

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

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Applicant
(Appellant)

and

BRANDON MOYSE AND WEST FACE CAPITAL INC.

Respondents
(Respondents)

**REPLY TO RESPONSES TO APPLICATION FOR LEAVE TO APPEAL
Pursuant to Rule 28 of the Rules of the Supreme Court of Canada**

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1. This Memorandum is filed as a joint reply to the Responses filed by West Face Capital Inc. (“**West Face**”) and Brandon Moyses (“**Moyse**”).
2. Both Responses emphasize the following arguments:
 - (a) that the findings of fact made by the Trial Judge that Moyses did not destroy any relevant evidence are determinative;
 - (b) that there are no legal issues of public importance warranting leave to appeal being granted, and,
 - (c) in any event, that the issues of spoliation are moot because of “other” factual findings made by the Trial Judge.
3. The validity of the Trial Judge’s finding that Moyses did not destroy any relevant evidence is dependent upon whether the Trial Judge applied proper legal principles in determining this question. For the reasons set out in the Memorandum of Argument filed in respect of this leave application¹ it is submitted that the Trial Judge did not properly apply the legal principles applicable to spoliation.
4. In this regard, the key point is that Moyses unilaterally deleted data from his computer in the face of a Consent Order² requiring that that computer – in its entirety – be turned over to a third party so that its contents could be imaged and made available for use in this case.
5. It is respectfully submitted that by consenting to this order, Moyses acknowledged that the contents of his computer – all of it, not just certain parts which he decided should be turned over – were relevant to the issues in this case. Unilaterally deleting data from his computer without seeking a variation of this order was – as the Court of Appeal concluded – a serious breach of a court order.³ Moreover, the effect of this improper deletion of data made it impossible for Catalyst or anyone else to determine what had been erased.

¹ See Applicant’s Memorandum of Argument, paragraphs 21 – 27.

² See Applicant’s Memorandum of Argument, paragraph 13.

³ See Applicant’s Memorandum of Argument, paragraphs 28 – 30 and 59 – 61.

6. In these circumstances, it was an error of law for the Trial Judge to conclude that Catalyst had not satisfied its burden to establish that relevant evidence had been destroyed.

7. As to the potential relevance of Moyse's browsing history, there are many possible ways in which that history could have been relevant, including for example:

(a) it could have revealed that Moyse accessed sites giving instructions about how to secretly delete other data from his computer, which was a live issue at trial;

(b) it could have shown he was accessing sites providing contact information or other information relating to persons such as Tony Lacaverra (or other participants in the WIND negotiations), which would have been highly relevant, and

(c) it could have revealed access or attempts access his Drop Box, which would have been inconsistent with other parts of Moyse's evidence.

8. No doubt there are many other examples. This is why the deletion of Moyse's browsing history – which made it impossible for Catalyst to show what that history was – constitutes spoliation, in light of the consent court order that Moyse breached.

9. It is respectfully submitted that the alleged errors in the legal principles applied by the Trial Judge – from which his “findings” were derived – raise important issues of broader application, given the increasing importance of electronic data in our courts. It is further submitted that the Trial Judge's holding that requires specific intent by Moyse to destroy relevant evidence was also erroneous.⁴ This issue has never been considered by this Court, nor has it ever been definitively addressed in the courts below. However, the case law cited from the United States Courts shows that there is a substantial body of jurisprudence in that jurisdiction – especially in the Second Circuit Court of Appeals – that supports a different level of intent than was applied by the Trial Judge in this case. This too is an important legal issue warranting consideration by this Court.⁵

⁴ See Applicant's Memorandum of Argument, paragraphs 35 – 48.

⁵ See Applicant's Memorandum of Argument, paragraphs 50 – 57 and 69 – 74.

10. With respect to the Respondents' submission that the spoliation issue is moot, the other findings relied upon by the Respondents are that Catalyst suffered no damages. These conclusions were based upon two lines of analysis by the Trial Judge:

(a) that Catalyst's failure to agree to a break fee at the end of its negotiations to acquire WIND caused it to lose the deal, and,

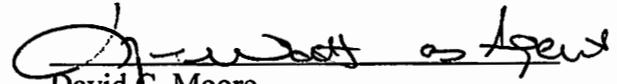
(b) Catalyst would never have been able to negotiate an acceptable Share Purchase Agreement with Vimpelcom for the acquisition of the WIND shares.

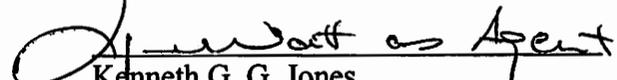
11. Both of the above lines of analysis relate to the dynamics and outcome of the negotiations between Catalyst and Vimpelcom, the vendor of the WIND shares. It is important to bear in mind that Catalyst's claims against Moyse and West Face were based upon the conclusion that Moyse had provided confidential information to West Face about Catalyst's negotiation strategies to acquire WIND, and that West Face took advantage of this information to submit a "superior" bid to Vimpelcom in the middle of the exclusivity period between Vimpelcom and Catalyst that ended in failure. In these circumstances, if the legal tests applicable to spoliation had been properly applied, this could well have resulted in different conclusions about Catalyst's claim that Moyse had provided confidential information to West Face and that West Face had misused this information to submit the "superior offer" that trumped Catalyst's efforts to complete its negotiations with Vimpelcom. In other words, the legal issues sought to be raised in relation to the issue of spoliation unavoidably have the potential to affect the other conclusions reached by the Trial Judge.

12. It is respectfully submitted that the issues sought to be appealed in respect of the spoliation issues are not moot. They are important and afford this Court an opportunity to provide overall guidance to the courts and to the profession, in an area of increasing importance.

13. It is further submitted that the *ad hominem* attacks on Catalyst in paragraph 43 of West Face's submissions are unfounded and should be rejected. If this court is satisfied that this leave to appeal application raises arguable issues of law of broad public importance, leave to appeal should be granted. If not, the application should be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 24th day of September, 2018.


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