, 2018, I emailed Mr. Moore again, re-attached to my email all three outstanding draft orders, and advised Mr. Moore that I intended to submit the orders to the Court of Appeal the next day (May 23) to be issued. I again asked him to provide me with any comments by the end of the day. A copy of this entire email exchange is attached as **Exhibit "E"**.

14. On Thursday, May 24, 2018, Mr. Moore and his colleague Kenneth Jones attended at Davies' offices and met with Mr. Milne-Smith and I regarding a number of outstanding issues between Catalyst and West Face in the various ongoing proceedings between our clients. I brought hard copies of the three draft orders to this meeting, and asked Mr. Moore at the meeting to advise whether he had any comments on them or whether he approved them as to form and content. Mr. Moore reviewed them in front of Mr. Milne-Smith and I, and gave us some comments, but he would not provide his formal approval as to form and content. Rather, he advised that he had a meeting with Catalyst's Chief Operating Officer, Jim Riley, scheduled for the following day (May 25), and that he intended to seek instructions regarding the orders from Mr. Riley at that meeting.

15. I did not hear back from Mr. Moore following his meeting with Mr. Riley on Friday, May 25, 2018. On Tuesday, May 29, 2018, I emailed Mr. Moore, saying:

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

16. Mr. Moore did not respond to my email of May 29, 2018.

17. I understand from Mr. Milne-Smith and verily believe that by May 30, 2018, Mr. Moore had communicated to Mr. Milne-Smith that Catalyst intended to seek leave to appeal the Court of Appeal's dismissal of the Trial Judgment, and that Mr. Moore acknowledged that Catalyst had missed the deadline for doing so, and therefore also intended to bring a motion to extend the deadline within which to commence the application for leave to appeal. On May 30, 2018, Mr. Milne-Smith sent an email to Mr. Moore advising him that "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". Mr. Milne-Smith also noted that Catalyst had provided no justification for its delay as at that time. A copy of Mr. Milne-Smith's email of May 30, 2018 is attached as **Exhibit "F"**.

18. I confirm the accuracy of Mr. Milne-Smith's statement that Catalyst had provided no justification for its delay as at that point. I also note that, consistent with Mr. Milne-Smith's email of May 30, 2018, at no time before then or since did West Face waive any of its rights with respect to Catalyst's late filing of its application materials.

19. By Tuesday, June 5, 2018, I had not received any indication from Mr. Moore as to whether or when he would be providing us with his comments on the draft orders, which I had first provided on May 15 and 17, 2018. For this reason, on that day, I sent Mr. Moore an email advising that we were "in the process of submitting the attached judgments to be issued and entered by the

Court of Appeal". I attached to that email both clean and endorsed versions of the draft orders. On the back page of each of the endorsed versions of these orders, I wrote "Agreed as to form and content by counsel to Moyse and West Face".

20. A copy of the email thread encompassing my email to Mr. Moore of May 29 and my follow-up email of June 5, 2018 is attached as **Exhibit "G"**.

21. That day (Tuesday, June 5), I had an agent attend at the Court of Appeal in an attempt to have the orders issued and entered. However, I was informed by our agent that the Court of Appeal staff had advised that because Catalyst's counsel had not agreed to the form and content of the orders, we were required to schedule a meeting at the Court in order to settle the issue. I was also advised that the Court staff's position was that we only needed to prepare one form of order encompassing the Court of Appeal's three decisions.

22. For that reason, that evening (of June 5), Mr. Milne-Smith emailed Mr. Moore and asked him to provide us with his authority to execute the consent to the orders on Catalyst's behalf. Mr. Milne-Smith further advised that, if Mr. Moore would not do so, we would need to attend at the Court of Appeal, and we would seek our costs of doing so. It was only at this stage (that is, upon our indicating that we would need to schedule an attendance at the Court of Appeal) that Mr. Moore provided us with his comments on the draft orders. He did so the following day, on Wednesday, June 6, 2018. On Thursday, June 7, 2018, I wrote back to Mr. Moore and advised him that his proposed changes were acceptable to us, and that absent any "last words from anyone", I would be submitting them to the Court of Appeal to be issued and entered. A copy of this email thread is attached as **Exhibit "H"**.

23. Given that I now had orders that were endorsed by all of the parties' counsel, I had our agent attend again at the Court of Appeal that day to have the three "fully endorsed" orders issued and entered. I also provided our agent with additional details regarding what had happened at the Court of Appeal, so that they could explain to the Court staff why three orders were appropriate. However, this attempt was rejected, and I was again informed that the Court staff would not issue and enter the orders because it was their position that the Court's decisions should be reflected in one formal order. All of this occurred on June 7, 2018, the day after I had finally received Mr. Moore's comments on the orders I had first provided to him on May 15 and 17, 2018.

24. At some point I had a phone call with a senior staff member of the Court of Appeal to discuss the issue. On the call, I took the position that because the Court of Appeal's decisions were made on three different dates, based on three different sets of submissions, and related to three different issues, that it made the most sense to capture the Court of Appeal's decisions in three formal orders. However, the senior Court of Appeal staff member insisted that because the decisions all related to one file, they should be documented in one formal order.

25. On July 4, 2018, after these exchanges with the Court of Appeal staff, I contacted Mr. Moore and Mr. Moyse's lawyers to advise them of the Court of Appeal's position. However, I pause here to note that at no time between June 7, 2018 and July 4, 2018 did Mr. Moore follow-up with me to ask why the orders had not yet been issued and entered. Indeed, to my knowledge Catalyst did nothing to obtain orders so that it could file its motion for leave to appeal to this Court.

26. The following facts are reflected in the emails attached to the Affidavit of Nicholas Reinkeluers:

- (a) On Wednesday, July 4, 2018, I sent an email to Mr. Moore and Mr. Moyse's counsel: (i) advising that my attempts to have the orders issued and entered had been rejected; (ii) advising that the Court of Appeal insisted that we document the Court of Appeal's decisions in one order; (iii) attaching the draft orders we had previously agreed to; and (iv) attaching a new draft order that I believed "capture[d] everything that we had previously set out in the three different forms of judgment".
- (b) Mr. Moyse's lawyers responded to me that day (July 4) and advised that I could endorse the new form of order on their behalf. Again, however, Mr. Moore did not respond.
- (c) On Friday, July 6, 2018, I sent a further email to Mr. Moore asking him if he could "take a quick look" and "give me [his] endorsement]" that day. He did not do so.
- (d) On Thursday, July 12, 2018, Mr. Milne-Smith informed me that he had spoken to Mr. Moore and he asked me to re-send a copy of the draft order to Mr. Moore. I did so. At that point, Mr. Moore responded to me, saying that he would "review and respond forthwith".
- (e) Later that same evening (July 12), Mr. Moore responded to my email with his comments on the proposed draft order, but he forgot to attach his marked-up version of the order.
- (f) On Friday, July 13, 2018, I asked Mr. Moore to re-send his email with his mark-up attached, and he did so – nine days after I had provided the draft order. Mr. Moore's only proposed changes were to the date in the top right corner of the order – he

wanted to ensure that the order reflected the three different dates on which the three different decisions were made. I responded to Mr. Moore's email, advising that I had never seen that approach taken but that I was "happy to try it on with the Court staff". Mr. Moyse's lawyers immediately responded saying that they had no objection to Mr. Moore's approach.

- (g) As reflected in my last email of July 13, I sent an agent to the Court to have the single order issued and entered by noon that day.
- (h) Approximately two weeks later, on Wednesday, July 25, 2018, the Court of Appeal contacted me and advised me that the single order we had submitted on July 13, 2018 needed to be split into two formal orders, and that a few additional non-substantive changes needed to be made.
- (i) I managed to speak with the senior member of the Court staff on the morning of Friday, July 27, 2018. I told her of the history of my dealings with the Court staff, and that I continued to view multiple orders to be appropriate in the circumstances, although in all of the parties' view, in the circumstances three orders was more appropriate than two. I sent an email to Mr. Moore and Mr. Moyse's counsel summarizing that call within a few minutes of it ending.
- (j) Later that morning (July 27), I circulated three new draft orders that included the "aesthetic" changes required by the Court of Appeal.

(k) Ultimately, the parties exchanged further emails on Tuesday, July 31, 2018, in which Mr. Moore agreed with the form of the three orders I had circulated the week before.

27. I submitted the orders to the Court of Appeal on Wednesday, August 1, 2018.

28. On the morning of Thursday, August 2, 2018, I had a final telephone call with two different staff members of the Court of Appeal. Ultimately, they agreed to issue and enter the orders in the form that I had submitted on August 1, 2018. They did so that day.

29. In sum, obtaining the issued and entered orders from the Court of Appeal was primarily an effort undertaken by me, with little independent effort made by Catalyst's counsel of which I am aware. Moreover, rather than responding to my emails in a timely manner, Mr. Moore was generally slow to respond, on occasion missed his own timing commitments to respond, and necessitated repeated follow-up from me in order to get a response. Mr. Moyse's counsel, on the other hand, generally responded to my emails and requests for comment on the draft orders on a same-day basis.

30. In light of the above, while I agree with the statement in paragraph 8 of the Affidavit of Mr. Reinkeluers that "difficulties were encountered in arriving at a form of order that was satisfactory for issuance by the staff responsible at the Court of Appeal", I disagree with the statement in paragraph 10 that "it was not possible before [August 2, 2018] to obtain the issued and entered orders". Indeed, as set out above, I did not even attempt to submit the draft orders to the Court of Appeal until June 5, 2018, more than six weeks after Catalyst's April 23, 2018 deadline. As the person who made most of the effort to have the orders of the Court of Appeal issued and entered, I have absolutely no reason to believe that, acting diligently, Catalyst's counsel could not have

succeeded in having the orders issued and entered by the April 23, 2018 deadline for filing its application for leave to appeal.

**B. Catalyst's Unnecessary Adjournment of the Appeal**

31. The appeal of the Moyse Action was initially scheduled to be heard for two days on September 26 and 27, 2017. These dates were fixed months earlier, in February 2017.

32. On the morning of Monday, September 25, 2017, Brian Greenspan of the Greenspan Humphrey Weinstein firm (who to my knowledge had not previously acted on behalf of Catalyst in any of the proceedings between West Face and Catalyst) wrote to the Court of Appeal on behalf of Catalyst and requested an urgent attendance before Justice Rouleau. In his letter, Mr. Greenspan stated that "over the weekend [of September 23 and 24], circumstances arose which have resulted in irreconcilable differences between current counsel of record [Mr. Rocco DiPucchio of the Lax O'Sullivan firm] and [Catalyst] regarding the conduct of the appeal". Mr. Greenspan further stated in his letter that these circumstances related to a "potential conflict of interest", such that the Lax O'Sullivan firm had concluded that it had "no option but to seek to be removed as counsel of record". Mr. Greenspan stated that in his view, these circumstances made it "impossible for the appeal to proceed as scheduled". A copy of Mr. Greenspan's letter of September 25, 2017 is attached as **Exhibit "I"**.

33. The Court of Appeal granted Mr. Greenspan's request for an urgent attendance that afternoon. At approximately 3:30 p.m. on the afternoon of September 25, the following counsel appeared before Justice Rouleau in Courtroom 8 at Osgoode Hall:

- (a) Mr. Greenspan;

- (b) David Moore of Moore Barristers (who, like Mr. Greenspan, to my knowledge had not previously acted on behalf of Catalyst in any of the proceedings between West Face and Catalyst);
- (c) Mr. DiPucchio and Eric Hoaken of the Lax O'Sullivan firm;
- (d) Kent Thomson, Matthew Milne-Smith and I from Davies, on behalf of West Face; and
- (e) Rob Centa, Kris Borg-Olivier, and Denise Cooney from the Paliare Roland firm, on behalf of Mr. Moyse.

34. During this attendance, Mr. Greenspan advised that he had been retained by Catalyst the previous week, on Thursday, September 21, 2017, to investigate bringing a potential fresh evidence motion in the appeal of the Moyse Action. Mr. Greenspan stated that he had seen the proposed fresh evidence, that he regarded it to be credible, and that he also regarded it to be relevant. He indicated that the only criterion of the *Palmer* test that he had yet to investigate concerned the potential impact of the proposed fresh evidence on the result. Mr. Greenspan indicated that because he had not been involved in the trial of the Moyse Action, he would need additional time to arrive at a determination in respect of that issue. Finally, Mr. Greenspan advised Justice Rouleau that there were "irreconcilable differences" between Catalyst and the Lax O'Sullivan firm arising out of the potential fresh evidence motion, which had led to the firm's withdrawal from the appeal.

35. Mr. DiPucchio also made brief submissions, the substance of which were that he could not disclose the nature of the conflict that had arisen between Lax O'Sullivan and Catalyst, but that he

agreed with Mr. Greenspan's submission that there was, indeed, a conflict that prevented Mr. DiPucchio from continuing to act for Catalyst in the appeal. He confirmed that the conflict pertained to the potential fresh evidence motion Mr. Greenspan had just discussed.

36. Mr. Thomson made submissions on behalf of West Face, and Mr. Centa made submissions on behalf of Mr. Moyse. They both submitted that adjourning the hearing of the appeal would be prejudicial to their respective clients.

37. Ultimately, however, Justice Rouleau granted the requested adjournment because the Lax O'Sullivan firm had withdrawn as Catalyst's counsel, and Catalyst did not have a lawyer retained to argue the appeal which was scheduled to proceed the following morning. Justice Rouleau issued an Endorsement adjourning the appeal to February 20 to 22, 2018 (the hearing was extended from two to three days in length to accommodate the proposed motion to introduce fresh evidence). A copy of Justice Rouleau's Endorsement is attached as **Exhibit "J"**.

38. In the period following the adjournment of the appeal of the Moyse Action, counsel to West Face and Mr. Moyse exchanged correspondence with Mr. Greenspan on a number of occasions regarding the proposed motion for fresh evidence. Among other questions, counsel for West Face and Mr. Moyse asked that Catalyst: (i) produce the proposed fresh evidence; and (ii) provide details concerning how the proposed fresh evidence came into Catalyst's possession, control or power, including detailed information as to where, how and when that fresh evidence was allegedly discovered by Catalyst. Catalyst's counsel refused to provide the requested evidence or information.

39. On Thursday, November 9, 2017, West Face learned that it and its current and former employees had been and were being "stung" by Black Cube, an investigative firm based in Israel

and comprised of former members of elite Israeli intelligence units, including the Mossad. That is, West Face learned that operatives of Black Cube were contacting current and former employees of West Face using false aliases and pretexts, in attempts to solicit information, including confidential information, from them, concerning matters that were relevant to the Moyse Action. By Sunday, November 12, 2017, West Face learned that one of its former employees who had been targeted by Black Cube was its former General Counsel, Alexander Singh (Mr. Singh had been West Face's General Counsel during the events underlying Catalyst's claim in the Moyse Action). To the best of my knowledge, none of these "stings" produced any evidence that supported Catalyst's position in the Moyse Action.

40. On Thursday, November 16, 2017, Justice Rouleau held a case conference, by telephone, to discuss Catalyst's potential fresh evidence motion. I participated on this call. The following day (November 17, 2017), the Court of Appeal sent a letter to counsel advising of Justice Rouleau's directions. A copy of this letter is attached as **Exhibit "K"**. Effectively it gave Catalyst a deadline of December 1, 2017 to file a notice of motion to introduce the fresh evidence.

41. On the evening of Friday, November 24, 2017, the *National Post* published an article on its website, titled "Exclusive: The Judge, the Sting, Black Cube and Me" (the "**Sting Article**"). A copy of the Sting Article is attached as **Exhibit "L"**. The Sting Article appeared in the print edition of the *National Post* the next morning.

42. The Sting Article describes an unsuccessful attempt by Black Cube operatives, acting under false pretences, to entice Justice Newbould into making anti-semitic comments.

43. On November 28, 2017, West Face commenced a motion within the Court of Appeal for a variety of relief, including an order requiring Catalyst and its counsel to produce immediately:

- (a) the proposed fresh evidence that Mr. Greenspan had represented to Justice Rouleau on September 25, 2017 that he had received, reviewed and regarded to be credible when he sought to adjourn the hearing of the appeal;
- (b) all investigative materials pertaining to the investigation of West Face's former General Counsel; and
- (c) all investigative materials pertaining to the investigation of Justice Newbould.

44. A copy of West Face's Notice of Motion dated November 28, 2017 is attached as **Exhibit "M"**. A copy of an affidavit I swore in support of that motion (without Exhibits) is attached as **Exhibit "N"**.

45. On November 30, 2017, the parties agreed that Catalyst would not bring a motion to introduce fresh evidence, and West Face would not bring the motion it had just commenced (without prejudice to West Face's ability to seek similar relief in the other ongoing proceedings between the parties). A copy of an email from Mr. Greenspan to the Court of Appeal, as well as a letter that Mr. Greenspan insisted be included in the Court file, is attached as **Exhibit "O"**. In the letter, Mr. Greenspan admitted that evidence arising from the sting on Justice Newbould was the potential fresh evidence that had prompted the adjournment of the appeal.

46. As a result of Catalyst withdrawing its motion for the introduction of fresh evidence, the third day of the appeal hearing (February 22) was no longer necessary; and the hearing proceeded on February 20 and 21, 2018 only.

**C. Catalyst's Delay in Seeking Leave to Appeal from the Order of Justice Glustein**

47. This is not the first time that Catalyst has missed a deadline within which to seek leave to appeal. Catalyst's prior conduct in this regard, and the prejudice it caused to West Face, is documented in the Affidavit of Philip de L. Panet sworn January 13, 2016, attached (without Exhibits) as **Exhibit "P"**.

**AFFIRMED BEFORE ME** at the City of  
Toronto, in the Province of Ontario this 14<sup>th</sup>  
day of August, 2018

Megan Anne Moniz, a Commissioner, etc.,  
Province of Ontario, while a Student-at-Law.  
Expires March 22, 2019.

Commissioner for Taking Affidavits  
*(or as may be)*

  
**ANDREW CARLSON**

This is Exhibit "A" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Megan Moniz*  
*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

| <https://nationalpost.com/news/canada/appeal-judge-tosses-catalyst-case-against-west-face-without-h>

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# Appeal judge tosses Catalyst case against West Face without hearing from defence

*Catalyst lawyers could seek leave to appeal Wednesday's decision to the Supreme Court of Canada, a process that could take as long as six months*



Catalyst lawyers had spent more than a day on their feet, arguing that when Ontario Superior Court Judge Frank Newbould threw the Catalyst case out in 2016, he'd done so improperly. *Brian Thompson//Postmedia*



CHRISTIE BLATCHFORD

With 14 terse words, Ontario Court of Appeal Judge David Doherty Wednesday dismissed Catalyst Capital Group's high-profile claim of wrongdoing by its rival West Face Capital.

February 21, 2018  
7:54 PM EST

"It will not be necessary to hear from the respondents on the main appeal," Doherty said on behalf of the three-member panel.

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It was a rarity, what's known as dismissing a case "from the bench" — meaning immediately — and without having heard a word from lawyers representing the other side.

The decision came after Catalyst lawyers David Moore and Brian Greenspan had spent more than a day on their feet, arguing that when Ontario Superior Court Judge Frank Newbould threw the Catalyst case out in 2016, he'd done so improperly.

The court took an extended break then and, when the judges returned, it was for Doherty to say they didn't need to hear from lawyers for West Face or Brandon Moyse, the junior analyst whose actions were at the heart of the case.

Moyse worked for Catalyst for about 18 months until May 2014, when he quit to move to West Face. Within a month, Catalyst was suing West Face and Moyse both, alleging that Moyse had taken with him confidential information and that West Face had misused it.

It was that suit, much amended, that went before Newbould almost two years ago, and which he dismissed in June 2016 after a six-day trial.

#### SEE ALSO

[Christie Blatchford: Bizarre case of Catalyst vs. West Face enters a new stage – appeals court](#)

[West Face files countersuit against Catalyst Capital, accusing rival firm of conspiracy and defamation](#)

[Christie Blatchford: Catalyst Capital drops 'fresh evidence' application that was based on sting against judge](#)

The judge found that while Moyse had submitted confidential samples of his writing as part of his efforts to land a job at West Face, they were mistakes made by a young analyst and that the samples contained no information at all about the WIND Mobile transaction so central to Catalyst's claims; that while Moyse had deleted the browsing history on his computer, he had done so because he was embarrassed by the fact he'd accessed porn sites and that West Face had set up a confidentiality wall to keep Moyse well away from the WIND deal.

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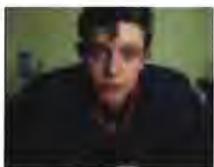
Police seizure of blood at issue in planned Supreme Court appeal of woman's conviction in motorboat crash



Why has Canada spent billions of dollars buying Saudi Arabian oil?



Christie Blatchford: Another problem for the (male) homeless: their hypermasculinity



Christie Blatchford: Hockey dressing rooms should belong to players and coaches, not human rights commissions

The two Toronto private equity firms were both fighting to acquire WIND.

But Newbould found that because Catalyst had voluntarily walked away from the deal when VimbleCom Ltd., a minority owner of WIND but in control of the sale, made a late request for a "break fee," it had only its own strategy to blame for its failure to get the wireless carrier.

A consortium led by West Face acquired control of WIND in a deal valued at about \$300 million in 2014. The next year, the group sold the wireless carrier to Shaw Communications for \$1.5 billion. Thus, Catalyst said, it was deprived of about \$750 million in potential profit.

The appeal dismissed this week was of Newbould's decision that Catalyst was in effect the classic "bitter bidder."

It doesn't automatically mean, however, that West Face can now distribute the profits from the WIND sale to its investors.

Catalyst lawyers could seek leave to appeal Wednesday's decision to the Supreme Court of Canada, a process that could take as long as six months, though it would be a long shot, given how swiftly the appeal court dismissed the appeal.

*It will not be necessary to hear from the respondents on the main appeal*



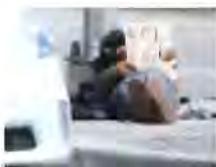
West Face, sources told the National Post, is likely to at least wait until another Catalyst lawsuit is settled.

That one is against VimbleCom Ltd. and other companies for \$750 million, alleging breach of contract, misuse of confidential information and a conspiracy to defeat Catalyst's bid for WIND — very similar allegations to those that were dismissed Wednesday.

West Face lawyers have moved to strike, or toss, that suit for abuse of process; that decision could come reasonably soon.



Why has Canada spent billions of dollars buying Saudi Arabian oil?



Christie Blatchford:  
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Christie Blatchford:  
Hockey dressing rooms  
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players and coaches,  
not human rights  
commissions

As well, while the appeal court dismissed the main appeal Wednesday, it reserved decision on the question of costs.

Newbould awarded costs to West Face on what's called "a substantive indemnity basis," or above the norm, because, he said, Catalyst's allegations had "attacked the integrity of West Face and its executives," this in a business where reputation is paramount. The judge fixed those costs at \$1,239,965.

He awarded Moyse, against whom he said Catalyst had launched "a full scale attack," partial indemnity costs of \$339,500. Moyse was actually employed at West Face for less than a month because of the lawsuit, and struggled thereafter to find another job.

Doherty appeared to sharply disagree with the characterization of Moyse's conduct as benign "mistakes," but the issue wasn't settled.

West Face in a statement issued Wednesday pronounced itself "very pleased" by the court's decision.

Greenspan said he wasn't surprised at the decision, because it's so rare for appeal courts to interfere with the decisions of trial judges.



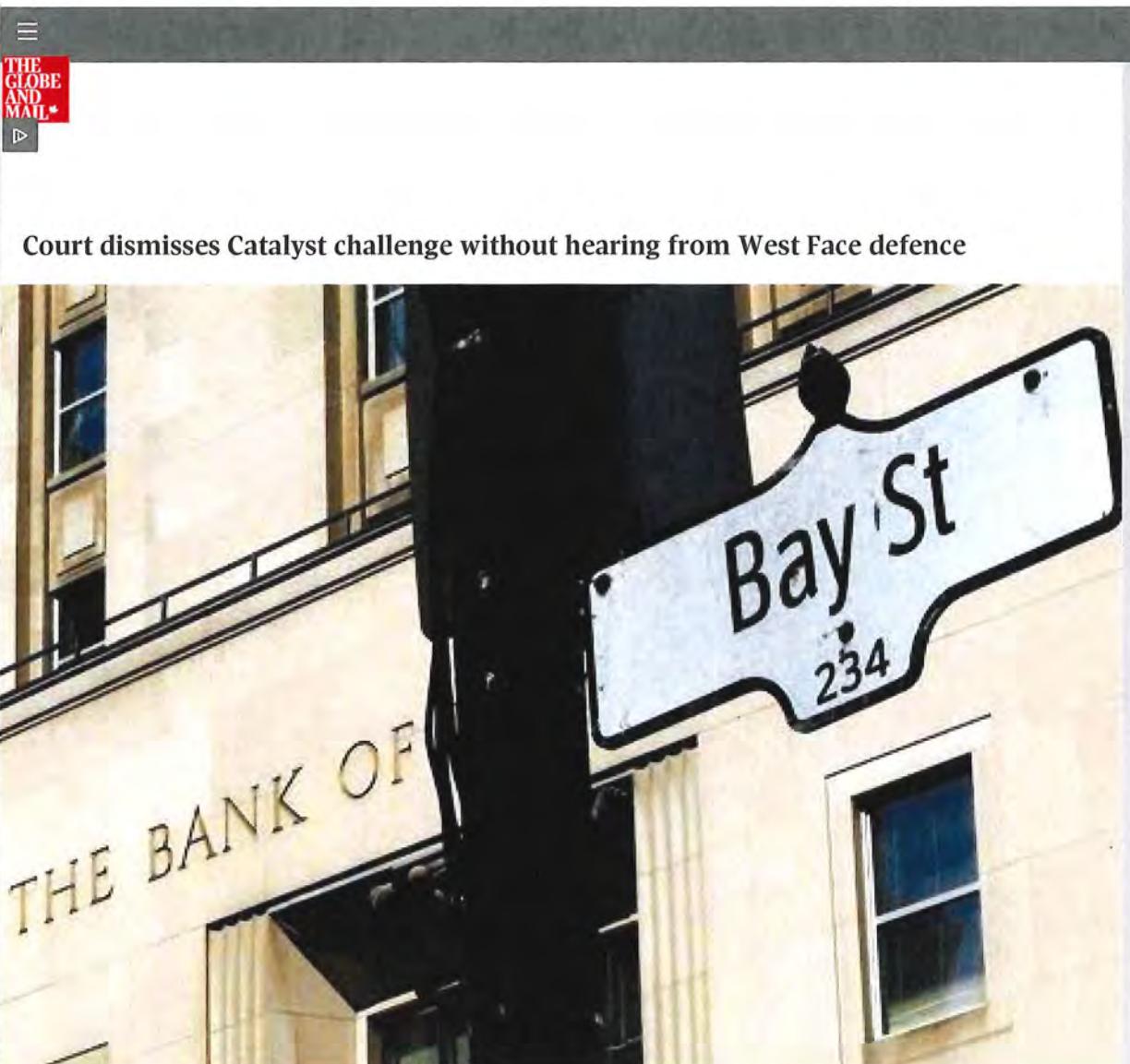
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This is Exhibit "B" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**



A Bay Street sign in Toronto's financial district.

MARK BLINCH/REUTERS

ALEXANDRA POSADZKI  
PUBLISHED FEBRUARY 21, 2018

In an unusual move, the Ontario Court of Appeal dismissed a challenge brought by Catalyst Capital Group Inc. against rival fund manager West Face Capital Inc. – without even hearing from the defendants in the courtroom.

Catalyst, a Toronto-based firm that manages distressed-debt funds, had been requesting a new trial of its lawsuit against its former employee Brandon Moyse and West Face, which hired Mr. Moyse in 2014.

At the heart of the matter was an allegation by Catalyst that Mr. Moyse, a junior analyst, provided confidential information to West Face when he left to go work for the competitor. Specifically, Catalyst asserted that Mr. Moyse gave West Face top-secret information pertaining to Catalyst's strategy for its planned acquisition of Wind Mobile Corp., then scrubbed his BlackBerry and computer to destroy the evidence.

STORY CONTINUES BELOW ADVERTISEMENT

Catalyst attempted to acquire Wind, but lost out to a consortium of investors led by West Face. The consortium acquired Wind Mobile for about \$300-million, including assumed debt, in September 2014. The group then sold it to Shaw Communications Inc. In late 2015 for \$1.6-billion, prompting Catalyst to claim that it had lost out on \$750-million of profits.

36

In August, 2016, now-retired Justice Frank Newbould of the Ontario Superior Court threw out Catalyst's lawsuit "in its entirety," saying that he found no evidence of wrongdoing on the part of West Face or Mr. Moyse. Justice Newbould also raised issues with the reliability of Catalyst founder and managing partner Newton Glassman as a witness, writing that Mr. Glassman was aggressive and argumentative and contradicted his own statements.

Catalyst appealed the ruling, and the company's lawyers argued in court on Tuesday that Justice Newbould failed to properly consider "highly relevant" information relating to Mr. Moyse deleting e-mails and the browsing history on his computer. They also argued that Justice Newbould honed in on inconsistencies in the testimonies of Catalyst witnesses, while overlooking similar discrepancies in the testimonies of West Face witnesses.

Justice David Doherty dismissed the appeal on the second day of hearings Wednesday, saying that it would not be necessary to hear arguments from lawyers for West Face or Mr. Moyse. The three-member panel reserved its decision on costs.

"We accept the conclusion of the court that the high standard to challenge the fact finding by the trial judge was not met," Catalyst said in a statement.

"We await the decision of the Court regarding the costs of the trial proceedings. Based upon the arguments made, we anticipate this decision will likely take into account the Court's observations regarding Catalyst's legitimate concern with the misuse of confidential information and the conduct of Mr. Moyse in the deletion of potentially relevant evidence."

West Face said that it is "very pleased" with the judgment, as it has spent four years defending itself in a case in which the trial judge found the allegations to be entirely without merit.

STORY CONTINUES BELOW ADVERTISEMENT

"The Court of Appeal has affirmed today Justice Newbould's decision which dismissed Catalyst's claims. West Face looks forward to reaching the same result in the defence of Catalyst's other claims," the company statement said.

Among the other outstanding lawsuits is one brought by Catalyst against West Face and the consortium of investors who purchased Wind. The lawsuit, which has not been heard in court, alleges that leaks of confidential data and the breach of an exclusivity agreement cost Catalyst a lucrative opportunity to acquire the mobile-phone company.

West Face CEO Greg Boland has said that the case is without merit and that West Face will defend itself vigorously in court.

FOLLOW ALEXANDRA POSADZKI ON TWITTER

@ALEXPOSADZKI

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EDITORIAL CODE OF CONDUCT

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Data Update [①](#)

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351 King Street East, Suite 1600, Toronto, ON Canada, M5A 0N1

Philip Crawley, Publisher



This is Exhibit "C" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

## COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2018 ONCA 447

DATE: 20180511

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 MoyseKent 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.

## COSTS ENDORSEMENT

- [1] The respondent, West Face Capital Inc. ("West Face"), seeks costs in the amount of \$250,000, inclusive of disbursements and HST. The respondent, Brandon Moyse, seeks costs in the amount of \$149,905.18, also inclusive of disbursements and HST.
- [2] The appellant, Catalyst Capital Group Inc. ("Catalyst"), argues that West Face should have its costs in the amount of \$150,000 and that Mr. Moyse should have no costs or, alternatively, costs in an amount well below the amount requested by Mr. Moyse.
- [3] The respondents were entirely successful on the appeal. They are entitled to reasonable costs on a partial indemnity basis.
- [4] The costs claimed, for what was basically a one-day appeal, are high. They reflect a full-out, no expense spared defence of the trial judgment. Catalyst did not provide the court with its bill of costs, but we have no doubt that it would reflect the same "leave no stone unturned" approach to the appeal. Given the history of this litigation, both sides would reasonably expect that the other side would pursue all legal avenues vigorously and thoroughly without financial restraint.
- [5] The nature of the appeal also justifies significant preparation-related costs. Although the legal issues raised were, with one exception, not complex or novel, the appeal record was large. The grounds of appeal were essentially attempts to

re-litigate most of the crucial findings of fact. The appellant's written arguments were lengthy and replete with detailed references to the evidence. The respondents were required to engage in a detailed, careful and time-consuming review of the full record. Given the manner in which the appeal was advanced, the respondents had to prepare to virtually retry the crucial factual issues on appeal.

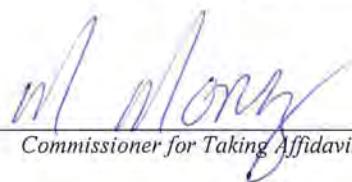
[6] The appeal was adjourned at the last moment in September at the request of Catalyst. The adjournment turned out to be unnecessary. There were considerable costs thrown away and those costs should be included in the amounts awarded to the respondents.

[7] The respondents brought a motion related to the fresh evidence in November 2017. That motion was never heard on its merits. We would impose no costs in respect of matters relating to that motion.

[8] Having regard particularly to the success of the respondents, the nature of the appeal, and the costs thrown away when the appeal was adjourned, we award costs to West Face in the amount of \$200,000 and costs to Mr. Moyse in the amount of \$100,000. Both are inclusive of disbursements and HST.

The image shows two handwritten signatures stacked vertically. The top signature is "John F. MacFarland" and the bottom signature is "D. R. J.A.".

This is Exhibit "D" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

## RE: Court of Appeal Costs Judgment

---

**From:** "Carlson, Andrew" <"/o=exchange/ou=toronto/cn=recipients/cn=acarlson">  
**To:** "David Moore' (david@moorebarristers.ca)" <david@moorebarristers.ca>  
**Cc:** "Milne-Smith, Matthew" <mmilne-smith@dwpv.com>, robert.centa@paliareroland.com, kris.borg-olivier@paliareroland.com, denise.cooney@paliareroland.com  
**Date:** Thu, 17 May 2018 13:49:47 -0400  
**Attachments:** C62655.deen-COSTS.PDF (372.76 kB); TOR\_DOCUMENTS-#3818143-v2-Court\_of\_Appeal\_Costs\_Judgment.docx (29.56 kB)

---

David,

I am reattaching our proposed draft form of order for your review and sign-off as to form and content. Please let us know if you have any comments by end of day today, so that we may have the order issued and entered tomorrow. Given your client's delinquency in paying the costs orders following the trial, we intend to proceed to enforce this order as soon as possible. If we do not hear from you we will simply advise the Court of Appeal that we've received no response.

Thank you,

-Andrew

---

**From:** Carlson, Andrew  
**Sent:** May 15, 2018 7:51 AM  
**To:** 'David Moore' (david@moorebarristers.ca)  
**Cc:** Milne-Smith, Matthew; Robert.Centa@paliareroland.com; Kris.Borg-Olivier@paliareroland.com; denise.cooney@paliareroland.com  
**Subject:** Court of Appeal Costs Judgment

Hi David,

In light of the Court of Appeal's Costs Endorsement issued on Friday (attached), I've attached a draft form of order for your review. Please let me know if you have any comments – otherwise please let me know if you approve it as to form and content.

Thank you,

-Andrew

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) FRIDAY, THE 11TH  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MAY, 2018  
AND PACIOCCO       )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc., and on reading the written costs submissions of the parties;

1. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay West Face Capital Inc. costs of the appeal in the amount of \$200,000.00 inclusive of HST and disbursements.

2. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay Brandon Moyse costs of the appeal in the amount of \$100,000.00 inclusive of HST and disbursements.

THIS JUDGMENT BEARS INTEREST at the rate of 3 percent per year commencing on May 11, 2018.

---

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

**PROCEEDING COMMENCED AT  
TORONTO**

**JUDGMENT**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson (LSUC# 24264J)**  
Email: kentthomson@dwpv.com  
Tel: 416.863.5566

**Matthew Milne-Smith (LSUC# 44266P)**  
Email: mmilne-smith@dwpv.com  
Tel: 416.863.5595

**Andrew Carlson (LSUC# 58850N)**  
Email: acarlson@dwpv.com  
Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

47

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2018 ONCA 447

DATE: 20180511

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.

## COSTS ENDORSEMENT

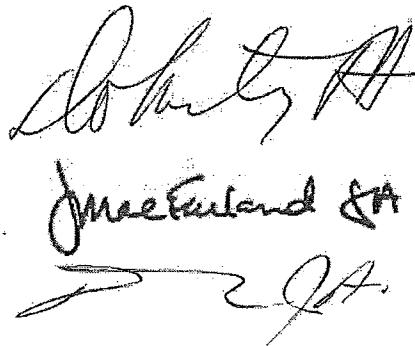
- [1] The respondent, West Face Capital Inc. ("West Face"), seeks costs in the amount of \$250,000, inclusive of disbursements and HST. The respondent, Brandon Moyse, seeks costs in the amount of \$149,905.18, also inclusive of disbursements and HST.
- [2] The appellant, Catalyst Capital Group Inc. ("Catalyst"), argues that West Face should have its costs in the amount of \$150,000 and that Mr. Moyse should have no costs or, alternatively, costs in an amount well below the amount requested by Mr. Moyse.
- [3] The respondents were entirely successful on the appeal. They are entitled to reasonable costs on a partial indemnity basis.
- [4] The costs claimed, for what was basically a one-day appeal, are high. They reflect a full-out, no expense spared defence of the trial judgment. Catalyst did not provide the court with its bill of costs, but we have no doubt that it would reflect the same "leave no stone unturned" approach to the appeal. Given the history of this litigation, both sides would reasonably expect that the other side would pursue all legal avenues vigorously and thoroughly without financial restraint.
- [5] The nature of the appeal also justifies significant preparation-related costs. Although the legal issues raised were, with one exception, not complex or novel, the appeal record was large. The grounds of appeal were essentially attempts to

re-litigate most of the crucial findings of fact. The appellant's written arguments were lengthy and replete with detailed references to the evidence. The respondents were required to engage in a detailed, careful and time-consuming review of the full record. Given the manner in which the appeal was advanced, the respondents had to prepare to virtually retry the crucial factual issues on appeal.

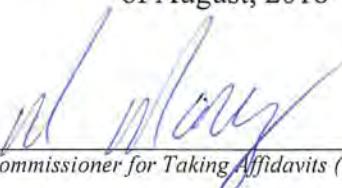
[6] The appeal was adjourned at the last moment in September at the request of Catalyst. The adjournment turned out to be unnecessary. There were considerable costs thrown away and those costs should be included in the amounts awarded to the respondents.

[7] The respondents brought a motion related to the fresh evidence in November 2017. That motion was never heard on its merits. We would impose no costs in respect of matters relating to that motion.

[8] Having regard particularly to the success of the respondents, the nature of the appeal, and the costs thrown away when the appeal was adjourned, we award costs to West Face in the amount of \$200,000 and costs to Mr. Moyse in the amount of \$100,000. Both are inclusive of disbursements and HST.



This is Exhibit "E" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



---

*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

## RE: Outstanding matters

52

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**From:** "Carlson, Andrew" <"/o=exchange/ou=toronto/cn=recipients/cn=acarlson">  
**To:** David Moore <david@moorebarristers.ca>  
**Cc:** "Milne-Smith, Matthew" <mmilne-smith@dwpv.com>  
**Date:** Tue, 22 May 2018 11:29:54 -0400  
**Attachments:** TOR\_DOCUMENTS-#3822307-v2-  
Judgment\_on\_the\_Application\_for\_Leave\_to\_Appeal\_Costs.DOCX (29.55 kB);  
TOR\_DOCUMENTS-#3822298-v1-Judgment\_on\_the\_Merits.DOCX (29.39 kB);  
TOR\_DOCUMENTS-#3818143-v2-Court\_of\_Appeal\_Costs\_Judgment.DOCX (29.56 kB)

---

Hi David,

I didn't hear from you on Friday regarding any of the attached judgments. I intend to submit these to the Court of Appeal tomorrow to be issued, so please provide me with any comments you may have by the end of the day.

Thank you,

-Andrew

---

**From:** David Moore [mailto:david@moorebarristers.ca]  
**Sent:** May 17, 2018 8:17 PM  
**To:** Carlson, Andrew  
**Cc:** Milne-Smith, Matthew  
**Subject:** RE: Outstanding matters

I will get back to you tomorrow.

---

**From:** Carlson, Andrew [mailto:acarlson@dwpv.com]  
**Sent:** Thursday, May 17, 2018 8:14 PM  
**To:** David Moore  
**Cc:** Milne-Smith, Matthew  
**Subject:** RE: Outstanding matters

David,

Moyse's counsel pointed out to me that technically it was a motion to for leave to appeal the costs order, not an application. I've made that change to the form of judgment. Moyse's counsel is now signed off on these as to form and content. Please advise if you have any further comments, or whether you are also signed off.

Thank you,

-Andrew

---

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

---

**D A V I E S**

155 Wellington Street West  
Toronto, ON M5V 3J7

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:** May 17, 2018 4:22 PM  
**To:** david@moorebarristers.ca  
**Cc:** Milne-Smith, Matthew  
**Subject:** RE: Outstanding matters

David,

Following on Matt's email below, please find attached the two draft forms of judgment on the merits of the appeal and the application for leave to appeal the costs order. Please let me know if you have any comments, otherwise please approve as to form and content.

These remain subject to comment / approval from Mr. Moyse's counsel.

-Andrew

---

**From:** Milne-Smith, Matthew  
**Sent:** May 17, 2018 3:44 PM  
**To:** david@moorebarristers.ca  
**Cc:** Carlson, Andrew; Thomson, Kent  
**Subject:** Outstanding matters

David,

As there quite a number of outstanding matters between our clients, I wanted to try to summarize them here. We may raise them at the 9:30 schedule for next Wednesday, if necessary.

#### **Moyse**

- Trial costs outstanding and payable
- Appeal costs outstanding and payable
- As a result of Catalyst's non-payment, we are now incurring costs of enforcement, which will also be recoverable on a partial indemnity basis
- Draft judgments for the appeal and the denial of leave to appeal have been provided to you by Andrew
- Judgment debtor examination of Mr. Glassman for May 28

#### **Veritas**

- Productions are due at the end of the month. We will be ready to produce. Please advise if Catalyst and Callidus will be in a position to do so.

#### **VimpelCom**

- We have offered to accept costs of \$485,000 on a substantial indemnity basis. Please let me know if you intend to make a counter-offer, failing which we will file costs submissions and seek our costs of doing so.
- We will circulate a draft judgment shortly.

#### **Wolfpack**

- When can we expect your factum? Adair has said he will have his in by Wednesday, and I've proposed our response by June 6.

There may be other matters I am overlooking but this will serve at least as a preliminary list. This does not include motions and demands by other parties.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) FRIDAY, THE 11TH  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MAY, 2018  
AND PACIOCCO       )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc., and on reading the written costs submissions of the parties;

1. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay West Face Capital Inc. costs of the appeal in the amount of \$200,000.00 inclusive of HST and disbursements.

2. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay Brandon Moyse costs of the appeal in the amount of \$100,000.00 inclusive of HST and disbursements.

THIS JUDGMENT BEARS INTEREST at the rate of 3 percent per year commencing on May 11, 2018.

---

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

**PROCEEDING COMMENCED AT  
TORONTO**

**JUDGMENT**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson (LSUC# 24264J)** 95  
Email: kentthomson@dwpv.com  
Tel: 416.863.5566

**Matthew Milne-Smith (LSUC# 44266P)**  
Email: mmilne-smith@dwpv.com  
Tel: 416.863.5595

**Andrew Carlson (LSUC# 58850N)**  
Email: acarlson@dwpv.com  
Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) WEDNESDAY, THE 21ST  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF FEBRUARY, 2018  
AND PACIOCCO       )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc.;

1. THIS COURT ORDERS AND ADJUDGES that the appeal of The Catalyst Capital Group Inc. is dismissed.

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson (LSUC# 24264J)** 58  
Email: kentthomson@dwpv.com  
Tel: 416.863.5566

**Matthew Milne-Smith (LSUC# 44266P)**  
Email: mmilne-smith@dwpv.com  
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**Andrew Carlson (LSUC# 58850N)**  
Email: acarlson@dwpv.com  
Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) THURSDAY, THE 22ND  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MARCH, 2018  
AND PACIOCCO      )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS MOTION FOR LEAVE TO APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for the parties;

1. THIS COURT ORDERS AND ADJUDGES that the motion for leave to appeal the costs Judgment of Justice Newbould dated October 7, 2016 is dismissed.

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson (LSUC# 24264J)** 09  
Email: kentthomson@dwpv.com  
Tel: 416.863.5566

**Matthew Milne-Smith (LSUC# 44266P)**  
Email: mmilne-smith@dwpv.com  
Tel: 416.863.5595

**Andrew Carlson (LSUC# 58850N)**  
Email: acarlson@dwpv.com  
Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

This is Exhibit "F" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

**Moyse**

---

**From:** "Milne-Smith, Matthew" <mmilne-smith@dwpv.com>  
**To:** david@moorebarristers.ca  
**Cc:** "Carlson, Andrew" <acarlson@dwpv.com>  
**Date:** Wed, 30 May 2018 10:16:11 -0400

---

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

This is Exhibit "G" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Megan Moniz*  
*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

# RE: Outstanding Judgments of the Court of Appeal<sup>64</sup>

---

**From:** "Carlson, Andrew" <"/o=exchange/ou=toronto/cn=recipients/cn=acarlson">  
**To:** "'David Moore' (david@moorebarristers.ca)" <david@moorebarristers.ca>  
**Cc:** "Milne-Smith, Matthew" <mmilne-smith@dwpv.com>, robert.centa@paliareroland.com, kris.borg-olivier@paliareroland.com, denise.cooney@paliareroland.com  
**Date:** Tue, 05 Jun 2018 15:55:48 -0400  
**Attachments:** Court\_of\_Appeal\_Costs\_Judgment.pdf (13.71 kB); Judgment\_on\_the\_Merits.pdf (11.55 kB); Judgment\_on\_the\_Motion\_for\_Leave\_to\_Appeal\_Costs.pdf (13.39 kB); Judgment\_on\_the\_Motion\_for\_Leave\_to\_Appeal\_Costs - endorsed.pdf (146.47 kB); Court\_of\_Appeal\_Costs\_Judgment - endorsed.pdf (146.71 kB); Judgment\_on\_the\_Merits - endorsed.pdf (144.78 kB)

---

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

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) FRIDAY, THE 11TH  
 )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MAY, 2018  
AND PACIOCCO )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc., and on reading the written costs submissions of the parties;

1. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay West Face Capital Inc. costs of the appeal in the amount of \$200,000.00 inclusive of HST and disbursements.

2. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay Brandon Moyse costs of the appeal in the amount of \$100,000.00 inclusive of HST and disbursements.

THIS JUDGMENT BEARS INTEREST at the rate of 3 percent per year commencing on May 11, 2018.

---

*(Signature of Judge)*

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson (LSUC# 24264J)** 67  
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Tel: 416.863.5566

**Matthew Milne-Smith (LSUC# 44266P)**  
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**Andrew Carlson (LSUC# 58850N)**  
Email: acarlson@dwpv.com  
Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) FRIDAY, THE 11TH  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MAY, 2018  
AND PACIOCCO       )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc., and on reading the written costs submissions of the parties;

1. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay West Face Capital Inc. costs of the appeal in the amount of \$200,000.00 inclusive of HST and disbursements.

2. THIS COURT ORDERS AND ADJUDGES that The Catalyst Capital Group Inc. shall pay Brandon Moyse costs of the appeal in the amount of \$100,000.00 inclusive of HST and disbursements.

THIS JUDGMENT BEARS INTEREST at the rate of 3 percent per year commencing on May 11, 2018.

---

*(Signature of Judge)*

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

Agreed at to  
form and content  
by consent to West Face  
Moyse Carlson

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

DAVIES WARD PHILLIPS & VINEBERG LLP  
155 Wellington Street West  
Toronto ON M5V 3J7

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Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) WEDNESDAY, THE 21ST  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF FEBRUARY, 2018  
AND PACIOCCO      )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc.;

1. THIS COURT ORDERS AND ADJUDGES that the appeal of The Catalyst Capital Group Inc. is dismissed.

---

(Signature of Judge)

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Kent E. Thomson (LSUC# 24264J)** 72  
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Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) WEDNESDAY, THE 21ST  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF FEBRUARY, 2018  
AND PACIOCCO       )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for The Catalyst Capital Group Inc.;

1. THIS COURT ORDERS AND ADJUDGES that the appeal of The Catalyst Capital Group Inc. is dismissed.

---

(Signature of Judge)

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

Agreed at to  
form and content  
by witness to West Face  
Moyse / Carlson

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

DAVIES WARD PHILLIPS & VINEBERG LLP  
155 Wellington Street West  
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Andrew Carlson (LSUC# 58850N)  
Email: acarlson@dwpv.com  
Tel: 416.367.7437

Tel: 416.863.0900  
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) THURSDAY, THE 22ND  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MARCH, 2018  
AND PACIOCCO     )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS MOTION FOR LEAVE TO APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for the parties;

1. THIS COURT ORDERS AND ADJUDGES that the motion for leave to appeal the costs Judgment of Justice Newbould dated October 7, 2016 is dismissed.

---

(Signature of Judge)

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

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Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

**COURT OF APPEAL FOR ONTARIO**

THE HONOURABLE ) THURSDAY, THE 22ND  
                    )  
JUSTICES DOHERTY, MACFARLAND, ) DAY OF MARCH, 2018  
AND PACIOCCO      )

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants  
(Respondents)

**JUDGMENT**

THIS MOTION FOR LEAVE TO APPEAL by the Plaintiff (Appellant), The Catalyst Capital Group Inc., was heard on February 20 and 21, 2018 at the court house, Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

ON READING the Appeal Book, Exhibit Book, Compendia and Facta of the parties, and on hearing submissions from the lawyers for the parties;

1. THIS COURT ORDERS AND ADJUDGES that the motion for leave to appeal the costs Judgment of Justice Newbould dated October 7, 2016 is dismissed.

---

*(Signature of Judge)*

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- BRANDON MOYSE et al.  
Defendants  
(Respondents)

Court File No. C62655

Agreed as to  
Agreement and Content  
by witness to West Face  
Moyse / [Signature]

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**JUDGMENT**

DAVIES WARD PHILLIPS & VINEBERG LLP  
155 Wellington Street West  
Toronto ON M5V 3J7

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Fax: 416.863.0871

Lawyers for the Defendant (Respondent),  
West Face Capital Inc.

This is Exhibit "H" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



---

*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

# RE: Outstanding Judgments of the Court of Appeal<sup>80</sup>

---

**From:** "Carlson, Andrew" <"/o=exchange/ou=toronto/cn=recipients/cn=acarlson">  
**To:** David Moore <david@moorebarristers.ca>, "Milne-Smith, Matthew" <mmilne-smith@dwpv.com>  
**Cc:** robert.centa@paliareroland.com, kris.borg-olivier@paliareroland.com,  
denise.cooney@paliareroland.com  
**Date:** Thu, 07 Jun 2018 10:48:27 -0400

---

Thanks David. Absent any last words from anyone, I believe your changes are acceptable to all of us. I plan to incorporate these changes, endorse them as to form and content on everyone's behalf, and submit them to the Court of Appeal today.

Thanks.

-Andrew

---

**From:** David Moore [mailto:david@moorebarristers.ca]  
**Sent:** June 6, 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

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

**DAVIES**

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

**81**

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)  
**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)  
**Cc:** Milne-Smith, Matthew; Robert.Centa@paliareroland.com; Kris.Borg-Olivier@paliareroland.com; 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 "I" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**



Sent via facsimile and email.

September 25, 2017

Mr. Stephen Mills-Hughes  
Registrar  
Court of Appeal for Ontario  
130 Queen Street West  
Toronto, ON M5H 2N5

Dear Mr. Mills-Hughes:

Re: The Catalyst Capital Group v. Moyse, Brandon et al  
Court file No. C62655

I am writing on behalf of The Catalyst Capital Corporation to request an urgent attendance in Chambers this afternoon before Mr. Justice Rouleau, the President of the Panel assigned to hear the above-noted appeal, which is scheduled to commence tomorrow, September 26, 2017.

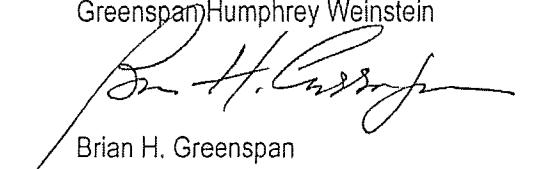
Over the weekend, circumstances arose which have resulted in irreconcilable differences between current counsel of record and The Catalyst Capital Corporation regarding the conduct of the appeal. These circumstances do not relate to any financial issue, but include a potential conflict of interest, such that Catalyst's current counsel have concluded that they have no option but to seek to be removed as counsel of record.

I have been retained by Catalyst to, *inter alia*, provide advice in respect of these issues and in my view current circumstances make it impossible for the appeal to proceed as scheduled.

I am available to attend before Justice Rouleau, together with current counsel of record, at 2:30 today or any time thereafter. I would respectfully request that you convey this request to His Honour and to advise if such an attendance can be arranged.

Thank you for your assistance.

Yours truly,  
Greenspan Humphrey Weinstein

  
Brian H. Greenspan

Copies to:

Appeal Scheduling unit, *via facsimile and email*

Rob Centa, *via email*

Rocco Di Pucchio, *via email*

Kent Thomson, *via email*

Matthew Milne Smith, *via email*

This is Exhibit "J" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



---

*Commissioner for Taking Affidavits (or as may be)*

MEGAN MONIZ

## COURT OF APPEAL FOR ONTARIO

DATE: 20170927  
DOCKET: C62655

Rouleau J.A. (In Chambers)

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents)

Rocco DiPucchio, Brian Greenspan and David Moore, for the appellant

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

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

Heard: September 25, 2017

On appeal from the judgment of Justice F. Newbould of the Superior of Justice, dated August 18, 2016.

**ENDORSEMENT**

[1] Mr. Greenspan for the appellant advised the parties and the court that he is seeking to adjourn the matter now scheduled to be heard starting tomorrow. He advises that on Thursday last, he was provided with information that requires immediate investigation and may well lead to the tendering of a fresh evidence

application with impact on the appeal. Apparently related to this, irreconcilable difference between the appellant and counsel of record, Lax O'Sullivan, have arisen such that Lax O'Sullivan has concluded that it has no option but to seek to be removed as counsel of record.

[2] The respondents oppose any adjournment as they are ready and anxious to proceed and are suffering some prejudice by the delay. Mr. Moyse has this cloud over his name and West Face is under pressure to distribute the profits it has made on the transaction.

[3] In the circumstances, I consider that it would be unfair to force the appellant on without counsel. I therefore reluctantly agree to adjourn the appeal. In order to allow for the possibility of the fresh evidence requiring additional court time I will provide the dates of February 20, 21 and 22 for the appeal. I will remain seized of any issues that may arise with respect to the potential fresh evidence. Counsel are to inform me once it is determined if a fresh evidence application will be brought. If no fresh evidence will be tendered, the appeal will be scheduled for only 2 of the days set aside.

[4] The appellant is to retain new counsel forthwith and the necessary notice of change of solicitors filed with the court. The issue of costs is left to the panel hearing the appeal.

A handwritten signature in black ink, appearing to read "Paul D. Donelan Q.C." The signature is fluid and cursive, with "Paul D." on top, "Donelan" in the middle, and "Q.C." at the end.

This is Exhibit "K" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



---

*Megan Moniz*  
Commissioner for Taking Affidavits (or as may be)

**MEGAN MONIZ**



PLEASE ADDRESS ALL COMMUNICATIONS TO:  
ADRESSER TOUTE CORRESPONDANCE À :

COURT OF APPEAL FOR ONTARIO  
COUR D'APPEL DE L'ONTARIO

November 17, 2017  
Sent by e-mail

SENIOR LEGAL OFFICER/AVOCAT PRINCIPAL  
OSGOODE HALL  
130 QUEEN STREET WEST/130, RUE QUEEN OUEST  
TORONTO, ONTARIO  
M5H 2N5

Robert A. Centa  
Paliare Roland Rosenberg Rothstein LLP  
155 Wellington Street West  
35th Floor  
Toronto, ON  
[Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com)

Kent Thompson & Matthew Milne-Smith  
Matthew Milne-Smith  
Davies, Ward Phillips & Vineberg LLP  
155 Wellington Street West  
Toronto, ON M5V 3J7  
[mmilne-smith@dwpv.com](mailto:mmilne-smith@dwpv.com)  
[kentthomson@dwpv.comk](mailto:kentthomson@dwpv.comk)

Brian Greenspan & Naomi Lutes  
Greenspan Humphrey Weinstein  
15 Bedford Road  
Toronto, ON M5R 2J7  
[bgreenspan@15bedford.com](mailto:bgreenspan@15bedford.com)  
[nlutes@15bedford.com](mailto:nlutes@15bedford.com)

David Moore  
Moore Barristers  
393 University Avenue  
Suite 1600  
Toronto, ON M5G 1E6  
[david@moorebarristers.ca](mailto:david@moorebarristers.ca)

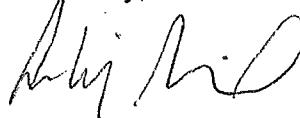
Dear Counsel,

Re: Catalyst Capital v. Moyse, B  
Court of Appeal for Ontario File No.: C62655

This letter will confirm that a case conference was held on November 16, 2017 between the Justice Rouleau and counsel. As a result of the case conference Justice Rouleau has directed the following.

- The appellant is to determine whether it will proceed with a fresh evidence application by December 1, 2017. That decision is to be communicated to the respondents by that date.
- If the appellants decides to proceed with a fresh evidence application, the notice of application is to be served and filed by December 1, 2017. All of the proposed fresh evidence need not be filed by December 1, 2017 although it is desirable that it be.
- The parties are to appear before me on December 1, 2017 at 1:15 p.m. in order to set a timetable for filing of materials and setting of deadlines for cross examinations. The parties should come prepared to commit to a schedule that will ensure that the appeal can proceed on the dates set for hearing. Those dates, February 20 – 22 are peremptory to the appellant.
- If the appellant advises that it will not proceed with a fresh evidence application, counsel are to advise the parties and the court as soon as possible and the December 1, 2017 appearance will be cancelled.

Sincerely,



Lily Miranda  
Office of the Senior Legal Officer  
Court of Appeal for Ontario

CC: The Honourable Justice Rouleau

This is Exhibit "L" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018

---

*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**



## EXCLUSIVE: THE JUDGE, THE STING, BLACK CUBE AND ME



ADVERTISEMENT

Christie Blatchford: How a legal battle between two ferociously competitive Toronto firms took a dark turn



CHRISTIE BLATCHFORD

National Post

A former Ontario Superior Court judge was targeted in a sting designed to discredit him days before his decision in a controversial case with hundreds of millions of dollars at stake was scheduled to be heard at the Ontario Court of Appeal.

The sting saw the 74-year-old former judge, Frank Newbould, audiotaped and photographed surreptitiously at a posh Toronto restaurant as an agent posing as a potential client apparently tried to induce him, in vain, to make anti-Semitic remarks.

Newbould, who just left the bench in June, was the trial judge in a 2016 lawsuit between Catalyst Capital Group and West Face Capital, two ferociously competitive Toronto private-equity firms whose feud hasn't yet ended in the courtroom.

A source authorized to speak for Catalyst acknowledges that a subcontractor working for a security company it hired carried out the sting on the judge. But the source said Catalyst did not order the sting or know about it until after it happened.

The subcontractor was the Israeli intelligence firm Black Cube, recently in the news as the same private agency Hollywood film producer Harvey Weinstein hired to undermine the women accusing him of sexual assault. Black Cube later apologized for taking the job and said it would donate the fee to women's groups.

Last week in response to another lawsuit filed against it by Catalyst — the fourth since 2014 — West Face alleged in court documents that operatives from Black Cube pretended to be recruiters in an attempt to get information from some of its current and former employees.



A sting arranged by Israeli intelligence firm Black Cube saw former judge Frank Newbould audiotaped and photographed surreptitiously at a posh Toronto restaurant in September 2017.

The sting on Newbould began Sept. 18 with an appointment arranged via email with a man who said his name was Hugo Gabriel Saavedra Rodriguez. He said he was the executive director at Victorius Group, a consultancy firm purportedly based in London, England, but with international interests.

But Companies House, the United Kingdom's government registrar of companies, has no record of a company by that name at the given address.

The two met at Newbould's downtown office. Rodriguez claimed to represent a Canadian company involved in the oil sands business that was unhappy with a competitor who "had gone behind my client's back" and allegedly used its technology to get licences to drill in Africa and Israel.

He said his client might be in the market for an arbitrator and appeared to be interested in hiring Newbould.

Three months earlier, in June, Newbould had stepped down from the bench amid a controversy over his involvement in an aboriginal land claim dispute near his family cottage at Sauble Beach on Lake Huron.

A judicial inquiry into a complaint that he had shown a "lack of sensitivity to the experiences of Aboriginal peoples" and derailed a proposed settlement of the claim by speaking out against it was stopped because Newbould resigned. However, he said at the time that he wasn't forced to quit and had decided two or three years before to retire from the bench early.

Almost immediately he joined Arbitration Place, a downtown Toronto agency for arbitrators, and also joined the law firm of Thornton Grout Finnigan as counsel.

In the first meeting at Newbould's office, Rodriguez said he thought his case might have to be heard in New York, but he expressed doubts about getting a fair hearing there because of "the Jewish lobby or influence in New York."



Four times in this conversation, Rodriguez mentioned as a potential problem for his client "the Jewish lobby or influence," "the Jewish issue," "the Jewish way of doing things.... All the time trying to take more than they should, and more than agreed."

Newbould failed to rise to the bait, repeatedly responding only with such benign disclaimers as "there's good Jewish people and there's some bad Jewish people ... some good Spaniards and bad Spaniards" and "My experience is arbitrators aren't influenced by that (ethnicity)."

He also tried to explain the rules of arbitration to Rodriguez and the two agreed to discuss the job over dinner that night at Scaramouche, an expensive midtown Toronto restaurant known equally for its fine food and sweeping views. Rodriguez paid.

The judge did not see a tape recorder being switched on. Nor did he notice a photographer taking his photo, careful it would seem to only capture the back of Rodriguez.

They quickly returned to that morning's discussion. With little preamble, Rodriguez said the man heading the company that was allegedly stealing his client's technology was "this Jewish guy."

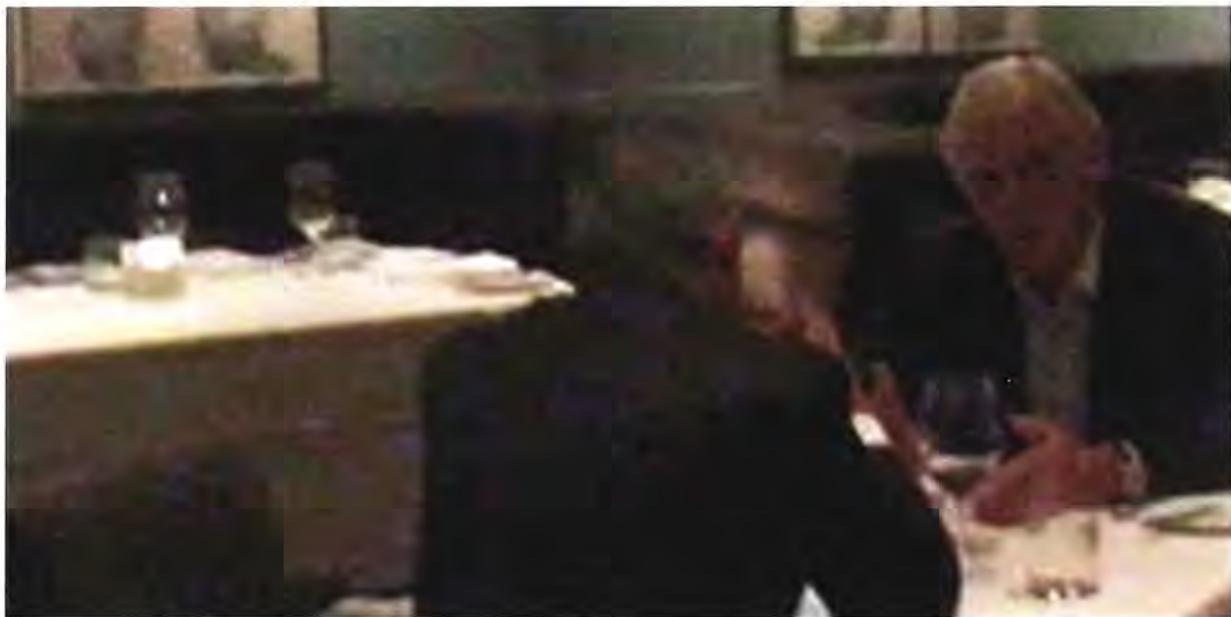
Newbould ignored this, told him he needed to retain both a lawyer and an arbitrator, and said it wasn't clear to him which role Rodriguez saw for him. "If you have in mind that I would be the arbitrator," he said, "I couldn't give you advice on all that you're asking me."

To do so, he said, would be inappropriate. "I couldn't do that," Newbould said. "Nobody, no good arbitrator, would ever do that."

In the course of the night, Newbould at one point made what could be described as an intemperate remark, though, seemingly to the regret of the agent's employers, it wasn't about Jews but about Chinese witnesses.

At one point, Rodriguez asked if a judge could make a decision on the basis of what he heard verbally, and Newbould said no, courts are document-heavy.

"The documents tell the story, for the most part," he said, then mentioned, "I had a case a year and a half ago now I guess, a lawsuit between two hedge funds and one hedge fund was trying to acquire a telecommunications company..."



Newbould said the plaintiff in the suit was named "Glassman and he is a terrible witness."

If it was perhaps indiscreet, it was nothing Newbould hadn't also said in his public decision.

Newton Glassman is the founder and managing partner of Catalyst, which sued West Face, accusing it of obtaining confidential information about its bid for WIND Mobile Inc. through former Catalyst analyst Brandon Moyse.

Moyse left Catalyst for West Face in 2014, four months before a consortium of investors led by West Face successfully acquired WIND in a deal valued at approximately \$300 million. In 2015, the group sold the wireless carrier to Shaw Communications for \$1.6 billion.

Catalyst has claimed it lost out on \$750 million in potential profit.

In his lengthy Aug. 18, 2016 decision, Newbould ruled against Catalyst. He was harshly critical of Catalyst witnesses, particularly Glassman, whom he described as "aggressive, argumentative" and more of a "salesman than an objective witness."

He simply could not accept being "outsmarted" on the WIND deal, the judge said later,

when awarding costs.

It would have been a humiliating rebuke for the proud and combative head of the successful company founded in 2002.

The judge ordered Catalyst to pay Moyse \$340,000. He also awarded costs of \$1.2 million to West Face on what's called "a substantial indemnity basis" because, the judge said, Glassman had played such "hardball attacking the reputation and honesty of West Face."

In fact, the judge had no idea then of what hardball really was.

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A day before Newbould and Rodriguez met, I received an email from a woman I didn't know. The subject line said: "Exclusive story offer — Judge Frank Newbould's record might unravel September 20th."

She gave me a one-sided, six-paragraph interpretation of the Catalyst/West Face/WIND Mobile case, and offered to connect me with a spokesperson "that can prove evidence was destroyed in the case and that Newbould's ultimate ruling completely ignored it."

She also wrote, "In addition, information is brewing about a wolf pack of companies that West Face is involved with as well — we can connect you with the investigators" and offered a meeting with her source.

(Catalyst filed a \$450-million lawsuit on Nov. 8 accusing West Face and others of being "Wolfpack conspirators" in a short-selling campaign targeting a publicly traded lender in which it holds the majority stake. West Face denies the allegations, and called the lawsuit meritless.)

In emails over the next few days, the woman described herself as a communications/public relations professional, a Canadian from Toronto living in New York City who said she chose me because her parents were big readers of mine.

When I pressed her, she insisted that was the reason, and added she'd been asked to

do a favour for a friend by finding a suitable Canadian reporter.

For several days, she peppered me with emails — there was clearly some urgency to the matter — and on Sept. 19, wrote, "I have arranged for an exclusive background meeting btw yourself and the leading figure from Catalyst.

"He is in Montreal today but will fly to Toronto — ideally tomorrow — to meet with you. I'll come back to you on times."

He knows of only one remotely comparable case in Canada, which happened almost 30 years ago, where a mining company that lost in court and, convinced the judge must have had a personal financial stake, hired a private eye.

— Christie Blatchford



The meeting with the unidentified figure from Catalyst never happened, and instead on Sept. 21, I met the woman alone at a midtown café.

There, she handed me a USB flash drive containing the photos of Newbould, audio and what appear to be edited transcripts of the two surreptitiously recorded conversations he had with Rodriguez at his office and Scaramouche.

She gave my number to the purported friend connected to the case, who texted a few days later to set up a meeting.

He is a former Israeli TV journalist and documentary filmmaker. We met on Oct. 20 at a diner in the east end of Toronto.

He said he was passing on the story because it would be of little interest to his audience in Israel. Plus, like the PR woman, he said he was doing a favour for someone close to the case. Also like the PR woman before him, he mentioned my unquestioned brilliance and experience as a reporter; flattery, however transparently and thickly ladled on, appears part of undercover tradecraft.

But where the PR woman was unequivocal that the people behind the sting were from Catalyst, the journalist seemed to be backing away from that. The movers behind this, he said, were Aboriginals. When I pushed him on it, he said they were the same people who had complained about Newbould in the land claim controversy.

I knew that was ridiculous. That complaint had been brought by the Indigenous Bar Association, a professional group of lawyers unlikely to have done something like this. And their complaint was no longer a live issue as Newbould had resigned.

I told the journalist I couldn't continue unless I met one of the principals.

"You will meet the guy who is behind this project," he texted me on Oct. 26, but that soon changed to "Jessie from the operational team."

Jessie and I met on Oct. 31 in a restaurant at the Eaton Centre. An attractive woman with dark hair, who looked to be in her early 40s, Jessie said she was now doing this work after a career in an unnamed government's national security agency. She wouldn't give me her last name, was vague about where she lived, and gave me an email address that she didn't answer.

I paid the bill and left after about 30 minutes. My patience with wannabe spooks, mules and ghostly figures — and mostly, being lied to — was exhausted.

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The lawyers for Catalyst and West Face met at the Court of Appeal on Sept. 25, a week after the sting on the judge.

Among them were two new faces: prominent Toronto lawyer Brian Greenspan and

veteran litigator David Moore, both there for Catalyst.

They were seeking an adjournment to the appeal, which was slated to be heard the next day.

A two-page document filed with the court says Greenspan told Judge Paul Rouleau that on Sept. 21, “he was provided with information that requires immediate investigation and may well lead to the tendering of a fresh evidence application with impact on the appeal.”

What the evidence is, he did not say. But on the 21st, Catalyst received its own USB flash drive with a transcript of Newbould and Rodriguez’s conversations as well as the audio and photos.

According to the source authorized to speak for Catalyst, the company was weighing whether they had enough to dislodge the presumption of neutrality that cloaks judges as a matter of law to now argue at the appeal that Newbould was biased.

Rouleau was also told that an “irreconcilable difference” between Catalyst and its lawyers, the Lax O’Sullivan Lisus Gottlieb firm, had arisen and that Lax O’Sullivan had “concluded it has no option but to seek to be removed as counsel of record.”

The “irreconcilable difference” was that once Lax O’Sullivan was told about what Black Cube had done, its lawyers made the decision it was “unethical conduct” and they wouldn’t be a part of it.

The lawyers demanded Catalyst sign an undertaking that it would never attempt to use in any way the information covertly obtained about Newbould.

But Catalyst wouldn’t make the decision then and there, and wanted time to weigh what it had learned.

In other words, according to the source’s account, Catalyst may not have ordered the attempted setup of the judge or even wanted it to happen, but now that it was done, the company had to evaluate the fruits of the sting to see if there was enough to bring an

allegation of bias against Newbould.

Such is the ruthless pragmatism attached to big money and big power.

Rouleau reluctantly granted the adjournment and set new dates for February, ordering the lawyers to tell him if there was going to be a fresh evidence application as soon as possible. He later set a deadline of Dec. 1 for any such application.

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According to the source authorized to speak for Catalyst, the company hired a security firm on Aug. 31 because of a variety of “security concerns.”

Among them, he said, was a belief that Catalyst had been cyber-hacked, evidence of trespassing and at least one break-in at the homes and cottages of its senior people and that their garbage was being picked through. And, said the source, some executives had received threats.

The company, he said, didn’t have sufficient evidence to go to Toronto Police, so took their concerns to the private firm instead.

The man was adamant that Catalyst never asked the main security company to set up a sting on Newbould, though he acknowledged that probably in the first briefing with the security firm, it would have been clear that Newbould and West Face were the subjects of much of the collective Catalyst ire.

Such contracts, the source said, are invariably arranged through lawyers, so as to cloak the arrangement — and protect to a limited degree any information gleaned by security operatives — with solicitor-client privilege.

He said it’s common in complex criminal matters and commercial crime cases with their enormous amounts of money at stake for parties to use private investigative firms with their covert methods.

The arrangement with Catalyst allowed the security firm to use other consultants and sub-contractors.

And it was the sub-contracted agency, Black Cube, that ran the sting on the former judge.

According to the source's account, when the firm found out on Sept. 21 what the sub-contractor had done, "damn right there was freaking out," he said.

At least one further sting run on a former West Face employee, he said, was the result of a miscommunication, following an attempt to call off such operations.

In an email Saturday, a Black Cube spokesman said: "It is Black Cube's policy to never discuss its clients with any third party and to never confirm or deny any speculation made with regards."

The company denied approaching any "journalist, lawyer, PR company or any other professional consultant with a view to publishing intelligence gathered."

In fact, the company had refused to make any on the record comment unless and until I submitted the story in advance of publication.

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On Oct. 12, I met Newbould in a boardroom at the office of his lawyer, Brian Gover, and gave them the USB to copy.

I had briefed Gover on the phone, so they knew some of what was coming, but still appeared shaken.

Though the Catalyst source maintains no laws were broken in the sting, the operation raises larger ethical questions about how common it is for companies to hire private investigators, how often they use these sorts of dirty tricks, the role of lawyers and law firms in their hiring, and if there are any boundaries beyond which the players won't go.

"Think of the collateral damage caused by well-heeled litigants who will do anything, but will stop at nothing," said Gover.

He knows of only one remotely comparable case in Canada, which happened almost 30 years ago, where a mining company that lost in court and, convinced the judge must have had a personal financial stake, hired a private eye to check him out.

Gavin MacKenzie, a Toronto litigator and leading authority on legal ethics, said the Newbould sting is shocking, and said he too was aware only of the one other case.

That case went all the way to the Supreme Court, but the investigation and surveillance of the judge never made it onto the record, though it was widely discussed in legal circles.

MacKenzie said lawyers will always “talk about a judge’s background and pre-dispositions and that sort of thing.”

In countries where judicial corruption is common, judges themselves often become targets. But Canada, he said, has “never had a judge on the take from a party.”

With a reputable and independent judiciary, MacKenzie said, talk is about as far as things get.

“It’s very rare and almost unnecessary to go beyond that.”

*National Post*

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This is Exhibit "M" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



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*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

WEST FACE CAPITAL INC. and BRANDON MOYSE

Defendants  
(Respondents)

**NOTICE OF MOTION**

The Defendant (Respondent), West Face Capital Inc. ("West Face"), will make a motion to Justice Rouleau on Friday, December 1, 2017 at 1:15 p.m. or on another date to be fixed by him, or to a full Panel of the Court of Appeal for Ontario (as may be necessary or appropriate) on a date to be fixed by Justice Rouleau or by the Court, at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5.

**PROPOSED METHOD OF HEARING:** The motion is to be heard orally. The estimated length of time for the oral argument of the motion by counsel for West Face is between 30 and 60 minutes.

**THE MOTION IS FOR AN ORDER:**

- (a) To the extent necessary, validating service of this Notice of Motion and the Motion Record and the manner in which service was effected, abridging the time for service thereof, and dispensing with service thereof on any person or entity other than the parties to this appeal;

- (b) Requiring the Plaintiff (Appellant), The Catalyst Capital Group Inc. ("Catalyst") and its counsel from the Greenspan Humphrey Weinstein firm and from the Moore Barristers firm (collectively, "**Catalyst's Counsel**") to produce immediately, within no more than 48 hours from the date and time of any Order the Court might make, the following:
- (i) the proposed fresh evidence that Brian Greenspan represented to Justice Rouleau on September 25, 2017 that he had received, reviewed and regarded to be credible when he sought to adjourn the hearing of this appeal from the scheduled dates of September 26 and 27, 2017;
- (ii) all physical and electronic documents, including recordings, in the possession, control or power of: (i) Catalyst or its principals; (ii) Catalyst's Counsel; and (iii) investigators, private security firms or other contractors (including subcontractors) retained for, by or on behalf of Catalyst or its principals, that pertain to, arise out of or discuss in any way the investigation of Alexander Singh, the former General Counsel of West Face, who was a witness in the proceedings at issue in this appeal;
- (iii) all physical and electronic documents, including recordings, in the possession, control or power of: (i) Catalyst or its principals, (ii) Catalyst's Counsel; and (iii) investigators, private security firms or other contractors (including subcontractors) retained for, by or on

behalf of Catalyst or its principals, that pertain to, arise out of or discuss in any way the investigation of Frank Newbould, formerly a Justice of the Superior Court of Justice, who was the Trial Judge in the proceedings at issue in this appeal;

- (c) Requiring Catalyst and Catalyst's Counsel to deliver, within no more than 72 hours from the date and time of any Order the Court might make, a comprehensive and detailed privilege log listing each and every document that falls within the scope of paragraph (b) above over which Catalyst asserts claims of privilege (the "**Allegedly Privileged Documents**");
- (d) Requiring Catalyst to deliver to Justice Rouleau (or to another Justice designated by a full Panel of the Court), the Allegedly Privileged Documents to permit proper determinations to be made in respect of any assertion of privilege that Catalyst might make;
- (e) Fixing an immediate date for the hearing of a motion to determine the propriety or validity of any assertion of privilege Catalyst might make in respect of the Allegedly Privileged Documents;
- (f) To the extent that Catalyst proceeds with a fresh evidence motion in this appeal, requiring Catalyst and Catalyst's Counsel to file the proposed fresh evidence under seal, pending a determination by the Court as to what portions of such evidence, if any, should be filed publicly; and
- (g) Such further and other relief as this Honourable Court may deem just.

**THE GROUNDS FOR THE MOTION ARE:****Background**

- (a) Catalyst's appeal is from a Judgment of Justice Newbould dated August 18, 2016. Catalyst alleged at trial that West Face had obtained confidential information about Catalyst's strategy for the acquisition of WIND Mobile from Brandon Moyse, a former junior employee of Catalyst. West Face participated in a consortium of investors that acquired WIND Mobile in September 2014 after Catalyst failed to do so.
- (b) Justice Newbould dismissed Catalyst's claim in its entirety, and awarded costs to West Face in an amount of approximately \$1.2 million, on a substantial indemnity basis.
- (c) On August 19, 2017, immediately after Justice Newbould released his Reasons for Judgment, Catalyst provided a written statement to the *Financial Post* in which it claimed that Justice Newbould's Reasons raised "severe indications of possible bias".
- (d) Catalyst perfected its appeal on February 23, 2017. In its appeal factum, Catalyst suggested that Justice Newbould had applied different standards in evaluating the evidence of the parties, but did not allege actual bias or a reasonable apprehension of bias.
- (e) The appeal of this matter was scheduled to be heard on September 26 and 27, 2017. Catalyst's appeal against West Face is manifestly devoid of merit,

and consists largely of re-arguing findings of fact and credibility that Justice Newbould made against Catalyst and its witnesses at trial. All of those findings were grounded firmly in the evidence.

### **Catalyst Launches Black Cube Investigations**

- (f) In September 2017, when the argument of the appeal was imminent, Catalyst decided to launch a series of covert investigations against West Face and Justice Newbould, using Black Cube, an Israeli-based private investigation firm comprised of former Mossad and Israeli Defence Force operatives. The purpose of these investigations was to manufacture evidence that could be used by Catalyst during the course of this appeal. Operators of Black Cube used systematic lies and deception in their efforts to entrap current and former employees of West Face, as well as Justice Newbould, to elicit from them potentially damaging statements and information that could be used by Catalyst to attack and discredit Justice Newbould as well as his Judgment at trial in this proceeding.
- (g) One Black Cube operation involved a surreptitious and deceptive "sting" against Justice Newbould that was intended to bait Justice Newbould into making anti-Semitic comments, in the hopes of utilizing secret recordings of meetings conducted by a Black Cube operative with Justice Newbould to accuse him of having been biased at trial against Newton Glassman, the Founder and Managing Partner of Catalyst, who is Jewish.

- (h) One or more operatives acting for and on behalf of Catalyst met with Justice Newbould on Monday September 18, 2017, under the false pretence of potentially retaining him to arbitrate a commercial dispute. Notwithstanding their lies, deception and blatantly improper conduct, these investigations failed entirely in their efforts to elicit from Justice Newbould anti-Semitic comments or other evidence of bias against Catalyst or Mr. Glassman.
- (i) A second Black Cube operation involved a surreptitious and deceptive "sting" against Alexander Singh, who was the General Counsel of West Face during the events that gave rise to this appeal. Black Cube first contacted Mr. Singh on Monday September 13, 2017, and then met with him on September 18, 2017, for morning coffee and dinner. These meetings, like the meeting with Justice Newbould, failed to elicit any information relevant to Catalyst's appeal.
- (j) Three days after the events referred to above, on Thursday, September 21, 2017, Catalyst received the investigative materials arising from the meetings with Justice Newbould, including audio and video recordings and transcripts of the meetings. Catalyst retained Mr. Greenspan that same day to assess the materials Catalyst had received, and to consider bringing a fresh evidence application in this appeal on behalf of Catalyst.
- (k) In addition to the deceptive sting operations against Justice Newbould and Mr. Singh referred to above, Black Cube also launched investigations using systematic lies and deception against a number of other current and former

employees of West Face. None of these operations produced any evidence relevant to Catalyst's appeal.

- (l) All of Black Cube's operations were undertaken on false pretences, using lies, deception, false identities, and false offers of employment or investment. These operations were conducted around the globe, including in Toronto, Ontario, and London, England.
- (m) All of Black Cube's operations in Canada were unlawful, including because Black Cube and its operatives are not now and have never been licensed private investigators in Ontario, or in any other Province of Canada.

#### **Catalyst Obtains an Adjournment of the Appeal**

- (n) On the morning of Monday, September 25, 2017, Mr. Greenspan wrote to the Court of Appeal asking for an adjournment of the hearing of the appeal on the basis that "irreconcilable differences" had arisen between Catalyst and its counsel of record, Rocco DiPucchio of the Lax O'Sullivan firm. Prior to then, Mr. Greenspan had played no role in this matter.
- (o) That same day, at approximately 3:30 p.m., counsel attended before Justice Rouleau. Mr. Greenspan, David Moore, Mr. DiPucchio and Eric Hoaken were all in attendance for Catalyst or Lax O'Sullivan. A contested motion for an adjournment of the appeal was argued before Justice Rouleau. During the argument of the motion, Mr. Greenspan advised that he had been retained by Catalyst on Thursday, September 21, 2017 to

consider a potential fresh evidence motion, and that the irreconcilable differences that were said to have arisen between the Lax O'Sullivan firm and Catalyst pertained to that motion. He did not specify what those differences were. Nor did he specify how or in what circumstances those differences had arisen.

- (p) During the attendance on September 25, 2017, Mr. Greenspan represented to the Court that he had seen and reviewed the fresh evidence that Catalyst was considering seeking leave to introduce on appeal, and that he regarded the evidence to be credible and relevant to the appeal. He stated that he needed time to assess the potential impact of that evidence to determine whether it met the test in the Palmer case for the admission of fresh evidence on appeal.
- (q) No disclosure was made to the Court, or to opposing counsel, as to what the proposed fresh evidence was, where it had come from or when. Moreover, Mr. Greenspan did not take the position that Catalyst required more time to find the fresh evidence it might seek leave to introduce on appeal. Instead, as indicated above, he stated the opposite, namely that he had seen the proposed fresh evidence of Catalyst and regarded it to be credible and relevant.
- (r) Over the objections of West Face and Mr. Moyse, Justice Rouleau reluctantly adjourned the hearing of the appeal to February 20-22, 2018 on the basis that the Lax O'Sullivan firm had withdrawn and that it would be

unfair to force Catalyst to proceed with the hearing of the appeal the next day without counsel.

### **Events Following the Adjournment**

- (s) Having obtained the adjournment, Catalyst and Black Cube proceeded to continue their illicit investigations of Mr. Singh and various other current and former West Face employees in the hopes of obtaining fresh evidence to adduce on appeal.
- (t) Moreover, in the period after September 25 Mr. Greenspan refused repeatedly to disclose to counsel to West Face and Mr. Moyse the proposed fresh evidence that Catalyst might seek leave to introduce on appeal, as well as any information as to where and when Catalyst had obtained that information. West Face and Mr. Moyse were kept completely in the dark.
- (u) On Tuesday, November 7, 2017, Catalyst commenced a new claim against West Face, claiming \$450 million in damages. This claim was drafted and issued by Mr. DiPucchio of the Lax O'Sullivan firm, despite the fact that Catalyst had secured the adjournment of this appeal on September 25, 2017 on the explicit basis that "irreconcilable differences" had arisen between Catalyst and Lax O'Sullivan.
- (v) On Thursday, November 9, 2017, West Face uncovered for the first time Black Cube's operations against a number of its current and former employees. West Face only learned of Black Cube's activities as a result of

widespread publicity in the mainstream media and over the Internet surrounding Black Cube's activities on behalf of Harvey Weinstein against the victims of his alleged sexual harassment and assault, as well as against the journalists who sought to expose these allegations.

- (w) On Friday, November 10, 2017, counsel to West Face wrote to counsel to Catalyst to demand that Black Cube's activities stop, and that all evidence of Black Cube's activities be preserved. Catalyst provided no such assurances. It was only upon receipt of this letter that Lax O'Sullivan was removed as counsel of record from the new cases it had commenced three days earlier.
- (x) On Sunday, November 12, 2017, West Face learned of Black Cube's activities against Mr. Singh. These activities included flying him to London, England on false pretences, and then eliciting from him disclosure of solicitor-client privileged advice that Mr. Singh had given to West Face during the course of his tenure as the firm's General Counsel concerning the hiring and employment of Mr. Moyse.
- (y) On Tuesday, November 14, 2017, counsel to West Face wrote to counsel to Catalyst demanding immediate disclosure concerning who at Catalyst or its external counsel was aware of Black Cube's activities in respect of Mr. Singh. This letter also advised that West Face would be seeking production of all evidence that pertained to Black Cube's activities involving West Face, and demanded that such evidence be preserved.

- (z) On November 16, 2017, West Face obtained a Consent Order from Justice Hainey of the Superior Court of Justice (Commercial List) that Catalyst preserve all records of Black Cube's activities.
- (aa) On the evening of Friday, November 24, 2017, the *National Post* published online an article exposing and detailing Black Cube's "sting" against Justice Newbould. This was the first time West Face learned of the investigation of Justice Newbould. That same night, counsel to West Face wrote letters to all of Catalyst's Counsel asking them, among other things, to explain the basis on which Catalyst had sought and obtained an adjournment on September 25, 2017, to disclose what knowledge they had of Black Cube's operations against Justice Newbould, and to produce to West Face all evidence of such operations.
- (bb) Although the Lax O'Sullivan firm responded immediately to this letter, neither Mr. Greenspan nor Mr. Moore have provided substantive responses.
- (cc) Catalyst's investigations of Mr. Singh and Justice Newbould are an egregious and entirely improper abuse that cast the administration of justice into disrepute. The actions of Catalyst and its investigators, and of any other person who played a role in, authorized, directed or attempted to utilize or take advantage of these illicit investigations in any way, either directly or indirectly, including in their dealings with third parties, journalists

or the judiciary, shock the conscience of the Court and expose Catalyst to the most severe form of judicial sanctions.

- (dd) Based on the disclosure sought on this motion, West Face may well bring motions: (i) for an Order removing or disqualifying Catalyst's Counsel; and (ii) dismissing Catalyst's appeal for abuse.
- (ee) This motion may be heard by a single judge because it is not a motion required to be heard by a three-judge Panel as set out in the Practice Direction of the Court of Appeal. Alternatively, West Face would be pleased to argue this motion before a full Panel of the Court.
- (ff) Subsection 13(2) of the *Courts of Justice Act*, and the inherent jurisdiction of the Court to control its own processes.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the motion:

- (a) The Affidavit of Andrew Carlson sworn November 28, 2017; and
- (b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

November 28, 2017

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Lawyers for the Defendant (Respondent),  
Brandon Moyse

THE CATALYST CAPITAL GROUP INC.  
Plaintiff  
(Appellant)

-and- WEST FACE CAPITAL INC. et al.  
Defendants  
(Respondents)

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

PROCEEDING COMMENCED AT  
TORONTO

**NOTICE OF MOTION**

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
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Toronto ON M5V 3J7

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Tel: 416.863.0900  
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Lawyers for the Defendant (Respondent)  
West Face Capital Inc.

121

15

This is Exhibit "N" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



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*Megan Moniz*  
Commissioner for Taking Affidavits (or as may be)

**MEGAN MONIZ**

Court File No. C62655

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff  
(Appellant)

and

WEST FACE CAPITAL INC. and BRANDON MOYSE

Defendants  
(Respondents)

**AFFIDAVIT OF ANDREW CARLSON**

I, Andrew Carlson, of the City of Toronto, in the Province of Ontario, MAKE OATH  
AND SAY:

1. I am a Partner with the law firm of Davies Ward Phillips & Vineberg LLP ("Davies"), the lawyers for the Defendant (Respondent), West Face Capital Inc. ("West Face").
2. Since January 2015, I have been a member of the Davies litigation team acting on behalf of West Face in various proceedings involving West Face and the Plaintiff (Appellant), The Catalyst Capital Group Inc. ("Catalyst"). The proceedings in which I have been involved include this appeal, Catalyst's proposed motion for leave to introduce fresh evidence, and the underlying action being appealed from (the "Moyse Action"). Specifically with respect to this appeal, I was present during an in-person attendance before Mr. Justice Rouleau on September 25, 2017, and participated in a subsequent telephone case conference held by Justice Rouleau on November 16, 2017. I have frequently communicated with, or been copied on communications with, counsel to

Catalyst throughout this appeal. As such, I have personal knowledge of the matters contained in this Affidavit, except where such matters are based on information from others, in which instances I have named the source of my information and verily believe that information to be true.

3. My Affidavit does not refer to or rely on solicitor-client communications between West Face and its counsel, and my swearing of this Affidavit is not intended to waive any privilege enjoyed by West Face.

**A. Catalyst's "Irreconcilable Difference" With the Lax O'Sullivan Firm, and the Resulting Adjournment of the Appeal of the Moyse Action**

4. The appeal of the Moyse Action was scheduled to be heard for two days on September 26 and 27, 2017, with Justice Rouleau to preside as the President of the three-judge Panel. The dates for the argument of the appeal were fixed months before, in February 2017, by Chief Justice Strathy, at the request of counsel for West Face. West Face sought and obtained the earliest available dates for the hearing of the appeal.

5. On the morning of Monday, September 25, 2017, the day before the appeal was scheduled to commence, Brian Greenspan of the Greenspan Humphrey Weinstein firm (who had not previously appeared in any of the proceedings between West Face and Catalyst) wrote to the Court of Appeal on behalf of Catalyst and requested an urgent attendance before Justice Rouleau. In his letter, Mr. Greenspan stated that "over the weekend [of September 23 and 24], circumstances arose which have resulted in irreconcilable differences between current counsel of record [Mr. Rocco DiPucchio of the Lax O'Sullivan firm] and [Catalyst] regarding the conduct of the appeal". Mr. Greenspan further stated in his letter that these circumstances related to a "potential conflict of

interest", such that the Lax O'Sullivan firm had concluded that it had "no option but to seek to be removed as counsel of record". Mr. Greenspan stated that in his view, these circumstances made it "impossible for the appeal to proceed as scheduled". A copy of Mr. Greenspan's letter of September 25, 2017 is attached as **Exhibit "A"**.

6. The Court of Appeal granted Mr. Greenspan's request for an urgent attendance that afternoon.

7. At approximately 3:30 p.m. on the afternoon of September 25, the following counsel appeared before Justice Rouleau in Courtroom 8 at Osgoode Hall:

- (a) Mr. Greenspan;
- (b) David Moore of Moore Barristers;
- (c) Mr. DiPucchio and Eric Hoaken of the Lax O'Sullivan firm;
- (d) Kent Thomson, Matthew Milne-Smith and I from Davies, on behalf of West Face; and
- (e) Rob Centa, Kris Borg-Olivier, and Denise Cooney from the Paliare Roland firm, on behalf of Mr. Moyse.

8. During this attendance, Mr. Greenspan advised that he had been retained by Catalyst the previous week, on Thursday, September 21, 2017, to investigate bringing a potential fresh evidence motion in the appeal of the Moyse Action. Mr. Greenspan stated that he had seen the proposed fresh evidence, that he regarded it to be credible, and that he also regarded it to be relevant. He indicated that the only criterion of the *Palmer* test

that he had yet to investigate concerned the potential impact of the proposed fresh evidence on the result. Mr. Greenspan indicated that because he had not been involved in the trial of the Moyse Action, he would need additional time to arrive at a determination in respect of that issue. Finally, Mr. Greenspan advised Justice Rouleau that there were "irreconcilable differences" between Catalyst and the Lax O'Sullivan firm arising out of the potential fresh evidence motion, which had led to the firm's withdrawal from the appeal.

9. Mr. DiPucchio also made brief submissions, the substance of which were that he could not disclose the nature of the conflict that had arisen between Lax O'Sullivan and Catalyst, but that he agreed with Mr. Greenspan's submission that there was, indeed, a conflict that prevented Mr. DiPucchio from continuing to act for Catalyst in the appeal. He confirmed that the conflict pertained to the potential fresh evidence motion Mr. Greenspan had just discussed.

10. Mr. Thomson made submissions on behalf of West Face, and Mr. Centa made submissions on behalf of Mr. Moyse. They both explained that adjourning the hearing of the appeal would be prejudicial to their respective clients. Ultimately, however, Justice Rouleau granted the requested adjournment because the Lax O'Sullivan firm had withdrawn as Catalyst's counsel, and Catalyst did not have a lawyer retained to argue the appeal which was scheduled to proceed the following morning.

11. Following this attendance, Justice Rouleau issued an Endorsement adjourning the appeal to February 20 to 22, 2018. A copy of Justice Rouleau's Endorsement is attached as **Exhibit "B"**.

12. In the period between the adjournment of the appeal of the Moyse Action and today, counsel to West Face and Mr. Moyse exchanged correspondence with Mr. Greenspan on a number of occasions regarding the proposed motion for fresh evidence. Among other questions, counsel for West Face and Mr. Moyse asked that Catalyst:

- (a) produce the proposed fresh evidence; and
- (b) provide details concerning how the proposed fresh evidence came into Catalyst's possession, control or power, including "detailed information as to where, how and when that fresh evidence was allegedly discovered by Catalyst".

13. These letters are attached as **Exhibits "C" to "M"**.

14. On Tuesday, November 7, 2017, Catalyst (and its affiliate, Callidus Capital Corporation) commenced an action against West Face and a number of other Defendants (the "**Wolfpack Action**"). The Statement of Claim in the Wolfpack Action was issued by Mr. DiPucchio of the Lax O'Sullivan firm as lead counsel. A copy of the Statement of Claim in this matter is attached as **Exhibit "N"**.

**B. Black Cube's Investigations Targeting West Face and Justice Newbould**

15. On Thursday, November 9, 2017, West Face learned that it and its current and former employees had been and were being targeted by Black Cube.

**(i) About Black Cube**

16. According to its public website ([www.blackcube.com](http://www.blackcube.com)), Black Cube is an investigative firm comprised of "a select group of veterans from the Israeli elite

intelligence units". It has offices in Tel-Aviv, London, and Paris. Its corporate name is B.C. Strategy Ltd.

17. Black Cube was recently the subject of widespread media coverage pertaining to its involvement in the Harvey Weinstein sexual assault scandal.

18. A copy of Black Cube's public website is attached as **Exhibit "O"**. Copies of various news articles about Black Cube, including in respect of its involvement in the Weinstein scandal, are attached as **Exhibits "P", "Q", "R", "S", "T" and "U"**.

19. Ontario's Ministry of Community Safety & Correctional Services website ([http://www.mcsbs.jus.gov.on.ca/english/PSIS/LicenceRegistry/licensee\\_list.aspx](http://www.mcsbs.jus.gov.on.ca/english/PSIS/LicenceRegistry/licensee_list.aspx)) links to a ServiceOntario website on which one is able to search a database for the name of licensed agencies that sell the services of private investigators. Searches on this database for the terms "Black Cube", "Cube", "Black", "B.C. Strategy", "BC", and "strategy" on November 13, 2017 each resulted in no search results. Attached as **Exhibit "V"** are screen captures of these search results.

**(ii) Black Cube's Investigation of West Face**

20. On November 15, 2017 West Face delivered a Motion Record in the Wolfpack Action in which it sought an Order preserving all evidence of Black Cube's investigations in respect of West Face. That Motion Record contained six Affidavits, including five Affidavits of current or former employees of West Face who had been targeted by operatives of Black Cube in the period from September 12, 2017 to November 9, 2017. Catalyst consented immediately to the Order sought by West Face. A copy of that Order, issued by Justice Hainey on November 16, 2017, is attached as **Exhibit "W"**.

21. On Friday, November 10, 2017, at approximately 3:45 p.m., Mr. Milne-Smith sent a letter to Catalyst's counsel, including Messrs. Moore, DiPucchio, and Greenspan, advising them that West Face had just learned of Black Cube's activities. A copy of Mr. Milne-Smith's letter of November 10, 2017 is attached as **Exhibit "X"**.

22. At approximately 6:45 p.m. on Friday, November 10, the Lax O'Sullivan firm withdrew or was replaced as counsel of record on all of Catalyst's ongoing proceedings, including the Wolfpack Action (which Mr. DiPucchio had issued on behalf of Catalyst three days earlier), another proceeding against West Face (which Mr. DiPucchio had been acting as lead counsel on for over two years), as well as a third proceeding not against West Face. A copy of an email from Mr. Moore attaching the relevant Notices of Change of Lawyer is attached as **Exhibit "Y"**.

23. On Monday, November 13, 2017, Mr. Greenspan responded to Mr. Milne-Smith's letter of November 10, 2017. A copy of Mr. Greenspan's letter of November 13, 2017 is attached as **Exhibit "Z"**.

24. Mr. Milne-Smith responded to Mr. Greenspan's letter on November 14, 2017. A copy of this letter is attached as **Exhibit "AA"**.

25. Also on November 14, 2017, Mr. Milne-Smith sent a letter addressed to Mr. Moore advising that Davies had met recently with West Face's former General Counsel Alexander Singh and had learned of Black Cube's efforts to induce Mr. Singh to reveal to operatives of Black Cube confidential and privileged information of West Face concerning the hiring of Mr. Moyse, as described in the Affidavit of Mr. Singh sworn November 14, 2017. Mr. Milne-Smith sent copies of this letter to Messrs. Greenspan and DiPucchio.

26. A copy of this letter is attached as **Exhibit "BB"**. A copy of Mr. Singh's Affidavit, with its Exhibits, is attached as **Exhibit "CC"**.

27. On November 15, 2017, Mr. Matthew Gottlieb, the Managing Partner of Lax O'Sullivan, delivered a letter in response to Mr. Milne-Smith's letters of November 10 and 14, 2017 regarding Black Cube. A copy of this letter is attached as **Exhibit "DD"**.

28. To date, neither Mr. Greenspan nor Mr. Moore have provided any information concerning requests made by Mr. Milne-Smith pertaining to the activities of Black Cube in the letters referred to above.

29. On Thursday, November 16, 2017, Justice Rouleau held a case conference, by telephone, to discuss Catalyst's potential fresh evidence motion. I participated during this case conference. The following day (November 17, 2017), the Court of Appeal sent a letter to counsel advising of Justice Rouleau's directions. A copy of this letter is attached as **Exhibit "EE"**.

(iii) **West Face Learns of Black Cube's Wrongful Investigations Into Justice Newbould**

30. On the evening of Friday, November 24, 2017, the *National Post* published an article online, on its website, titled "Exclusive: The Judge, the Sting, Black Cube and Me" (the "**Sting Article**"). A copy of the Sting Article is attached as **Exhibit "FF"**.

31. Late in the evening of Friday, November 24, 2017, Mr. Milne-Smith sent letters to Catalyst's various counsel regarding the Sting Article. Copies of these letters to Messrs. Greenspan and Moore are attached as **Exhibits "GG" and "HH"**.

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32. Late in the day on Monday November 27, 2017 counsel for the parties exchanged emails concern the Sting Article and this motion. A copy of this email exchange is attached as **Exhibit "II"**.

**C. Previous Statement of Catalyst Concerning Justice Newbould**

33. On August 19, 2016, the day after Justice Newbould released his Reasons for Judgment dismissing all of Catalyst's claims and allegations in the Moyse Action, Catalyst reportedly provided a written statement to the *Financial Post* concerning the Reasons of Justice Newbould. A copy of this *Financial Post* article is attached as **Exhibit "JJ"**.

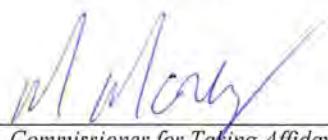
**SWORN BEFORE ME** at the City of  
Toronto, in the Province of Ontario this  
28th day of November, 2017

  
\_\_\_\_\_  
Commissioner for Taking Affidavits  
(or as may be)

  
\_\_\_\_\_  
ANDREW CARLSON

Rui Zhe Gao, a Commissioner, etc..  
Province of Ontario, while a Student-at-Law  
Expires March 22, 2019.

This is Exhibit "O" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018



---

*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

---

**From:** Brian H. Greenspan <bhg@15bedford.com>  
**Sent:** November 30, 2017 2:35 PM  
**To:** 'Miranda, Lily (MAG)'; Milne-Smith, Matthew; david@moorebarristers.ca; Thomson, Kent; Carlson, Andrew; 'robert.centa@paliareroland.com'  
**Cc:** Schirripa, Mary (MAG)  
**Subject:** RE: Catalyst / Moyse / West Face C62655  
**Attachments:** CATALYST 20171129 L BHG to Mr Milne-Smith Re Response to letter dated November 242017.pdf

Dear Ms. Miranda:

We would appreciate if you would bring to the attention of Justice Rouleau that it will not be necessary to attend before him as previously scheduled tomorrow, December 1, 2017 at 1:15 p.m. Please advise Justice Rouleau that:

- (i) No application for the introduction of fresh evidence by Catalyst on the "Moyse" appeal now scheduled to proceed in the Court of Appeal on February 20, 2018 will be brought. The third day previously scheduled as a result of a possible fresh evidence application can be vacated.
- (ii) The motion initiated by West Face returnable before you tomorrow is withdrawn.
- (iii) Counsel have agreed that the attached letter dated November 29, 2017 should be filed on consent and attached to the Motion Record previously filed by West Face.
- (iv) We understand that counsel for West Face will provide to Justice Rouleau an additional letter which on consent is to be added to the public record.
- (v) Should Justice Rouleau have any questions which he wishes to canvas with counsel or considers an attendance necessary, counsel are available to address the matter as previously scheduled at Osgoode Hall, Courtroom 2 at 1:15 p.m. tomorrow.

Thank you for your assistance.

Yours sincerely,  
 Brian Greenspan



Greenspan  
Humphrey  
Weinstein

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This email may contain information that is privileged, confidential and/or exempt from disclosure. No waiver whatsoever is intended by sending this e-mail which is intended only for the named recipient(s). Unauthorized use, dissemination or copying is prohibited. If you receive this email in error, please notify the sender and destroy all copies of this email.

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**From:** Miranda, Lily (MAG) [mailto:[Lily.Miranda@ontario.ca](mailto:Lily.Miranda@ontario.ca)]  
**Sent:** Thursday, November 30, 2017 10:13 AM  
**To:** Milne-Smith, Matthew; [david@moorebarristers.ca](mailto:david@moorebarristers.ca); Thomson, Kent; Carlson, Andrew; 'robert.centa@paliareroland.com'; Brian H. Greenspan; Naomi M. Lutes  
**Cc:** Schirripa, Mary (MAG)  
**Subject:** RE: Catalyst / Moyse / West Face C62655

Hello,

As you know a case management meeting is scheduled before Justice Rouleau for December 1, 2017 at 1:15 p.m.. The case management will be heard in courtroom two at Osgoode Hall.  
Counsel may proceed directly to courtroom two.

Thank you,

Lily Miranda  
Civil Appeals Scheduling Coordinator  
Court of Appeal for Ontario  
130 Queen Street West  
Toronto, ON M5H 2N5  
Osgoode Hall  
(416) 327 1730  
[Lily.miranda@ontario.ca](mailto:Lily.miranda@ontario.ca)

---

**From:** Miranda, Lily (MAG)  
**Sent:** November-17-17 11:06 AM  
**To:** 'Milne-Smith, Matthew'; [david@moorebarristers.ca](mailto:david@moorebarristers.ca); Thomson, Kent; Carlson, Andrew; 'robert.centa@paliareroland.com'; 'bgreen span@15bedford.com'; 'nlutes@15bedford.com'  
**Subject:** RE: Catalyst / Moyse / West Face C62655

Hello,

Further to a case conference before Justice Rouleau, please find attached a letter for the matter.

Regards.

Lily Miranda  
Civil Appeals Scheduling Coordinator  
Court of Appeal for Ontario  
130 Queen Street West  
Toronto, ON M5H 2N5  
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(416) 327 1730  
[Lily.miranda@ontario.ca](mailto:Lily.miranda@ontario.ca)



**Greenspan  
Humphrey  
Weinstein**

**Brian H. Greenspan**  
Partner

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November 29, 2017

Matthew Milne-Smith  
Davies Ward Phillips & Vineberg LLP  
155 Wellington Street West  
Toronto, ON  
M5V 3J7

Dear Mr. Milne-Smith:

**Re: The Catalyst Capital Group Inc.**

I am writing in response to your letter dated November 24, 2017. I am responding on behalf of Mr. Moore who has reviewed and concurs with the contents of this letter.

We note that your November 24, 2017 letters have been included in the motion record publicly filed and which apparently appears on your website at Tabs GG and HH. As well, Mr. Moore's initial response by e-mail on November 27<sup>th</sup> is included in the motion record at Tab II. Evidently, that motion record has been made available to the press and forms the genesis of the front page article in today's National Post. We would therefore expect that this correspondence also be provided to the court on the public record.

You have irresponsibly alleged, based upon an incomplete and inaccurate account of tape recordings of two conversations which took place on September 18, 2017, that the application made to Justice Rouleau on September 25, 2017, was without a good faith basis for seeking the potential admission of fresh evidence or the adjournment of the appeal. We unequivocally reject the suggestion that counsel failed to properly and ethically consider the substance of the tapes and their potential evidentiary impact on the appeal in accordance with established principles of law. Neither Mr. Moore nor I had any pre-knowledge nor involvement in the events which led to the interviews of Frank Newbould or the resulting tape recordings nor with respect to any other similar investigative activities in relation to any West Face personnel and we have been assured by Catalyst that the same applies to them.

We agree that the unauthorized means by which the tape recordings were obtained was unacceptable. Nevertheless, our duty as counsel to our clients, once the recordings came into our possession, was to objectively and dispassionately assess the impact of the contents of the tape recordings, which we believe were improperly but not unlawfully obtained. Indeed, contrary to the mischaracterization contained in the National Post article referred to in your letters, we arrived at the initial conclusion, and remain of the view, that portions of the tape recordings are equally, if not more unacceptable and troubling than the manner in which the recordings were obtained. In our view, a proper assessment had to be conducted as to whether or not reliance could or should be placed upon this material, together with certain other historical facts, in relation to an application for the introduction of fresh evidence. Regardless of our ultimate determination of this issue, a virtually unique and unprecedented legal dilemma had been

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November 29, 2017  
Page 2 of 2

presented in a situation not of our choosing or making. It required a careful assessment and legal research to arrive at an appropriate determination.

We are confident that any objective assessment of our actions will not only demonstrate the bona fide justification for the adjournment application but will also demonstrate appropriate professional judgment and restraint.

We will respond to your further correspondence under separate cover.

Yours truly,



Brian H. Greenspan

BHG:st

cc.: Kent Thomson and Andrew Carlson *via email*

Rob Centa and Kris Borg-Olivier *via email*

David Moore *via email*

This is Exhibit "P" referred to in the  
Affidavit of Andrew Carlson  
sworn before me, this 14<sup>th</sup> day  
of August, 2018

A handwritten signature in blue ink, appearing to read "M Moniz".

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*Commissioner for Taking Affidavits (or as may be)*

**MEGAN MONIZ**

Divisional Court File No.: 648/15  
Superior Court File No.: CV-14-507120

ONTARIO  
SUPERIOR COURT OF JUSTICE  
(DIVISIONAL COURT)

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff /Moving Party

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/Responding Parties

AFFIDAVIT OF PHILIP de L. PANET  
(Sworn January 13, 2016)

I, PHILIP de L. PANET, of the City of Toronto, in the Province of Ontario,  
MAKE OATH AND SAY:

1. I am the General Counsel and Secretary of the Defendant West Face Capital Inc. ("West Face"), and have held that position since December 1, 2014. In that role I have personally supervised the instant litigation and been kept apprised of all relevant developments by West Face's counsel (Jeff Mitchell and Andrew Pushalik of Dentons LLP through until February 2015, and Matthew Milne-Smith and Andrew Carlson of Davies Ward Phillips & Vineberg LLP thereafter). I have also become aware of events in the litigation preceding my arrival at West Face as a result of conversations with counsel and the relevant participants, my review of various court filings, and

attendance at court and during various cross-examinations. As a result, I have personal knowledge of the matters set out in this Affidavit, except where I have relied on information from others, in which case I have identified the source of my information and believe it to be true.

2. I am swearing this Affidavit in response to the motion by the Plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), for an Order extending the time to file its motion for leave to appeal the interlocutory Order of Justice Glustein made July 7, 2015, and for leave to appeal that decision.

3. The delay of Catalyst in pursuing its motion for leave to appeal in the Divisional Court has caused significant prejudice to West Face, including in respect of a pending \$1.6 billion transaction for the sale of WIND Mobile Inc. to Shaw Communications Inc. ("Shaw"). On December 16, 2015, Shaw announced that it has agreed to acquire WIND Mobile by way of Plan of Arrangement. A term of the Plan of Arrangement is that Shaw take the shares of WIND Mobile free and clear of any lien or encumbrance.

4. In the case at bar, Catalyst has asserted a constructive trust over West Face's equity holding in WIND Mobile, which is to be sold to Shaw pursuant to the Plan of Arrangement. West Face's estimated proceeds from this sale are over \$500 million. Catalyst has taken the position that its claim against West Face cannot be fairly decided without resolution of one of the issues raised by its proposed appeal, and that until its claim is decided, West Face should be required to hold the proceeds of sale from the

WIND Mobile transaction in escrow. A delay in being able to deploy the proceeds of sale will cause significant prejudice to West Face and its investors.

### **Background to the Motion**

5. This motion arises from Brandon Moyse's decision to resign from Catalyst and join West Face in June 2014. At the time, Mr. Moyse was a 27 year-old junior analyst at Catalyst. Shortly before he joined West Face, Catalyst claimed that he was prohibited from working for West Face by the non-competition provisions of his employment agreement with Catalyst. Catalyst also advised West Face that Mr. Moyse had confidential information relating to a "telecom file". Prior to being notified of Catalyst's concerns, West Face was already negotiating to acquire WIND Mobile from its then owner, VimpelCom Inc. As a prophylactic measure, West Face therefore implemented an ethical wall to preclude Mr. Moyse from communicating with others at West Face any information he may have had concerning Catalyst's pursuit of WIND Mobile. That ethical wall was established before Mr. Moyse joined West Face on June 23, 2014.

6. Mr. Moyse worked at West Face for less than one month. On July 16, 2014, he was placed on leave pursuant to the terms of a consent Interim Order pending Catalyst's interlocutory motion to enjoin him from working at West Face for the six-month term of the non-competition provision in his employment agreement with Catalyst.

7. On July 23, 2014, Catalyst entered into exclusive negotiations with VimpelCom to acquire WIND Mobile, during which time West Face and the consortium

of investors (the "Investors") with which West Face was acting had no further negotiations with VimpelCom. Catalyst's exclusive negotiating period expired on August 18, 2014 without concluding a deal. The Investors then re-initiated negotiations with VimpelCom, and ultimately entered into a transaction to acquire VimpelCom's interest in WIND Mobile on September 16, 2014.

8. On November 10, 2014, Mr. Justice Lederer granted an interlocutory injunction preventing Mr. Moyse from working for West Face until the expiration of his non-competition covenant on December 23, 2014. At the same time, Mr. Justice Lederer appointed an Independent Supervising Solicitor (the "ISS") to review Mr. Moyse's personal electronic devices for any evidence of the transmission by him to West Face of the confidential information of Catalyst. That role was played by Brendan van Niejenhuis of the Stockwoods firm.

**Catalyst Moves for Interlocutory Relief against West Face and Mr. Moyse**

9. On January 13, 2015, after receiving a request from the ISS for clarification concerning how to manage the number of "hits" generated by the initial list of computerized search terms, Catalyst commenced a motion seeking two forms of interlocutory relief against West Face:

- (a) first, an injunction restraining West Face (and its officers, directors, employees, agents or any persons acting under its direction or on its behalf) from: (i) participating in the management and/or strategic direction of WIND Mobile; and (ii) participating in the advanced wireless services

spectrum auction that was being conducted at the time by Industry Canada; and

- (b) second, an Order authorizing the ISS to create and review forensic images of *all of West Face's electronic devices*, for the stated purpose of identifying whether West Face had misused any confidential information belonging to Catalyst.

10. On January 21, 2015, the parties attended Motion Scheduling Court, and agreed to the following schedule for Catalyst's motion:

- (a) February 16, 2015: Catalyst to file its motion record
- (b) March 9, 2015: Defendants to file their responding motion records
- (c) March 19, 2015: Argument of motion

11. On February 6, 2015, Catalyst amended its motion to seek an Order that Mr. Moyse be committed to jail for contempt of an earlier interim consent Order of Justice Firestone dated July 16, 2014. A copy of Catalyst's Amended Notice of Motion dated February 6, 2015 is attached as Exhibit "A". Catalyst ultimately filed its motion record on February 19, 2015, three days after the scheduled date for its motion record.

12. After West Face delivered its responding materials on Tuesday, March 10, 2015, Catalyst asked to adjourn the motion so that it could file reply materials. These materials were not received until May 1, 2015. Catalyst's motion was eventually heard by Justice Glustein on Thursday, July 2, 2015, almost seven months after Catalyst had

filed its original Notice of Motion and almost four months after West Face filed its responding motion record.<sup>1</sup> By the end of this hearing before Justice Glustein, Catalyst had narrowed the relief it was seeking to the following three remedies:

- (a) first, an interlocutory injunction prohibiting West Face from voting its equity interest in WIND Mobile pending a determination of the issues raised in the action (the "**Voting Injunction**");
- (b) second, an interlocutory Order authorizing the ISS to create and review forensic images of West Face's servers and the electronic devices used by five individuals at West Face, to take place before discovery (the "**Imaging Order**"); and
- (c) third, an Order declaring that Mr. Moyse was in contempt of the interim consent Order of Justice Firestone dated July 16, 2014 (the "**Contempt Order**").

13. On Tuesday July 7, 2015, Justice Glustein released reasons dismissing Catalyst's motion in its entirety. A copy of Justice Glustein's Order is attached as Exhibit "B". A copy of Justice Glustein's Endorsement is attached as Exhibit "C".

14. Subsequently, on August 26, 2015, Justice Glustein released his Costs Endorsement, pursuant to which he ordered Catalyst to pay West Face and Mr. Moyse costs of \$90,000 and \$70,000 respectively, within 30 days. A copy of Justice Glustein's Costs Endorsement is attached as Exhibit "D".

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<sup>1</sup> The motion was originally returnable on June 11, 2015 before Justice Chapnik, but was adjourned at that time. The next available date to the parties was July 2, 2015.

**a Catalyst Purports to Appeal to the Court of Appeal Without Seeking Leave**

15. On July 22, 2015, Catalyst served Notice of Appeal and Appellant's Certificate in which it purported to appeal directly to the Court of Appeal from Justice Glustein's dismissal of both the Imaging Order (against West Face) and the Contempt Order (against Mr. Moyse). Catalyst did not appeal the Voting Injunction. Nor did Catalyst seek leave to appeal from the Divisional Court.

16. This is so even though Catalyst's Notice of Appeal recognized that Justice Glustein's dismissal of the Imaging Order was an interlocutory order. Catalyst took the position in its Notice of Appeal, however, that Justice Glustein's dismissal of the Contempt Order was a final order, and that the Court of Appeal had jurisdiction to hear its appeals of both the Contempt Order and the Imaging Order on the basis of sections 6(1) and 6(2) of the *Courts of Justice Act*. A copy of Catalyst's Notice of Appeal is attached as Exhibit "E".

17. Two days later, Kris Borg-Olivier, counsel to Mr. Moyse, sent a letter to Andrew Winton, counsel to Catalyst, advising that Catalyst's position was not correct in law, based on the Court of Appeal's decision in *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.) (which held that the dismissal of a motion for contempt is interlocutory in nature, rather than final). Mr. Borg-Olivier enclosed a copy of the Court of Appeal's decision for Mr. Winton's reference, and advised that if Catalyst did not withdraw its Notice of Appeal within five business days, Mr. Moyse would bring a motion to quash Catalyst's appeal. A copy of Mr. Borg-Olivier's letter dated July 24, 2015 is attached as Exhibit "F". That same day Mr. Milne-Smith at Davies sent a similar letter on behalf of

West Face to Mr. Winton and his co-counsel Rocco DiPucchio. A copy of Mr. Milne-Smith's letter is attached as Exhibit "G".

18. To my knowledge, Catalyst never responded to either of these letters.

**Mr. Moyse and West Face Move to Quash Catalyst's Appeal**

19. On Tuesday August 4, 2015, Mr. Moyse served Catalyst with a Notice of Motion to quash Catalyst's appeal to the Court of Appeal. As Monday, August 3 was a holiday, this was the first business day after the deadline by which Mr. Borg-Olivier and Mr. Milne-Smith had requested Catalyst withdraw its appeal. West Face served its Notice of Motion to quash the appeal the following day (Wednesday, August 5). In short, both West Face and Mr. Moyse commenced their motions to quash Catalyst's appeal within two weeks of Catalyst filing its Notice of Appeal in the Court of Appeal.

20. On September 9, 2015, Mr. Moyse served his motion record, factum, and book of authorities in respect of his motion to quash Catalyst's appeal.

21. On September 11, 2015, West Face served its motion record, factum, and book of authorities in respect of West Face's motion to quash Catalyst's appeal. West Face's motion record included an Amended Notice of Motion. A copy of West Face's motion record is attached as Exhibit "H". A copy of West Face's factum is attached as Exhibit "I".

22. In its factum, West Face noted that even if Justice Glustein's dismissal of the Contempt Order constituted a final order (which it did not), the Court of Appeal "would still have no jurisdiction under section 6(2) of the *Courts of Justice Act* to hear

the appeal of the interlocutory [Imaging Order], because Catalyst has not obtained leave to appeal".<sup>2</sup> West Face cited numerous cases supporting this position, and included them in its book of authorities.<sup>3</sup>

23. Catalyst took no steps to regularize its proposed appeals, including by seeking an extension of time in the Divisional Court to seek leave to appeal, even after it received this controlling authority indicating that even if the Contempt Order were final, an appeal of the Imaging Order could not lie to the Court of Appeal unless leave to appeal was first obtained.

24. On September 17, 2015, the parties received a letter from the Court of Appeal advising that the motions to quash of Mr. Moyse and West Face would be heard together on November 5, 2015. A copy of this letter is attached as Exhibit "J".

25. Pursuant to Rule 61.16(4)(b), Catalyst's responding materials were due within 25 days after service of the moving parties' motion records and facta – in this case, by October 6, 2015. However, Catalyst failed to deliver its responding materials.

26. On October 7, 2015, Mr. Milne-Smith of Davies sent an email to Catalyst's counsel, Mr. Winton, advising that Catalyst's factum was overdue, and asking whether he could expect it immediately. Mr. Winton responded that same day, advising that he had inadvertently mis-scheduled the due date for Catalyst's materials. Mr. Winton undertook to deliver them by Tuesday, October 13, 2015 (the day after Thanksgiving Monday).

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<sup>2</sup> West Face's Motion to Quash Factum dated September 10, 2015, at para. 17.

<sup>3</sup> See West Face's Motion to Quash Factum dated September 10, 2015, at paras. 1, 4, & 13-23.

27. Nevertheless, Catalyst did not deliver its responding materials on October 13. As a result, Mr. Milne-Smith and Robert Centa, counsel to Mr. Moyse, sent follow up emails to Mr. Winton on Thursday, October 15 and Friday, October 16 respectively.
28. A copy of an email chain capturing all of these emails is attached as Exhibit "K".
29. I am informed by Mr. Milne-Smith and believe that ultimately, on or around October 15, 2015, Mr. Winton called Mr. Milne-Smith and had a without prejudice conversation that ultimately resulted in Catalyst consenting to West Face's motion to quash the appeal of the Imaging Order. This occurred:
- (a) almost *three months after* the deadline for Catalyst to file its motion for leave to appeal Justice Glustein's dismissal of the Imaging Order had expired;
  - (b) almost *three months after* West Face had advised Catalyst that the Court of Appeal did not have jurisdiction to hear Catalyst's appeal of the Imaging Order;
  - (c) five weeks after West Face had served its motion record, factum and book of authorities, setting out West Face's position that leave to appeal from the Imaging Order was required regardless of whether the appeal of the Contempt Order lay to the Court of Appeal; and
  - (d) three weeks before the scheduled hearing of West Face's motion to quash Catalyst's appeal (which was to be heard November 5, 2015).

30. On October 30, 2015, Mr. Milne-Smith sent a motion confirmation form to the Court of Appeal confirming that he had conferred with Mr. Winton and that West Face's motion to quash Catalyst's appeal of the Imaging Order was proceeding on consent. A copy of this form is attached as Exhibit "L". A further letter clarifying that it was only West Face's motion to quash, and not also Mr. Moyse's, that was proceeding on consent, is attached as Exhibit "M".

31. The Court of Appeal made an Order on consent quashing Catalyst's appeal of the Imaging Order during the hearing on November 5. The Order was issued and entered the following day. Section 3 of the Order fixed the costs of West Face's motion to quash in the amount of \$2,500 and required that that amount be paid to West Face by Catalyst forthwith. A copy of the Court of Appeal's Order quashing Catalyst's appeal of the Imaging Order is attached as Exhibit "N".

32. Mr. Moyse's motion to quash Catalyst's appeal of Justice Glustein's dismissal of the Contempt Order was heard on a contested basis on November 5, 2015. On November 17, 2015, the Court of Appeal released its decision allowing Mr. Moyse's motion to quash and quashing Catalyst's appeal of the Contempt Order. A copy of the Court of Appeal's Reasons is attached as Exhibit "O".

**Catalyst Moves for Leave to Extend the Time for Filing its Motion for Leave to Appeal**

33. On November 27, 2015—almost five months after Justice Glustein's decision was released, and more than four months after the deadline for seeking leave to appeal to the Divisional Court had passed, Catalyst finally served a Notice of Motion

purporting to seek: (i) leave to appeal to the Divisional Court from the Order of Justice Glustein dated July 7, 2015, including Justice Glustein's dismissal of the Imaging Order sought against West Face; and (ii) leave to extend the time for filing its motion for leave to appeal.

34. On December 3, 2015, Mr. Winton sent to counsel for West Face and Mr. Moyse an email advising that the Divisional Court had refused to accept Catalyst's Notice of Motion because it did not follow the Court's protocol for seeking an extension of time for filing a motion for leave to appeal. In this same email, Mr. Winton wrote: "When the appeals to the Court of Appeal were quashed, we left it as unsettled as to whether the defendants would consent to the extension of time to seek leave to appeal. Can you please let us know if your respective clients will oppose the motion for an extension of time." Both Mr. Centa and Mr. Milne-Smith responded to Mr. Winton's email within a few minutes, advising that Mr. Moyse and West Face, respectively, would not consent to such a motion. A copy of this email chain is attached as Exhibit "P".

35. On December 10, 2015, Catalyst delivered its Notice of Motion to extend the time for filing a notice of motion for leave to appeal in the Divisional Court (the "**December 10 Notice**"). However, Catalyst did not deliver its Motion Record. Indeed, the December 10 Notice explicitly stated that the evidence to be used by Catalyst at the hearing would include the affidavit of Andrew Winton "to be sworn". Shortly after receiving the December 10 Notice, Mr. Milne-Smith emailed Mr. Winton and asked when he planned to deliver his affidavit, given the relatively short time period before the scheduled return date of Catalyst's extension motion on, January 19, 2016. A copy of this email is attached as Exhibit "Q".

36. Catalyst finally served Mr. Winton's affidavit in support of its motion for an Order extending time several days ago, on Friday, January 8, 2016. The next day, on January 9, 2016, West Face delivered its productions along with an unsworn affidavit of documents to Catalyst's counsel. The majority of these documents had already been produced to Catalyst in March 2015 as a part of West Face's response to Catalyst's interlocutory motion that was ultimately dismissed by Justice Glustein. I am informed by Mr. Milne-Smith and believe that at a subsequent 9:30 appointment before Mr. Justice Newbould of the Commercial List that occurred on Monday, January 11, 2016 regarding the scheduling of a hearing to approve the Plan of Arrangement pertaining to the sale of WIND Mobile to Shaw, the parties agreed that this has become a matter of urgency, with the result that it would be most expedient to combine Catalyst's motion for an extension of time with its motion for leave to appeal to the Divisional Court.

37. To my knowledge, Catalyst has never taken the position that Justice Glustein's dismissal of its motion for the Imaging Order was final. At no point after West Face delivered its factum on its motion to quash Catalyst's Notice of Appeal on September 11 did Catalyst ever take the position that West Face's position (that Catalyst required leave to appeal from the Imaging Order regardless of whether the appeal of the Contempt Order lay properly to the Court of Appeal) was incorrect.

#### **Prejudice to West Face**

38. As alluded to above, in December 2015, West Face and the other Shareholders of WIND Mobile agreed to sell that company to Shaw for a purchase price of \$1.6 billion, and to proceed by way of Plan of Arrangement. A copy of the Notice of

Application for approval of the Plan of Arrangement dated December 23, 2015 is attached as Exhibit "R". Counsel to West Face, Shaw and Catalyst attended a 9:30 scheduling appointment before Mr. Justice Newbould of the Commercial List on January 4, 2016, Justice Newbould directed that the plan approval hearing be held on January 25, 2016.

39. On January 6, 2016, Rocco DiPucchio, counsel to Catalyst, wrote a "With Prejudice" letter to Mr. Milne-Smith and Mr. Carlson in which he proposed that Catalyst would allow the Plan of Arrangement to proceed without opposition on the condition that West Face "agree to the appointment of an ISS to review the electronic devices of an agreed upon set of custodians at West Face". A copy of Mr. DiPucchio's letter is attached as Exhibit "S".

40. In that same letter, counsel for Catalyst also took the position that West Face should place its proceeds from the sale of WIND Mobile into escrow pending a final determination of Catalyst's claim, and that trial of the Moyse action should not occur until after the ISS's report is received. In respect of the latter request at least, Catalyst's position is therefore that West Face should consent to the very relief Justice Glustein rejected and dismissed following the hearing of a fully contested motion in July 2015 and be enjoined from dealing with over \$500 million in proceeds until:

- (i) the trial of the Moyse action has been heard and determined; and
- (ii) all appeal rights concerning the decision of the trial judge in that case have been exhausted.

41. Not surprisingly, West Face immediately rejected Mr. DiPucchio's proposal.

42. The request for appointment of an ISS is, of course, one of the subjects of Catalyst's motion in this Court for an extension of time and for leave to appeal.

43. Catalyst's delay of approximately six months in pursuing its motion for leave to appeal in this Court has caused West Face significant prejudice. If Catalyst is granted leave to extend time and to appeal at this late date, West Face may suffer a significant delay in proceeding with the trial of the Moyse action and obtaining a final resolution of Catalyst's claims on their merits, given Catalyst's position that no trial can occur until: (i) its proposed appeal from the Imaging Order has been heard and finally determined; and (ii) if that appeal is successful, the ISS has imaged, inspected and reported on all of West Face's potentially relevant electronic records. That process could take months to complete. This is particularly problematic given Catalyst's position that in the interim, West Face should be precluded from dispersing to its investors or re-deploying the hundreds of millions of dollars of proceeds that West Face will receive from the disposition of its interest in WIND Mobile.

#### **Prejudice from Inability to Manage Investments**

44. As a general matter, any restriction on West Face's ability to manage funds entrusted to it by its investors damages West Face's interests and reputation. West Face acts as a fiduciary to actively manage investors' money. To the extent that investor capital entrusted to West Face must be held in escrow or are otherwise unavailable for distribution or re-investment, West Face is unable to provide the

investment services that its clients expect it to perform for them. As a result, the investors will be directly prejudiced, and West Face may suffer for its failure to prevent this harm to its investors.

45. Specifically, West Face's investors will be deprived of the investment returns that West Face expects to generate by actively managing the assets of its investors and/or deprived of the alternative uses for the WIND Mobile proceeds that investors had intended. It is difficult to predict at this time what investment opportunities may be foregone if West Face is unable to invest over \$500 million for a period of several months or more, but the investment opportunities foregone by investors could well be substantial.

46. In addition, investors generally value liquidity, and may well prefer to invest in asset management firms that do not suffer from restrictions on their liquidity. For example, investors may be concerned by liquidity constraints resulting from Catalyst's claims. As an illustration, most sophisticated institutional investors require West Face to complete due diligence questionnaires before investing and often on an ongoing basis. A standard question is whether West Face has been subject to litigation and/or to restrictions on the ability of investors to redeem funds. Delay in resolving this matter expeditiously therefore may be required to be disclosed to future investors and so threatens to create a permanent stain on West Face's reputation going forward.

47. West Face holds its investment in WIND Mobile in two different sets of fund groups: The Long Term Opportunities group of funds (the "LTOF") hold approximately 91% of the investment, while the Alternative Credit group of funds (the "ACF") hold the

remaining approximately 9%. As the structure and management of these fund groups are different, they will be discussed separately.

#### **Specific Prejudice to Investors in the LTOF**

48. The LTOF is what is commonly referred to as a "hedge fund". One of the principal characteristics of a hedge fund, as opposed to a private equity fund, is that investors have significantly more frequent opportunities to exit or "redeem" their investments in a hedge fund. For example, investors in the LTOF are generally permitted to redeem their investments on a quarterly basis. The greater flexibility to exit hedge fund investments is one of their principal attractions to institutional and individual investors. Investors may need to liquidate funds to pay current expenses, make capital expenditures, or invest in other opportunities. In my experience, hedge funds that are unable to meet, or that suspend, redemption requests of their investors suffer irreparable damage to their reputation in the investment community.

49. Like many hedge fund managers, West Face received two kinds of fees in respect of the LTOF: (1) a "management fee" in the range of 2% of assets under management; and (2) an "incentive fee" equal to 20% of net profits achieved in the portfolio in excess of a specified "high water mark".

#### ***Prejudice from Inability to Redeem Designated Investment***

50. Hedge funds that hold a significant proportion of illiquid investments can encounter difficulties as a result of the potential for a mismatch between the expected investment horizon of their assets, and investor redemption demands. If too many investors choose to redeem their investments at once, for instance, the fund could be

forced to liquidate a long-term investment at an inopportune moment or to liquidate an attractive but more liquid investment, or may even be unable to honour redemptions. To mitigate this risk, the LTOF employs the concept of a "Designated Investment".

51. A Designated Investment is a segregated corpus of assets within the LTOF structure that is used to purchase an illiquid investment, from which redemptions are prohibited until such time as the investment manager determines that there has been a "liquidity event". Each investor in the LTOF designates a percentage of its invested capital that may be allocated, at West Face's discretion, to Designated Investments. Accordingly, West Face used existing liquidity in the LTOF to acquire its interest in WIND Mobile and then classified that interest as a Designated Investment. Only investors in the LTOF at the time the WIND Mobile investment was classified by West Face as a Designated Investment were allocated with exposure to that investment.

52. The result of the Designated Investment is that investors in the LTOF who have redeemed their investments in the LTOF in the period since the Designated Investment was created were not able to redeem their entire investment in the LTOF, and continue to retain their residual interest in the Designated Investment pending a future liquidity event. These investors are being deprived of the opportunity to invest the WIND Mobile sale proceeds that may be effectively frozen pending resolution of Catalyst's claim, or to deploy their capital to other preferred uses.

53. If West Face determines that a liquidity event has occurred with respect to the WIND Mobile Designated Investment upon the closing of that transaction (a decision West Face has not yet made, and cannot make until it knows the precise circumstances

of any litigation at that time), this could create complications in satisfying any judgment if Catalyst's claim against West Face in respect of WIND Mobile were ultimately to be allowed.

54. West Face will also lose fee income to the extent that it is unable to redeem or re-deploy invested capital from the Designated Investment. For invested capital in the Designated Investment, West Face's management fee described above is calculated based on the cost of the investment. Once a liquidity event is declared and the invested capital is released from the Designated Investment, the management fee is then calculated based on the then net asset value of those assets (or sale proceeds). Retaining funds in the Designated Investment because of this litigation therefore deprives West Face of a management fee on the increase (due to the WIND Mobile transaction) in value of invested capital. West Face is also deprived of the opportunity to earn its 20% incentive fee on funds that could otherwise be re-invested. Similarly, the capital invested in the Designated Investment on behalf of investors who remain in the LTOF are deprived of the opportunity to have their invested capital actively managed by West Face.

55. Finally, to the extent that funds cannot be re-invested and are held as cash or in low-yielding investments, it reduces the returns that West Face might otherwise earn for LTOF investors, and reduces the incentive fees that West Face earns based on increases in the net asset value of the LTOF.

***Prejudice from Administrative Fees***

56. Like many hedge fund managers, West Face employs a third-party administrator to administer the LTOF. The administrator processes investor money, performs necessary accounting tasks in respect of investors' accounts, and assists in net asset value calculations. For these services, the administrator is paid a fee based on the LTOF's net asset value, including the net asset value of any Designated Investments. That net asset value has already been marked up following the announcement of the sale of WIND Mobile to Shaw. Therefore, absent resolution of Catalyst's claim, the administrator will be charging West Face fees based on invested capital in the Designated Investment, even though West Face may not be able to invest that capital.

***Prejudice from Currency Hedging Costs***

57. Over 90% of capital invested in the LTOF is denominated in U.S. dollars, while the WIND Mobile investment is denominated in Canadian dollars. In order to protect against the risk of the Canadian dollar depreciating, West Face hedges this currency exposure. However, hedging has a cost that has varied over time from 4 to 70 basis points. West Face also has to post collateral for certain hedging transactions.

58. To the extent that West Face cannot redeem or re-deploy the process of sale of WIND Mobile, it will be paying hedging fees, and posting collateral, in respect of invested capital on which neither it nor its investors are likely able to earn a competitive return.

**Prejudice to Investors in the ACF**

59. Much as with the LTOF, both West Face and investors in the ACF would be prejudiced by an inability to redeem or re-deploy the proceeds from the sale of WIND Mobile, thereby losing the opportunity to earn investment returns on their capital. West Face would also face similar currency hedging costs that would be wasted on uninvested capital as described above.

60. Unlike the LTOF, the ACF is structured similar to a private equity fund and therefore does not have the same liquidity concerns. However, the ACF raises other problems.

***Prejudice from Restrictions on Equity Investments***

61. The ACF's investment in WIND Mobile involved the acquisition of a portion of WIND Mobile's outstanding debt from its former owner, VimpelCom, along with a smaller slice of equity in that business. Since the ACF is a vehicle principally for debt investments, and has contractual limits on how much equity it can hold, the ACF only acquired approximately 9% of West Face's aggregate equity investment in WIND Mobile. That equity investment, however, represented substantially all of the equity investment permitted for the ACF. A restriction on West Face's ability to re-deploy the proceeds of sale, depending on the circumstances, may therefore limit West Face's ability to acquire any equity in other transactions on behalf of the ACF. As many debt investments also present opportunities to make associated equity investments, this represents a significant limitation on the flexibility of the ACF, in circumstances where no further returns can be earned on the proceeds from the WIND Mobile investment.

***Prejudice from Dilution of Investment Returns***

62. Similar to the LTOF, for the ACF West Face receives a management fee based on invested capital, and an incentive fee. The incentive fee for the ACF, however, is based on achieving returns above a designated "preferred return" calculated on a compound basis per annum. There is a "waterfall" for returns in the ACF that proceeds in three stages:

- (a) First, profits are returned to investors until they have received the preferred return;
- (b) Next, profits are split on a designated basis in favour of West Face until West Face has received a specified percentage of profits; and
- (c) Finally, remaining profits are divided between West Face and its investors based on the specified percentage of profits to West Face described above.

63. Because of this structure for allocating returns, the longer investors have to wait before receiving proceeds from the WIND Mobile investment, the higher the preferred return threshold that West Face has to meet before being entitled to participate in the investment returns.

64. Moreover, to the extent that West Face is precluded from investing the proceeds of sale from WIND Mobile, West Face's ability to earn a return on invested capital that cannot be re-deployed will be impaired, while its investors will be paying a management fee on invested capital that is likely earning little or no return.

***Prejudice from the Limited Deployment Window of the ACF***

65. Like many private equity funds, the ACF has a "deployment period" during which committed investor capital is invested, and a "harvest period" during which investments are liquidated and proceeds returned to investors. The deployment period for the ACF expires at the end of December 2016. Once the deployment period ends, West Face is significantly restricted in its ability to call additional capital or make additional investments.

66. If West Face is able to re-invest the proceeds from the sale of WIND Mobile before December 2016, then it can re-deploy (and earn additional incentive and management fees in respect of) those funds. If, however, those funds are restricted because of delays in the hearing and/or appeals of Catalyst's claim, the deployment period will be compressed or may even close, and West Face and its investors will lose out on additional potential investments that could have been made between now and December 2016. The shorter the deployment period during which West Face can re-invest the proceeds from the sale of WIND Mobile interests held in the ACF, the less opportunity there will be to find suitable investments through which to earn returns for West Face's investors, and management and incentive fees for West Face.

SWORN BEFORE ME at  
the City of Toronto, in the  
Province of Ontario, this  
13th day of January, 2016.

A Commissioner, etc.



PHILIP de L. PANET