Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICAITONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

MOTION RECORD OF THE DEFENDANT/MOVING PARTY
WEST FACE CAPITAL INC.
(VOLUME 9 OF 19)

December 7, 2016

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Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICAITONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

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This is Exhibit "12" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 4388
COURT FILE NO.: CV-14-507120
DATE: 20150707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Rocco DiPucchio* and *Andrew Winton*, for the Plaintiff

Matthew Milne-Smith and *Andrew Carlson*, for the Defendant, West Face Capital Inc.

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

HEARD: July 2, 2015

ENDORSEMENT

Nature of motion and overview

[1] The plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), brings this motion for:

(i) an order that the defendant, West Face Capital Inc. ("West Face") is prohibited from voting its 35% share interest in WIND Mobile ("WIND") pending a determination of the issues raised in this action (the "Voting Injunction"),

(ii) an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face, at the expense of Moyse and West Face, to take place before any examination-for-discovery (the "Imaging Order"), and

(iii) an order (the "Contempt Order") that the defendant, Brandon Moyse ("Moyse"), is in contempt of an interim consent order of Firestone J., dated July 16, 2014 (the "Consent Order").

[2] At the hearing, the parties prepared extensive material. West Face filed a four-volume motion record with (i) a lengthy affidavit with 163 exhibits from Anthony Griffin ("Griffin"), a partner at West Face, (ii) an affidavit from Assar El Shanawany ("El Shanawany"), the

Corporate Planning & Control Officer of WIND, and (iii) an affidavit from Harold Burt-Gerrans, a forensic computer expert retained by West Face.

[3] Moyse filed two motion records, including a lengthy affidavit from Moyse and two affidavits from Kevin Lo ("Lo"), a forensic computer expert retained by Moyse.

[4] The defendants also filed a joint motion record with answers to undertakings from cross-examinations, transcripts, and an affidavit from West Face's head of technology.

[5] Catalyst filed three separate motion records, including (i) two extensive affidavits with approximately 40 exhibits from James Riley ("Riley"), the Chief Executive Officer of Catalyst, and (ii) three affidavits from Martin Musters ("Musters"), a computer forensic expert retained by Catalyst.

[6] In total, the parties filed over 3,000 pages of motion material, three factums totalling more than 110 pages, and 66 authorities.

[7] In this endorsement, I address only the key evidence and law which I find are necessary to consider the issues raised by the parties. For the reasons I discuss below, I dismiss the motion for all grounds of relief sought by Catalyst.

The Voting Injunction

a) The failure to provide an undertaking

[8] The Voting Injunction cannot be granted as Catalyst provided no undertaking as to damages.

[9] Rule 40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), provides that:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[10] The failure to provide an undertaking (or request to be relieved) is fatal to an injunction. Such an undertaking in damages "is almost invariably required in commercial cases" (Sharpe J.A., *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, 2014), at paras. 2.470 and 2.500).

[11] The court will dismiss a motion for an injunction if the moving party fails to provide an undertaking under Rule 40.03 (*Mandel v. Morguard Corp.*, [2014] OJ No. 1088 (SCJ), at paras. 20-21; *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.*, [2007] OJ No. 89 (SCJ), at para. 70, affirmed without separate reasons [2008] OJ No. 2567 (CA)).

[12] West Face raised the lack of an undertaking in its factum, as was appropriate since Catalyst failed to provide the undertaking in its evidence before the court on this injunction.

[13] Catalyst knew and understood the need for an undertaking to obtain an injunction.

[14] At the outset of the hearing, I raised directly with Catalyst's counsel the issue of an undertaking with respect to the injunctive relief sought on this motion.

[15] I advised counsel that Catalyst could consider, prior to argument, whether it was necessary to adjourn the hearing to provide the court with an undertaking. I further advised Catalyst's counsel that if he chose to argue the motion on the basis of the existing evidentiary record, the court could not adjourn the hearing in mid-argument to permit further evidence on the issue. Counsel for Catalyst assured the court that he was prepared to argue the motion on the basis of the evidentiary record and would set out in his oral submissions why the requirement for an undertaking had been satisfied.

[16] During his submissions, when asked to address the issue of the undertaking, Catalyst sought to rely on the undertaking it provided to the court to obtain an interim injunction from Justice Lederer by reasons dated November 10, 2014 (the "Interim Injunction"). Justice Lederer had granted interim relief, by which he, *inter alia*, enjoined Moyse from working for West Face until December 21, 2014 and ordered that an independent supervising solicitor (previously defined as the "ISS") be put into place to review the images of Moyse's personal computer and electronic devices that had been conducted pursuant to the Consent Order (Reasons of Lederer J., at para. 83).

[17] In support of the Interim Injunction, Riley swore an affidavit on June 26, 2014 in which he gave an undertaking to the court that Catalyst "will comply with any order regarding damages the Court may make in the future, if it ultimately appears that the injunction requested by the plaintiff ought not to have been granted" (para. 75 of the June 26, 2014 Riley affidavit).

[18] Justice Lederer relied on the evidence from Riley to find that Catalyst had complied with its requirement under Rule 40.03 to provide an undertaking for damages which might arise if the court ultimately found that the injunction requested by Catalyst ought not to have been granted.

[19] Justice Lederer's reasons made it clear that the undertaking related only to the order he made. He stated that Catalyst gave an undertaking (Reasons of Lederer J., at para. 84):

> that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them. [Emphasis added.]

[20] At the hearing before me, Catalyst submitted that this undertaking "continued" (in effect, could be transferred) to the present Voting Injunction. Catalyst submitted that Riley was not required to provide a separate undertaking for the Voting Injunction since Riley

stated in his affidavit for this motion that "I adopt and re-state the facts set out in those affidavits [filed in support of the Interim Injunction] in this affidavit".

[21] I do not agree that an undertaking for an injunction seeking to prevent employment for a limited time or having documents imaged by an ISS can be "transferred" to an injunction seeking to prevent a 35% shareholder of WIND from exercising voting rights at any time until trial of the action.

[22] First, an undertaking is not a "fact" to be repeated and relied upon in a subsequent affidavit. It is a promise to the court to pay damages arising out of the injunctive relief sought before the court at that time. At no point until this injunction did Catalyst seek an order preventing West Face from exercising its 35% voting interest in WIND.

[23] Second, the damages that could be incurred as a result of the Voting Injunction are exponentially greater than any possible damages that could arise on an order to prevent competition by an analyst (Moyse) who leaves for a competitor. The Interim Injunction, based on the earlier Riley affidavits, protected Catalyst's interests through (i) a review by the ISS of the forensic images of Moyse's computer and electronic devices before discovery, and (ii) orders prohibiting Moyse from competing for six months and using confidential information. Any damage associated with the order sought on the Interim Injunction could pale to the losses West Face could incur as a result of the Voting Injunction if West Face is unable to vote its shares in WIND on all decisions between the present and trial.

[24] Justice Lederer was clear that the undertaking he accepted was based on the relief sought in the specific motion before him, as it was based on the undertaking to pay damages if "it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them" [Emphasis added.] (Reasons of Lederer J., at para. 84).

[25] At the present hearing, Catalyst attempted to rely on the evidence in the current Riley affidavit that it "currently has in excess of $3 billion dollars under management". However, the existence of assets under management is not an undertaking to the court to pay damages for an injunction.

[26] When an undertaking is provided, a responding party has the opportunity to challenge the sufficiency of the undertaking. Regardless of the amount of assets managed or owned by a corporation, the undertaking provided by the moving party depends on its ability to pay the damages which could arise from the injunction. A responding party is entitled to cross-examine to test the sufficiency of the undertaking.

[27] Consequently, there is no undertaking before the court on the present injunction, which is between sophisticated commercial parties with Catalyst seeking a Voting Injunction to enjoin West Face from voting any of its 35% share interest in WIND until trial.

[28] This is not a case of West Face's counsel "laying in the weeds" (as submitted by Catalyst). Catalyst knew the requirements for an injunction, as demonstrated by the earlier injunction sought before Justice Lederer. West Face raised the issue directly in its factum.

Catalyst was advised by the court at the outset that the court was providing it with an opportunity to consider whether it would seek an adjournment to file further evidence, and Catalyst chose not to do so. West Face is not required to create evidence for Catalyst on cross-examination when Catalyst chose not to provide the evidence.

[29] Consequently, Catalyst made a decision to rely on the earlier undertaking with full knowledge that no adjournment mid-hearing could be obtained if the court was not satisfied that there was a proper undertaking.

[30] For these reasons, I dismiss the Voting Injunction on the basis of the failure to provide an undertaking under Rule 40.03.

b) The failure to satisfy the requirements of irreparable harm and balance of convenience

[31] Catalyst's counsel acknowledges that Catalyst has the burden of establishing irreparable harm and that the Voting Injunction cannot be granted if Catalyst does not meet this burden.

[32] The only evidence of harm to Catalyst if the injunction is not granted is Riley's statement in his affidavit that:

> As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

[33] The above evidence does not meet the test of harm that "could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory application", or "harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald Inc. v. Canada*, [1994] SCJ No. 17, at paras. 58-59).

[34] Evidence of irreparable harm must be clear and not speculative (*Trapeze Software Inc. v. Bryant*, [2007] OJ No. 276 (SCJ), at para. 52). It is not enough to show that a moving party is "likely" to suffer irreparable harm; one must establish that he or she "would suffer" irreparable harm (*Burkes v. Canada (Revenue Agency)*, [2010] OJ No. 2877 (SCJ), at para. 18, leave to appeal refused, [2010] OJ No. 5019 (Div. Ct.)).

[35] Riley's assertion is speculative. He does not state that West Face "will" use its voting interest in WIND to harm Catalyst's purported interest. Rather, he states only that West Face "can" do so without explaining how such conduct would arise.

[36] Even if Catalyst has a contingent interest in WIND, Riley admitted during cross-examination that (i) "West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do"; and (ii) West Face "would obviously have an incentive to

maximize the value of its investment in [WIND]" in the same manner as Catalyst claims that it would.

[37] Catalyst submits at paragraph 114 of its factum that West Face could provide capital to WIND (or WIND could seek to raise capital) "on terms to which Catalyst, in West Face's shoes, would not agree". However, there is no evidence to that effect. To the contrary, West Face has been a shareholder and an active part of the management of WIND since September 16, 2014, and Catalyst led no evidence that it is worse off today than it was almost nine months ago.

[38] In essence, Catalyst's position on irreparable harm is that West Face, as a 35% shareholder in WIND, might vote their shares in a manner that decreases the value of the company, and as such, harm Catalyst's "contingent" interest based on Catalyst's claim of constructive trust. However, any claim of constructive trust over property raises a speculative concern that the property may be worth less at trial than at the outset of pleadings. In the present case, there is no evidence to suggest any past or future conduct which will cause irreparable harm, and as such, the injunction must fail.

[39] With respect to the balance of convenience, since Catalyst offers no proper evidence of irreparable harm, it cannot establish that the balance of convenience favours granting the injunction.

[40] Further, West Face filed evidence (in the Griffin and El Shanawany affidavits) that West Face is the single largest investor in WIND, designates two of the ten seats on the board of directors, and plays an important role in WIND's governance, strategic and capital funding direction. An inability for West Face, as the largest WIND shareholder, to vote on issues that affect a significant investment is evidence of the type of harm that cannot be cured in monetary terms, as other shareholders would then have the ability to control the future of WIND without any voting from a 35% shareholder.

[41] For the above reasons relating to Catalyst's failure to provide the undertaking, Catalyst's failure to establish irreparable harm, and given my finding that the balance of convenience is against granting an injunction, I dismiss the motion for a Voting Injunction.

[42] Consequently, I do not address whether there is a serious question to be tried.

The Imaging Order

[43] West Face characterizes the Imaging Order as either an *Anton Piller* order or a Rule 30.06 order. For the purposes of this argument, I make no finding as to whether the higher threshold of an *Anton Piller* order should apply because I agree with West Face that even under the lower "Rule 30.06" threshold as considered in cases where a similar imaging order was sought, the motion must fail.

[44] In the present case, Catalyst proposes to have the ISS conduct a review of West Face's corporate servers and the electronic devices of five West Face representatives and then "prepare a report which shall": (i) "identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and (ii)

provide particulars of who authored or saw any emails which contained or referred to the Confidential Information.

[45] I note that many of the cases relied upon by West Face arise in the context of a request by an adverse party to review the documents sought to be imaged, typically through a forensic expert retained by the moving party. It may be that the discussion in those cases could apply to the Catalyst request for ISS review, since the nature of a review is similarly intrusive, even if not conducted directly by the moving party.

[46] However, it is not necessary to rely on those authorities and I make no finding as to whether the test to permit a moving party to have direct access to the servers of a responding party requires a higher threshold to obtain such relief.

[47] Under Rule 30.06, the principle remains that a party has an obligation under the *Rules* to produce relevant documents, and the court will only order further and better production if there is good reason to believe that the responding party has not complied with its production obligations. I agree that the same approach should apply to a request that a responding party image computer servers and electronic devices.

[48] This approach was followed by Justice Stinson in *Brown v. First Contact Software Consultants Inc.*, [2009] OJ No. 3782 (SCJ) ("*Brown*"). Justice Stinson was not faced with a request by a moving party to review the responding party's server, but only with a request for "an order that would require the responding parties to 'image' the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them" (*Brown*, at para. 67). The intrusiveness of such a request would be less than the ISS review proposed by Catalyst.

[49] In *Brown*, Justice Stinson refused to order the plaintiffs (responding parties) to image their hard drives or computers. He held (*Brown*, at para. 67):

> There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

[50] Orders for production of computer hard drives will not be made when a party can explain any delay or errors in producing relevant documents (*Baldwin-Jones Insurance Services (2004) Ltd. (c.o.b. Baldwin Janzen Insurance Brokers) v. Janzen*, [2006] BCJ (S.C.) at paras. 34, 36). Further, the number of "hits" of a term does not demonstrate that a party has failed to produce relevant documents (*Mathieson v. Scotia Capital Inc.*, [2008] OJ No. 3500 (Mast.) at par. 9).

[51] As Morgan J. held in *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] OJ No. 6082 (SCJ) ("*Zenex*"), "it is not sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden'" (*Zenex*, at paras. 13-14).

[52] There is no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations.

[53] The evidence relied upon by Catalyst at the hearing to demonstrate an effort to thwart discovery obligations was not convincing. Evidence with respect to Callidus Capital Corporation ("Callidus") was produced by West Face once Catalyst put Callidus in issue by alleging misuse of confidential information. West Face disclosed its investment in Arcan voluntarily.

[54] West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer.

[55] The error of West Face to recall the March 27, 2014 email arose not in the context of litigation production, but only when West Face received Catalyst's pre-litigation correspondence. The email was immediately produced in the July 7, 2014 responding material, six business days after Catalyst brought its motion for interim relief. West Face's failure to recognize prior to litigation that the March 27, 2014 email had been received and forwarded is not evidence of an intention to hide or delete electronic information.

[56] Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

[57] For the above reasons, I find that Catalyst has not met its burden to establish that West Face has engaged in any destruction of evidence or in any conduct "designed to hide or delete electronic or other information". Consequently, I dismiss the motion for an Imaging Order.

Contempt Order

[58] For the reasons that follow, I do not find Moyse to be in contempt of the Consent Order.

[59] I summarize the relevant legal principles below:

(i) The contempt power rests on the power of the court to uphold its dignity and process. It is necessary to maintain the rule of law (*Carey v. Laiken*, 2015 SCC 17 ("*Carey*"), at para. 30);

(ii) There are three elements which must be established beyond a reasonable doubt before a court may make a finding of civil contempt:

(a) The order that was breached must state clearly and unequivocally what should and should not be done;

(b) The party alleged to have breached the order must have had actual knowledge of it; and

(c) The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey*, at paras. 31-35);

(iii) Any reasonable doubt must be resolved in favour of the person or entity alleged to have breached the order (*Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (CA), at para. 270);

(iv) The contempt power is discretionary and courts should discourage its routine use to obtain compliance with court orders. The contempt power should be used "cautiously and with great restraint" and as "an enforcement power of last rather than first resort" (*Carey*, at para. 36); and

(v) The court retains a discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith (*Carey*, at para. 37).

[60] I review the relevant evidence against the backdrop of these principles.

[61] The impugned contemptuous acts of Moyse are (i) he deleted his personal browsing history immediately prior to turning his personal computer over to the ISS; and (ii) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.

a) The relevant evidence

[62] Moyse's evidence was that when he was ordered to deliver his computer, he was concerned and embarrassed by some of the content on his computer related to adult entertainment sites. Moyse's evidence is that he was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in the lawsuit since he had reasonable explanations for every Catalyst-related document that would be found on the computer and intended to disclose all such documents in his affidavit of documents, as required under the Consent Order.

[63] Moyse's evidence is that he understood and respected his obligations under the Consent Order and was careful in how he maintained his computer following the Consent Order. Moyse's evidence that if Catalyst had sought and obtained an order requiring that he maintain the computer "as is", he would not have used it at all prior to the image being taken.

[64] Moyse's evidence was that he did not have advanced knowledge about computers but was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently-deleted material.

[65] Moyse did some internet searches on how to ensure a complete deletion of his internet browsing history. He came to believe that "cleaning" the computer's registry following the deletion of the internet history would ensure the permanent deletion of the history.

[66] Moyse then purchased the "RegCleanPro" product on July 12, 2014 to delete his internet browser history and four days later purchased the "Advanced System Optimizer" ("ASO") program which contains a suite of programs for personal computer tune-up. One product on the ASO suite is a program called "Secure Delete".

[67] Moyse made no efforts to hide the purchase of these products. The payment receipts and license keys for Moyse's purchases of the two Systweak products were found by the ISS in his electronic personal mail box.

[68] On Sunday, July 20, 2014, the day before Moyse was scheduled to deliver his computer and other devices to counsel, he (i) opened the RegClean Pro and ASO software products on his computer, (ii) looked into how each operated, and (iii) ran the "RegCleanPro" software to clean up the computer registry after he deleted his internet browser history.

b) Deleting personal browsing history

[69] With respect to the first impugned act, there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches.

[70] The Consent Order only requires Moyse to preserve and maintain records "that relate to Catalyst", "relate to their activities since March 27, 2014" or "are relevant to any of the matters raised in this action".

[71] If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.

[72] Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

[73] Catalyst's submission as to the purported contempt is that the court should find, on a standard of beyond reasonable doubt, that Moyse's deletion of his personal browsing history resulted in deletion of any references to his searching his "Dropbox" files, and that such searches would have been relevant as evidence that Moyse was taking confidential information with him prior to departing Catalyst.

[74] However, the evidence does not support a finding beyond a reasonable doubt that there were such files on Moyse's personal computer. It is not enough for Catalyst to speculate

that in the course of deleting his personal browsing history, Moyse may have deleted references to searches of Dropbox files.

[75] The Amended Report of the ISS, dated March 13, 2015, states that Digital Evidence International ("DEI"), the forensic computer expert retained by the ISS, searched Moyse's iPad and found over 1,000 "Catalyst" documents in Moyse's iPad Dropbox. The ISS stated:

> DEI was able to generate a list of documents accessible from this device from the 'Dropbox' iOS application. The iPad contained records for some 1,327 total documents which were recorded by the operating system as accessible to the user at some point in time. Of these documents, a total of 1,017 documents were contained in a folder entitled 'Catalyst'. I have attached as **Appendix 'N'** a copy of the list of files contained within the 'Catalyst' folder, from the data supplied by DEI. The data generated also include a record of the last time that each file was recorded to have been accessed by the user, which is contained within that spreadsheet. I note that there are no records of the documents in the Dropbox being reviewed on any date subsequent to April 16, 2014, and therefore no evidence that the Dropbox files were viewed subsequent to Moyse's departure from Catalyst on the iPad device. [Emphasis in original.]

[76] Catalyst seeks to rely on Moyse's evidence that he accessed Dropbox from time to time, and as such, relevant search history from his computer must have been deleted. However, there was no evidence as to whether Moyse accessed Dropbox through his personal computer or his iPad. Moyse's evidence was that he did not know whether he accessed Dropbox through an "app" (which could have been on his iPad) or by internet (which could also have been through his iPad) (see questions 254-260 of his cross-examination transcript).

[77] Further, Moyse was asked by Catalyst counsel that "if I'm correct that your Dropbox, your history of accessing Dropbox, was retained in your browsing history, you would also have been successful in deleting that, right?" Moyse answered that "I access my Dropbox through a variety of other means" (see questions 294-300 of his cross-examination transcript).

[78] Consequently, there is no evidence, on the standard of beyond reasonable doubt, that Moyse deleted Dropbox information from his personal computer when he deleted his personal browsing history and ran the registry cleaner. Given the over 1000 "Catalyst" files on his iPad Dropbox account, and Moyse's explanation that he may have accessed Dropbox files through an "app", I cannot find (on a standard of beyond reasonable doubt) that Moyse deleted his personal browsing history relevant to Dropbox from his personal computer and as such, I cannot find contempt of court for deleting relevant information from his personal computer.

[79] I note that even if I found that it was beyond reasonable doubt that Moyse deleted relevant Dropbox searches from his personal computer, I would exercise my discretion to decline to making a finding of contempt as such conduct would have occurred as a result of Moyse's "good faith" efforts to comply with the Consent Order while deleting embarrassing personal files which were not relevant to the litigation.

c) Use of the Secure Delete program

[80] Catalyst submits that it is beyond reasonable doubt that Moyse ran the Secure Delete program to delete relevant files from his personal computer. I do not agree that the evidence supports such a conclusion.

[81] First, all of the forensic experts agreed that the presence of a Secure Delete folder on Moyse's system is not evidence that he ran the program.

[82] DEI, on behalf of the ISS, indicated that it could not conclude from the presence of a folder whether the program had been used to delete files. Musters, the forensic expert retained by Catalyst, acknowledged on cross-examination that "the Secure Delete program was launched, but it doesn't yet speak to whether or not files or folders were deleted". Lo, the forensic expert retained by Moyse, gave the same opinion, *i.e.*, that the presence of a Secure Delete folder is not evidence that Moyse ran the program.

[83] Second, Lo's evidence was that he had conducted a complete forensic analysis of Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Moyse's computer. Lo's expert opinion evidence was that if the Secure Delete program had been run on the computer, a log would have been found which maintains records of the files deleted (the "Secure Delete Log"), but no such log exists on Moyse's computer.

[84] Catalyst's expert, Musters, initially gave opinion evidence that it was a "relatively simple" matter to "reset" the Secure Delete Log by using a function called Registry Editor to hide any trace of having run the program. Musters did not append as an exhibit to his affidavit the "publicly available information" on which he relied. Musters maintained his position in cross-examination. However, in an answer to an undertaking, Musters sought to "correct an error in his testimony" in that "the [publicly-available] information includes advice on the removal of the entire ASO program".

[85] Consequently, the evidence is that Moyse could not have easily deleted only the Secure Delete Log with publicly-available information. Instead, the conclusion sought by Catalyst, at a level of beyond reasonable doubt, is that Moyse ran Secure Delete to remove files and then (i) obtained information which explained how to remove the ASO software from his computer, (ii) chose not to use that information to remove all traces of that ASO software, (iii) instead removed only the Secure Delete Log files of the ASO (though Musters did not provide any publicly-available information which would simply instruct Moyes how to do so), (iv) but still left the ASO software, receipts, and emails in place to be easily found by a forensic investigator.

[86] I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO

software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

[87] For the above reasons, I dismiss the Contempt Motion.

Order and costs

[88] Consequently, I dismiss Catalyst's motion in its entirety. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a costs outline), to be delivered by West Face and Moyse within 14 days of this order, with Catalyst to respond within 14 days from receipt of the Defendants' submissions. The Defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of Catalyst's costs submissions.

GLUSTEIN J.

Date: 20150707

This is Exhibit "13" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

Court of Appeal File No. C60799
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

NOTICE OF APPEAL

THE PLAINTIFF APPEALS to the Court of Appeal from the Order of Justice Glustein dated July 7, 2015, made at Toronto.

THE APPELLANT ASKS that the Order be set aside and an Order be granted as follows:

1. An Order authorizing an Independent Supervising Solicitor ("ISS") to attend the Defendant West Face Capital Inc.'s premises to create forensic images of all electronic devices, including computers and mobile devices of the principals of West Face (the "Images") and to prepare a report which shall:

    a. identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was

located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and

b. in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:

i. who authored the email;

ii. to whom the email was sent, copied and/or blind copied;

iii. the date and time when the email was sent;

iv. the subject line of the email;

v. whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);

vi. the contents of the email; and

vii. if the email was deleted, when the email was deleted.

2. A declaration and finding that the Defendant Brandon Moyse is in contempt of the Order of Justice Firestone dated July 16, 2014 (the "Interim Order");

3. An Order that the determination of the appropriate sanction for Brandon Moyse's contempt be determined by another Judge of the Superior Court of Justice;

4. An award of costs of the motion below and this appeal; and

5. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

A. Background to this Action

1. The Appellant ("Catalyst") is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

2. The Respondent West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

3. The Respondent Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014.

4. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

5. On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

6. Shortly thereafter, Catalyst commenced this action and brought an urgent motion for injunctive relief seeking, among other things, preservation of documents and enforcement of the Non-Competition Covenant.

B. The Interim Order

7. On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

8. On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to the Interim Order, pursuant to which, among other things:

(a) The Respondents were ordered to preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against the Respondents; and

(b) Moyse was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image the data stored on the Devices (the "Images"), to be held in trust by his counsel pending the outcome of the motion for interlocutory relief.

C. Moyse's Contempt of the Interim Order

9. Catalyst's motion for interlocutory relief was heard on October 27, 2014. On November 10, 2014, Justice Lederer of the Superior Court of Justice released his decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images.

10. On February 17, 2015, the ISS delivered a its report (the "ISS Report") to counsel for Catalyst and Moyse.

11. The ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

12. Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images. On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

13. On Sunday, July 20, 2014, at 8:09 p.m., Moyse ran the Secure Delete programme on his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer.

14. In addition, Moyse admits that on July 20, 2014, he deleted his Internet browsing history from his personal computer. Moyse's browsing history would have included information related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

15. As a result of Moyse's conduct, it is impossible to know for sure what information, files and/or folders he deleted on July 20, 2014.

16. By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse acted in contempt of Court.

17. The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

18. The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme and deletion of his Internet browsing history on July 20, 2014, was a breach of the Interim Order.

19. It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

20. Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

21. Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

22. As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

D. Appeal of the Contempt Decision

23. The motion judge erred in dismissing the Appellant's motion for a declaration that Moyse acted in contempt of the Interim Order:

(a) The motion judge erred in interpreting the Interim Order to mean that "activities that relate to [the Respondents'] activities since March 27, 2014 was not intended to encompass all of the Respondents' activities, and/or that if this was the intended meaning, then the Interim Order was ambiguous.

(b) The motion judge erred in concluding that there was no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of his Internet searches.

(c) In particular, the motion judge erred in concluding that the Appellant could only speculate that information deleted from Moyse's computer included evidence of Moyse's activities related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

(d) In addition, the motion judge erred in concluding that, even if Moyse had acted in contempt of the Interim Order, it was appropriate to exercise his discretion to decline to make a finding of contempt. Such discretion is limited to situations

where a finding of contempt would impose an injustice in the circumstances of the case, and is not available in situations where a party's acts in violation of an order make subsequent compliance impossible.

E. Appeal of the ISS Decision

24. The motion judge erred in dismissing the Appellant's motion to create forensic images of the electronic images belonging to the principals of West Face and for the appointment of an ISS to review those images.

25. Justice Lederer had already determined that it was appropriate to authorize an ISS to review the Images of Moyse's devices prior to the discovery process in this Action.

26. As a result of Moyse's conduct, described above, the ISS's review of Moyse's devices was tainted in a manner unanticipated by Justice Lederer.

27. The creation of forensic images of West Face's devices for review of an ISS prior to the discovery process in this Action is necessary to give effect to the Order of Justice Lederer, from which leave to appeal was unsuccessfully sought by the Respondents.

28. The motion judge erred by failing to consider the need to create the Images of West Face's devices and for an ISS review in order to give effect to the Order of Justice Lederer in this Action.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: *(State the basis for the appellate court's jurisdiction, including (i) any provision of a statute or regulation establishing jurisdiction, (ii) whether the order appealed from is final or interlocutory, (iii) whether leave to appeal is required*

1. Sections 6(1)(b) and 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;

2. The Order of Justice Glustein dismissing the Plaintiff's contempt motion is final;

3. The Order of Justice Glustein dismissing the Plaintiff's motion for an ISS is an interlocutory order in the same proceeding as the contempt motion, which lies to and is taken to the Court of Appeal; and

4. Leave to appeal is not required.

July 22, 2015

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THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

BRANDON MOYSE et al.
Defendants (Respondents)

Court of Appeal File No.
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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28B9

This is Exhibit "14" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

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File 23622

July 24, 2015

VIA EMAIL

Andrew Winton
Lax O'Sullivan Scott Lisus LLP
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Dear Mr. Winton:

Re: The Catalyst Capital Group Inc. v. Brandon Moyse et al.
Court File No. CV-14-507120

We have received your client's notice of appeal to the Court of Appeal purporting to appeal the Order of Justice Glustein dated July 7, 2015, which dismissed your client's motion to have Mr. Moyse found in contempt of court (the "Order"),.

The notice of appeal states that the Order is final, and that therefore an appeal lies to the Court of Appeal pursuant to s. 6(1)(b) and 6(2) of the *Courts of Justice Act*.

This is not correct in law. The Order is interlocutory, not final: *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.). I have enclosed a copy of the decision for your reference.

An appeal of the Order only lies to the Divisional Court, with leave, pursuant to s. 19(1)(b) of the *Courts of Justice Act* and rule 62.02 of the *Rules of Civil Procedure*. The Court of Appeal has no jurisdiction to hear the appeal.

If your client withdraws the notice of appeal within five business days, Mr. Moyse will not seek costs against your client. If your client does not do so, we will bring a motion to strike the notice of appeal, and will rely on this letter to seek substantial indemnity costs on success of that motion.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Kris Borg-Olivier

Encl.

c: Matthew Milne-Smith / Andrew Carlson

Case Name:

Simmonds v. Simmonds

Between
Garfield Simmonds, Applicant (Appellant), and
Michelle Simmonds, Respondent (Respondent in Appeal)

[2013] O.J. No. 4680

2013 ONCA 479

117 O.R. (3d) 479

Docket: C56555

Ontario Court of Appeal
Toronto, Ontario

A. Hoy A.C.J.O., K.N. Feldman and J.M. Simmons JJ.A.

Heard: July 5, 2013.
Oral judgment: July 5, 2013.
Released: July 16, 2013.

(6 paras.)

Family law -- Maintenance and support -- Practice and procedure -- Courts -- Jurisdiction -- Contempt -- Orders -- Interim or interlocutory orders -- Appeals and judicial review -- Appeal by husband from dismissal of motion for a finding wife was in contempt for failing to comply with court order dismissed -- Motion judge found wife complied with order that required her to provide disclosure in respect of her income loss claim arising from motor vehicle accident that occurred in 2004 -- Court lacked jurisdiction as motion judge's order was interlocutory and not binding on trial judge.

Appeal From:

On appeal from the order of Justice E. Ria Tzimas of the Superior Court of Justice, dated January 22, 2013.

Counsel:

Peter M. Callahan, for the appellant.

Orlando da Silva Santos, for the respondent.

ENDORSEMENT

The judgment of the Court was delivered by

1 THE COURT (orally):-- The appellant appeals the January 22, 2013 order of the motion judge dismissing his motion for a finding that the respondent was in contempt of court because she had failed to comply with the August 3, 2012 order of Mossip J. requiring her to provide specified disclosure in respect of her income loss claim arising from the motor vehicle accident that occurred in 2004.

2 The motion judge reviewed the materials that had been provided and found that the respondent had complied with the order of Mossip J. and provided all relevant disclosure.

3 The appellant relies on *Pimiskern v. Brophey*, [2013] O.J. No. 505 to argue that an order dismissing a motion for contempt is a final order.

4 The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, the motion judge's order is interlocutory and not binding on the trial judge, and that an appeal accordingly does not lie to this court.

5 We agree with the respondent and reject the conclusion reached in *Pimiskern*.

6 This appeal is accordingly dismissed for lack of jurisdiction. Costs are fixed in the amount of $3,500 all inclusive.

A. HOY A.C.J.O.
K.N. FELDMAN J.A.
J.M. SIMMONS J.A.

cp/e/qljel/qlrdp/qlmll/qlpmg/qlhcs

This is Exhibit "15" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

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July 24, 2015

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File No. 250486

WITH PREJUDICE

BY E-MAIL

Andrew Winton / Rocco Di Pucchio
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RE: The Catalyst Capital Group Inc. v. Moyse et. al. (Court File No. CV-14-507120)

Dear Andrew and Rocco:

We have reviewed your client's Notice of Appeal and Appellant's Certificate served July 22, 2015, as well as Mr. Borg-Olivier's letter of today's date and the 2013 *Simmonds v. Simmonds* decision of the Court of Appeal enclosed therein.

First, we note that Catalyst's Notice of Appeal recognizes that Justice Glustein's dismissal of the relief sought against West Face is an interlocutory order, as opposed to a final one, for the purposes of determining appeal routes. Second, we agree with Mr. Borg-Olivier that Justice Glustein's dismissal of Catalyst's motion for contempt against Mr. Moyse is also interlocutory. Therefore, no appeal of Justice Glustein's Order lies to the Court of Appeal, and section 6(2) of the *Courts of Justice Act* has no application to the appeal of the relief sought against West Face. Rather, as noted by Mr. Borg-Olivier, any appeal of the Order lies to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

In light of the foregoing, we agree that the Court of Appeal has no jurisdiction to hear the appeal. If Catalyst withdraws the Notice of Appeal within five business days, West Face will not seek costs against it. If not, West Face will join and/or support Mr. Moyse in the motion to strike the Notice of Appeal, and will seek substantial indemnity costs against Catalyst on success of that motion.

Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP

Matthew Milne-Smith

MMS/

cc Andrew Carlson, Kris Borg-Olivier, Rob Centa

This is Exhibit "16" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Parties)

FACTUM OF THE MOVING PARTY DEFENDANT (RESPONDENT) WEST FACE CAPITAL INC. (MOTION TO QUASH APPEAL)

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PART I - OVERVIEW

1. A motion for an interlocutory injunction is by definition interlocutory and not final. To prevent unnecessary appeals from grinding actions to a halt, leave to appeal to the Divisional Court is required. The Plaintiff, however, has tried to leapfrog directly to the Court of Appeal without seeking or obtaining leave. This Court should quash the Plaintiff's Notice of Appeal for want of jurisdiction.

2. Catalyst's Notice of Appeal explicitly concedes that Justice Glustein's dismissal of the relief Catalyst sought against West Face (the "**West Face Order**") is an interlocutory order, not a final one. Catalyst claims jurisdiction in this Court solely by "piggybacking" the West Face appeal on to the appeal of its dismissed contempt motion against Mr. Moyse (the "**Moyse Order**"), which Catalyst claims lies to this Court. As a result, if the Moyse Order is also interlocutory, Catalyst has implicitly conceded that this Court has no jurisdiction over the appeal of the West Face Order.

3. West Face adopts and relies upon the submissions of Mr. Moyse that the Moyse Order is interlocutory. If those submissions are accepted, then West Face's additional submissions need not be considered.

4. Moreover, even if the Moyse Order were final (which is denied), Catalyst's reliance on section 6(2) of the *Courts of Justice Act* is misplaced and the appeal of the West Face Order must be quashed in any event. Section 6(2) only allows appeals of interlocutory orders to be taken to this Court once leave to appeal to the Divisional Court has been granted. Catalyst has neither sought nor obtained leave to appeal.

5. Furthermore, and in the alternative, section 6(2) is discretionary, and this Court should exercise its discretion to not hear the appeal of the West Face Order.

6. In sum, Catalyst's appeal of the West Face Order lies to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*. The purported appeal to this Court should be quashed.

PART II - THE FACTS

7. The Plaintiff, The Catalyst Capital Group Inc., brought a motion in the Superior Court of Justice (Court File No.: CV-14-507120) for three exceptional remedies against the Defendants:[1]

(a) first, an *interlocutory* injunction prohibiting the Defendant West Face Capital Inc. from voting its 35% share interest in WIND Mobile pending a determination of the issues raised in the action (the "**Voting Injunction**");

(b) second, an *interlocutory* order authorizing an Independent Supervising Solicitor (an "**ISS**") to create and review forensic images of West Face's servers and the electronic devices used by five individuals at West Face, at the expense of Mr. Moyse and West Face, to take place before discovery (the "**Imaging Order**"; the West Face Order dismissed Catalyst's motion for the Voting Injunction and the Imaging Order); and

(c) third, an Order that Mr. Moyse was in contempt of the interim consent Order of Justice Firestone dated July 16, 2014 (the "**Contempt Order**").[2]

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1 See paragraph 1 of the Endorsement of Justice Glustein dated July 7, 2015 (the "**Endorsement**"), Brandon Moyse's Motion Record, Tab 3.

2 In fact, the relief sought by Catalyst against both West Face and Mr. Moyse in its Amended Notice of Motion was even more expansive. Catalyst narrowed its requests for relief to the Orders set out above only in its factum, after extensive affidavit evidence and cross-examination. See Catalyst's Amended Notice of Motion dated February 6, 2015, Brandon Moyse's Motion Record, Tab 5.

8. The Honourable Justice Glustein heard Catalyst's motion on July 2, 2015, and on July 7, 2015 His Honour released reasons dismissing Catalyst's motion in its entirety (the "**Endorsement**").[3]

9. Catalyst served its Notice of Appeal on July 22, 2015,[4] purporting to appeal the West Face Order directly to the Court of Appeal, on the basis of sections 6(1)(b) and 6(2) of the *Courts of Justice Act*.[5] Catalyst is not appealing Justice Glustein's dismissal of the Voting Injunction, but only the Imaging Order. However, Catalyst has never sought leave to appeal the dismissal of the Imaging Order.

10. 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.

PART III - ISSUES AND THE LAW

11. There are three issues on this motion:

(a) first, whether the Moyse Order is interlocutory, in which case the entire appeal must be quashed and the next two questions need not be considered;

(b) second, does this Court lack jurisdiction to hear Catalyst's appeal of the West Face Order[6] pursuant to section 6(2) of the *Courts of Justice Act*;

(c) third, even if this Court could assume jurisdiction to hear the appeal, whether it should exercise its discretion not to do so.

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3 Endorsement, Brandon Moyse's Motion Record, Tab 3. See also the Order of Justice Glustein dated July 7, 2015 (the "**Order**"), Brandon Moyse's Motion Record, Tab 2.

4 Notice of Appeal of Catalyst dated July 22, 2015 Brandon Moyse's Motion Record, Tab 7.

5 Notice of Appeal of Catalyst, at pp. 8-9, Brandon Moyse's Motion Record, Tab 7.

6 Recognizing in this context that Catalyst purports to appeal only the dismissal of the Imaging Order, not the Voting Injunction.

12. For the reasons set out below, West Face respectfully submits that the answer to these questions is "yes". West Face adopts and relies on Mr. Moyse's submissions on the first issue.

A. This Court Does Not Have Jurisdiction to Hear the Appeal

13. Even if the Moyse Order were interlocutory, this Court does not have jurisdiction to hear Catalyst's appeal of the West Face Order under section 6(2) of the *Courts of Justice Act*. An appeal of the West Face Order only "lies to the Divisional Court" within the meaning of section 6(2) once leave to appeal that Order has been granted, and Catalyst has not been granted leave to appeal the West Face Order.

14. Generally, appeals of interlocutory orders of judges lie to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act*. This section provides:[7]

> **Divisional Court jurisdiction**
>
> 19. (1) An appeal lies to the Divisional Court from,
>
> (b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

15. In order to avoid section 19(1)(b), Catalyst purports to appeal both the Moyse Order and the West Face Order to the Court of Appeal, on the basis of sections 6(1)(b) and 6(2) of the *Courts of Justice Act*. Those sections provide:[8]

> **Court of Appeal jurisdiction**
>
> 6. (1) An appeal lies to the Court of Appeal from,

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7 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19(1)(b).

8 *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 6(1)(b) and 6(2).

> (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19(1)(a) or an order from which an appeal lies to the Divisional Court under another Act;
>
> **Combining of appeals from other courts**
>
> (2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

16. In relying on these provisions, Catalyst explicitly recognized that the West Face Order is an *interlocutory* order for the purposes of determining appeal routes. Indeed, in its Notice of Appeal, Catalyst stated:

> The Order of Justice Glustein dismissing the Plaintiff's motion for an ISS **is an interlocutory order** in the same proceeding as the contempt motion, which lies to and is taken to the Court of Appeal;[9] [emphasis added]

17. For the reasons set out in Mr. Moyse's factum, the appeal of the Moyse Order does not lie to the Court of Appeal. However, even if it did, this Court would still have no jurisdiction under section 6(2) of the *Courts of Justice Act* to hear the appeal of the interlocutory West Face Order, because Catalyst has not obtained leave to appeal.

18. As very recently confirmed by this Court in the 2015 decision of *Waldman v. Thomson Reuters Canada Ltd.*:

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[9] Notice of Appeal of Catalyst, Brandon Moyse's Motion Record, Tab 7. As an aside, we note that even if Catalyst had not conceded this point, there is no doubt that the West Face Order is interlocutory. Catalyst's motion for the Imaging Order was in the nature of an *Anton Piller* injunction or a premature motion under Rule 30.06 (Justice Glustein made no finding as to whether the onerous test for an *Anton Piller* order applied because he agreed with West Face that even under the lower Rule 30.06 threshold, Catalyst's motion failed: See paragraph 43 of the Endorsement). *Anton Piller* motions and motions under Rule 30.06 are interlocutory. See, for example, *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2001] O.J. No. 477 (Div. Ct.), West Face's Book of Authorities, Tab 8, in which the defendants properly sought leave to appeal to the Divisional Court from a decision granting an *Anton Piller* Order (pursuant to Rule 19(1)(b) of the *Courts of Justice Act*), and *Leduc v. Roman*, [2009] O.J. No. 681 (S.C.J.), West Face's Book of Authorities, Tab 6, in which a master's order dismissing a Rule 30.06 motion was appealed to a single judge of the Superior Court (pursuant to section 17(a) of the *Courts of Justice Act*, which provides that an appeal lies to the Superior Court of Justice from an interlocutory order of a master).

> **An appeal from an interlocutory order only "lies to the Divisional Court" within the meaning of s. 6(2) once leave to appeal that order has been granted**: ... If the motion judge's order refusing to approve the settlement agreement was interlocutory, then this court still would not have jurisdiction to hear the appeal from that order under s. 6(2) of the *CJA* unless and until the appellant obtained leave to appeal to the Divisional Court. Only then could the appellant bring a motion, under s. 6(3) of the *CJA* to transfer that appeal to this court. Section 6(3) of the *CJA* provides that:
>
> > The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2).[10] [emphasis added]

19. In other words, Catalyst was required to first seek and obtain leave to appeal the West Face Order before it could then invoke section 6(2).

20. This Court has applied the foregoing principle repeatedly dating back to the 1993 decision of *Albert v. Spiegel.*[11] As explained in *Albert*, under section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02(1), appeals of interlocutory orders can only be made with leave from a judge of the Superior Court of Justice other than a judge who made the interlocutory order.[12] Section 6(2) of the *Courts of Justice Act* does not give the Court of Appeal the jurisdiction or authority to either grant such leave or otherwise

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10 *Waldman v. Thomson Reuters Canada Ltd.*, [2015] O.J. No. 395 at para. 17 (C.A.) [*Waldman*], West Face's Book of Authorities, Tab 9.

11 See *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.) [*Albert*], West Face's Book of Authorities, Tab 2; *Merling v. Southam Inc.*, [2000] O.J. No. 123 (C.A.), West Face's Book of Authorities, Tab 7; *Cole v. Hamilton (City)*, [2002] O.J. No. 4688 (C.A.), West Face's Book of Authorities, Tab 4; and *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2004] O.J. No. 10 (C.A.) [*Diversitel*], West Face's Book of Authorities, Tab 5. See also *813302 Ontario Ltd. v. 815970 Ontario Inc.*, [1996] O.J. No. 4531 (C.A.), West Face's Book of Authorities, Tab 1.

12 Pursuant to Rule 62.02(1.1), in Toronto, motions for leave to appeal are heard by a judge of the Divisional Court sitting as a judge of the Superior Court of Justice. *Rules of Civil Procedure*, R.R.0. 1990, Reg. 194, R. 62.02(1) & (1.1).

ignore that essential pre-requisite.[13] In short, this Court cannot grant Catalyst the leave it requires.

21. This Court's decision in *Diversitel Communications Inc. v. Glacier Bay Inc.* is particularly relevant to this motion. In *Diversitel*, the appellant, Glacier Bay, brought a motion for the production of documents by the respondent, Diversitel. Diversitel brought a cross-motion for summary judgment. The motions judge dismissed Glacier Bay's motion for the production of documents and, at the same time, allowed Diversitel's cross-motion (thereby rendering judgment in favour of Diversitel and dismissing Glacier Bay's counterclaim). Glacier Bay then sought to appeal, to the Court of Appeal, both the final order granting judgment against it and dismissing its counterclaim, and the interlocutory order of the motions judge dismissing its motion for the production of documents, without having obtained leave to appeal the interlocutory order. Diversitel brought a motion for an order quashing that part of the appeal which related to the motions judge's refusal to order the production of documents. In allowing Diversitel's motion, this Court stated:

> The decision of the motions judge refusing to order the production of documents is clearly interlocutory and leave to appeal must be obtained from a judge of the Divisional Court pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 even though the appellant has a right of appeal to this court on the judgment and the dismissal of the counter-claim. If the Divisional Court grants leave then the appellant may bring a motion pursuant to s. 6(2) of the *Courts of Justice Act* for an order directing that the productions issue be heard with the appeal related to the judgment in the action and the dismissal of the counter-claim... I would therefore quash that part of the appeal which relates to the productions issue.[14]

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13 *Albert*, *supra* note 11 at para. 5, West Face's Book of Authorities, Tab 2.

14 *Diversitel*, *supra* note 11 at para. 6, West Face's Book of Authorities, Tab 5.

22. The strictness of the rule that leave must have been previously obtained before section 6(2) can apply is intentional and important. If this rule did not exist, a litigant could obtain an unfair advantage by effectively bypassing the important threshold test necessary for obtaining leave to appeal. The rule's importance is evident from *Waldman* itself, in which this Court quashed the appeal despite the fact that both the appellant and the respondent were allied in interest and argued in favour of this Court's jurisdiction.[15]

23. In sum, even if Catalyst could satisfy the first requirement of section 6(2) – that "an appeal in the same proceeding" as the West Face Order "lies to and is taken to the Court of Appeal" (which is denied for the reasons set out above) – Catalyst has not satisfied the second requirement of section 6(2). It must first obtain leave to appeal pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

B. In the Alternative, this Court Should Exercise its Discretion Not to Hear the Appeal

24. Even if this Honourable Court could assume jurisdiction to hear the appeal of the West Face Order on the basis that the order with respect to Mr. Moyse is final, and not interlocutory (which is denied for the reasons set out above), it should exercise its discretion not to do so.

25. In the 2013 decision of *Cavanaugh v. Grenville Christian College*, this Court confirmed that the jurisdiction to combine appeals under section 6(2) of the *Courts of Justice Act* is discretionary, not mandatory. The Court noted that while the purposes of

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[15] *Waldman*, *supra* note 10 at paras. 1-3 and 25, West Face's Book of Authorities, Tab 10.

section 6(2) include to promote consistent results, decrease costs, and use judicial resources efficiently, there will be cases when "factors relevant to the administration of justice" override the efficiencies achieved by combing appeals.[16]

26. Indeed, the Court held that *Cavanaugh* was one such case, and refused to hear the appeal of an interlocutory order even though it had jurisdiction to hear the appeal of a final order made in the same proceeding. The Court reasoned that, in the circumstances of that case, there was "little to be gained by joinder", because there was "no risk of inconsistent results and very little overlap in the matters to be addressed on the two appeals".[17]

27. The Court's reasoning in *Cavanaugh* applies to Catalyst's dual appeals of the Moyse Order and the West Face Order. The motion for (and the appeal of) the Moyse Order depends solely on whether Mr. Moyse acted in contempt of the previous interim Order of Justice Firestone by: (i) deleting his personal web browsing history; and (ii) buying and allegedly using "scrubbing" software. As is apparent from Justice Glustein's Endorsement, West Face had no involvement in Mr. Moyse's browsing or scrubbing history.

28. Conversely, the West Face Order turned on whether there was any evidence that West Face attempted to destroy evidence or otherwise evade its discovery obligations. The determination of Catalyst's motion for the West Face Order had nothing to do with whether Mr. Moyse acted in contempt of the previous Order of Justice Firestone.

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16 *Cavanaugh v. Grenville Christian College*, [2013] O.J. No. 1007 at paras. 86-87 (C.A.) [*Cavanaugh*], West Face's Book of Authorities, Tab 3.

17 *Cavanaugh*, *supra* note 16 at para. 88, West Face's Book of Authorities, Tab 3.

29. Catalyst's argument that the two orders are linked is further undermined by its own conduct. When Catalyst initially launched its motion in January 2015, it sought relief against West Face only, and the grounds for such relief (as stated in Catalyst's original Notice of Motion) did not include any allegation of contempt by Mr. Moyse. In other words, Catalyst itself believed that it had grounds to seek the West Face Order independent of any alleged contempt by Mr. Moyse. Catalyst only amended its Notice of Motion in February 2015 to add the allegations of contempt against Mr. Moyse.[18]

30. In short, Catalyst's appeals of the orders sought against the two Respondents are completely distinct. They are based on different facts and different law. There would be little to nothing gained by hearing the two appeals together.

31. On the other hand, scarce judicial resources will be wasted if Catalyst is permitted to circumvent the important step of obtaining leave. Catalyst has not proven: (a) that there is a conflicting decision and that it is desirable that leave to appeal be granted; nor (b) that there is good reason to doubt the correctness of Justice Glustein's decision and that the proposed appeal involves matters of importance that transcend the interests of the parties such that leave to appeal should be granted.[19] Until Catalyst can prove that it can meet this conjunctive test, then by definition Catalyst's motion is not worthy of consideration on appeal.

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[18] See Catalyst's Notice of Motion dated January 13, 2015, Brandon Moyse's Motion Record, Tab 4; and Catalyst's Amended Notice of Motion dated February 6, 2015, Brandon Moyse's Motion Record, Tab 5.

[19] Rule 62.02(4) provides that leave to appeal "shall not be granted" unless these grounds are met. See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 62.02(4).

C. Conclusion

32. The Court of Appeal has no jurisdiction to hear the appeal of the West Face Order. Because the Moyse Order and the West Face Order are both interlocutory, any appeal of either or both of them lies to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

PART IV - ORDER REQUESTED

33. West Face respectfully requests that Catalyst's Notice of Appeal be quashed, with costs on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2015.

Matthew Milne-Smith
DAVIES WARD PHILLIPS & VINEBERG LLP

Lawyer for the Moving Party Defendant
(Respondent), West Face Capital Inc.

Andrew Carlson
DAVIES WARD PHILLIPS & VINEBERG LLP

Lawyer for the Moving Party Defendant
(Respondent), West Face Capital Inc.

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *813302 Ontario Ltd. v. 815970 Ontario Inc.*, [1996] O.J. No. 4531 (C.A.)
2. *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.)
3. *Cavanaugh v. Grenville Christian College*, [2013] O.J. No. 1007 (C.A.)
4. *Cole v. Hamilton (City)*, [2002] O.J. No. 4688 (C.A.)
5. *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2004] O.J. No. 10 (C.A.)
6. *Leduc v. Roman*, [2009] O.J. No. 681 (S.C.J.)
7. *Merling v. Southam Inc.*, [2000] O.J. No. 123 (C.A.)
8. *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2001] O.J. No. 477 (Div. Ct.)
9. *Waldman v. Thomson Reuters Canada Ltd.*, [2015] O.J. No. 395 (C.A.).

TAB B

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, Ch. C.43.

Court of Appeal jurisdiction

6. (1) An appeal lies to the Court of Appeal from,

(a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;

(b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;

(c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17).

Combining of appeals from other courts

(2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Idem

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Appeals to Superior Court of Justice

17. An appeal lies to the Superior Court of Justice from,

(a) an interlocutory order of a master or case management master;

(b) a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 17; 1996, c. 25, ss. 1 (1), 9 (17).

Divisional Court jurisdiction

19. (1) An appeal lies to the Divisional Court from,

(a) a final order of a judge of the Superior Court of Justice, as described in subsections (1.1) and (1.2);

(b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

(c) a final order of a master or case management master. 2006, c. 21, Sched. A, s. 3.

***Rules of Civil Procedure*, R.S.O. 1990, Reg. 194**

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

30.06 Where the court is satisfied by any evidence that a relevant document in a party's possession, control or power may have been omitted from the party's affidavit of documents, or that a claim of privilege may have been improperly made, the court may,

(a) order cross-examination on the affidavit of documents;

(b) order service of a further and better affidavit of documents;

(c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and

(d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege. R.R.O. 1990, Reg. 194, r. 30.06.

MOTION FOR LEAVE TO APPEAL

Leave to Appeal from Interlocutory Order of a Judge

62.02 (1) Leave to appeal to the Divisional Court under clause 19 (1) (b) of the *Courts of Justice Act* shall be obtained from a judge other than the judge who made the interlocutory order. O. Reg. 171/98, s. 23 (1); O. Reg. 170/14, s. 22 (1).

(1.1) If the motion for leave to appeal is properly made in Toronto, the judge shall be a judge of the Divisional Court sitting as a Superior Court of Justice judge. O. Reg. 171/98, s. 23 (1); O. Reg. 292/99, s. 2 (2).

Motion in Writing

(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 170/14, s. 22 (2).

Notice of Motion

(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifications, to the notice of motion for leave. O. Reg. 170/14, s. 22 (2).

Grounds on Which Leave May Be Granted

(4) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4).

Procedures

(5) Subrules 61.03.1 (4) to (19) (procedure on motion for leave to appeal) apply, with the following and any other necessary modifications, to the motion for leave to appeal:

1. References in the subrules to the Court of Appeal shall be read as references to the Divisional Court.

2. For the purposes of subrule 61.03.1 (6), only one copy of each of the motion record, factum, any transcripts and any book of authorities is required to be filed.

3. For the purposes of subrule 61.03.1 (10), only one copy of each of the factum, any motion record and any book of authorities is required to be filed. O. Reg. 170/14, s. 22 (3).

(6), (6.1), (6.2) REVOKED: O. Reg. 170/14, s. 22 (3).

(6.3) REVOKED: O. Reg. 394/09, s. 30 (3).

Reasons for Granting Leave

(7) The judge granting leave shall give brief reasons in writing. R.R.O. 1990, Reg. 194, r. 62.02 (7).

Subsequent Procedure Where Leave Granted

(8) Where leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and thereafter Rule 61 applies to the appeal. R.R.O. 1990, Reg. 194, r. 62.02 (8).

THE CATALYST CAPITAL GROUP INC.
Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE MOVING PARTY, WEST FACE CAPITAL INC. (MOTION TO QUASH)

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

Matthew Milne-Smith LSUC #44266P
Andrew Carlson LSUC #55850N
Tel: 416.863.0900
Fax: 416.863.0871

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

This is Exhibit "17" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meerapersaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE ASSOCIATE CHIEF JUSTICE HOY	)	THURSDAY THE 5TH
THE HONOURABLE JUSTICE MACFARLAND	)	DAY OF NOVEMBER, 2015
THE HONOURABLE JUSTICE LAUWERS	)	

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Party)

ORDER

THIS MOTION by the Defendant (Respondent) West Face Capital Inc. ("**West Face**") for an Order quashing the Plaintiff's appeal from the Order of Justice Glustein dated July 7, 2015 dismissing the Plaintiff's motion heard July 2, 2015, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the Motion Records, Facta, and Books of Authorities filed by "on the consent of" the parties, and on hearing the submissions of counsel for the parties:

1. THIS COURT ORDERS that the appeal bearing Court of Appeal court file number C60799 is hereby dismissed as against West Face.

2. THIS COURT ORDERS that the dismissal of the appeal against West Face is without prejudice to any future motion by the Plaintiff to transfer an appeal from the Order of Justice Glustein dated July 7, 2015, that lies to the Divisional Court, to this Court.

3. THIS COURT ORDERS that the costs of this motion are fixed in the amount of $2,500.00 (inclusive of disbursements and HST) and payable by the Plaintiff to West Face forthwith.

THIS ORDER BEARS INTEREST at the rate of 3% per cent per year commencing on December 4, 2015.

D. MURPHY
REGISTRAR
COURT OF APPEAL FOR ONTARIO

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

NOV - 6 2015

PER / PAR:

THE CATALYST CAPITAL GROUP INC.
Plaintiff and BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

ORDER

DAVIES WARD PHILLIPS & VINEBERG LLP
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Lawyers for the Defendant (Respondent)
West Face Capital Inc.

2867

This is Exhibit "18" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera Persaud

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONCA 784
DATE: 20151117
DOCKET: M45378 M45387 (C60799)

Hoy A.C.J.O., MacFarland, and Lauwers JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant/Responding Party)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents/Moving Party)

Rocco Di Pucchio, for the appellant/responding party

Kristian Borg-Olivier and Denise Cooney, for the respondents/moving party Brandon Moyse

Andrew Carlson, for the respondents/moving party West Face Capital Inc.

Heard: November 5, 2015

Motion to quash an appeal from the judgment of Justice B.T. Glustein of the Superior Court of Justice, dated July 7, 2015, with reasons reported at 2015 ONSC 4388.

Lauwers J.A.:

[1] The motion judge dismissed the motion of Catalyst Capital Group Inc. for a declaration that its former employee, Brandon Moyse, is in contempt of the July 16, 2014 order of Firestone J. for failing to preserve certain electronic records relating to Catalyst.

[2] The moving party, Mr. Moyse, seeks to quash Catalyst's appeal on the basis that the judgment appealed from is interlocutory and therefore falls within the jurisdiction of the Divisional Court under s. 19 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. For the reasons set out below, I would quash the appeal.

FACTUAL BACKGROUND

[3] Mr. Moyse is a former employee of Catalyst. He accepted employment with a competitor of Catalyst. Catalyst was concerned that he had or would impart its confidential information to his new employer.

[4] Eventually, on Catalyst's motion, Firestone J. issued an interim consent order for injunctive relief, dated July 16, 2014. The court ordered that "Moyse and [his new employer], and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst." Paragraph 5 of this order provided:

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

[5] Catalyst brought a motion for a declaration that Mr. Moyse was in contempt of the consent order.

MOTION JUDGE FOUND NO CONTEMPT

[6] The motion judge's reasons set out a lengthy review of the evidence. He was unable to find "beyond a reasonable doubt" that Catalyst had established that Mr. Moyse was in contempt. His specific findings are relevant to Catalyst's argument on this motion to quash.

[7] With respect to Mr. Moyse's actions in deleting the personal browsing history from his computer, the motion judge found, at para. 69: "there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches."

[8] With respect to Mr. Moyse's conduct in buying and using software to "scrub" files from his personal computer before delivering it, the motion judge stated, at para. 86:

> I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

ANALYSIS

[9] Mr. Moyse argues that an order dismissing a contempt motion is interlocutory for the purpose of an appeal, and therefore lies to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*. He relies on this court's brief endorsement in *Simmonds v. Simmonds,* 2013 ONCA 479, which was an appeal from an order of a motion judge dismissing a motion for a finding of contempt against the respondent's spouse in a family dispute. There, the motion judge found that the respondent had complied with the disclosure order in question. In *Simmonds,* this court accepted the respondent's argument that while an order finding contempt is final, the dismissal of the motion for contempt was interlocutory: the motion judge's finding was not binding on the trial judge. The court rejected the conclusion to the contrary found in *Pimiskern v. Brophey*, [2013] O.J. No. 505 (S.C.).

[10] Catalyst argues that the ruling precedent is this court's decision in *Sabourin and Sun Group of Companies v. Laiken*, 2013 ONCA 530, in which the court heard an appeal from a decision dismissing a contempt motion. That case was about the possible breach of a *Mareva* injunction. I observe that the court did not advert to the interlocutory/final distinction or to the question of jurisdiction at all. The issue appears not to have been argued.

[11] In fairness to the parties, this court's decisions on the final/interlocutory distinction have not been models of clarity. Much ink has been spilled, and court and counsel time wasted in exploring the nuances. But the root principle that all can and do accept was expressed by Middleton J.A in *Hendrickson v. Kallio*, [1932] O.R. 675:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.

[12] This important case is one to which this court frequently returns. See, for example, *Waldman v. Thomson Reuters Canada Ltd.*, 2015 ONCA 53, MacFarland J.A. at para. 22. On the *Hendrickson v. Kallio* test, there can be no doubt that the dismissal of the contempt motion is interlocutory. The merits of the case remain to be determined.

[13] But Catalyst drills deeper and argues that in this case the outcome of the motion is effectively final in a significant dimension. It submits that the important point for the court to keep in mind is that it would not be open to a party who was unsuccessful in a contempt motion to revisit the contempt motion at trial. Counsel argues that the motion judge's decision that Mr. Moyse's conduct did not contravene the order is *res judicata,* and Mr. Moyse's conduct in deleting the

browser history, for example, "can't be re-litigated even in cross-examination." It is therefore final in the sense contemplated by the *Courts of Justice Act*.

[14] I disagree. The motion judge's findings are clear. He simply concluded that Catalyst had not proven, beyond a reasonable doubt, that Mr. Moyse breached Firestone J.'s order. There is nothing in the motion judge's decision that would prevent Catalyst from exploring, in Mr. Moyse's cross-examination at discovery or at trial, what he did with his computer, when he did it, why he did it, who assisted him (if anyone), how he did it and for what purpose or purposes. While the finding that Mr. Moyse was not in contempt may not itself be re-litigated, barring some new revelation, all of the factual issues between the parties may be fully and exhaustively explored at any discovery and at the trial.

[15] In the circumstances of this appeal, the principle in *Simmonds* applies. The order dismissing the contempt motion against Mr. Moyse is interlocutory, and therefore appealable to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*.

[16] I would quash the appeal without prejudice to Catalyst's right to seek leave to appeal to the Divisional Court. I would award Mr. Moyse costs fixed in the agreed amount of $5,000, all-inclusive.

Released: NOV 17 2015

I agree Alexandra Hoy ACJO

I agree. Juriaefarland JA

This is Exhibit "19" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 554
DIVISIONAL COURT FILE NO.: 648/15
DATE: 20160122

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: The Catalyst Capital Group Inc. v. Moyse and West Face Capital Inc.

BEFORE: Swinton J.

COUNSEL: *Rocco Di Pucchio and Lauren Epstein,* for the Plaintiff (Moving Party)
Kent E. Thomson and Matthew Milne-Smith, for the Defendant West Face Capital Inc. (Responding Party)
Robert A. Centa, for the Defendant Brandon Moyse (Responding Party)

HEARD at Toronto: January 21, 2016

ENDORSEMENT

[1] The Catalyst Capital Group Inc. ("Catalyst") has brought a motion to extend time to bring a motion for leave to appeal and, if leave is granted, seeks leave to appeal two parts of an interlocutory order made by Glustein J. dated July 7, 2015:

1. the dismissal of the request for an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of the responding party West Face Capital Inc. ("West Face") and the electronic devices used by five individuals at West Face (the "Imaging Order"); and

2. the dismissal of a request for an order that the responding party Brandon Moyse be found in contempt because of his failure to comply with a court order (the "Contempt Order").

[2] In granting an extension of time, the court considers four factors. The overarching consideration is the justice of the case. Those factors are:

1. whether the moving party formed an intention to appeal within the relevant period;

2. the length of the delay and the explanation for it;

3. prejudice to the responding party; and

4. the merits of the appeal.

(See *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 at para. 15.)

Intention to appeal in the relevant period

[3] I am satisfied that Catalyst formed an intention to appeal within the relevant period, as it filed a Notice of Appeal to the Court of Appeal on July 22, 2015, and it pursued that appeal.

The length of the delay and the explanation for the delay

[4] Two days after the Notice of Appeal was served, counsel for both West Face and Mr. Moyse informed counsel for Catalyst that Catalyst was in the wrong court, because the orders under appeal were interlocutory. Catalyst continued with its appeal, which required the responding parties to bring motions to quash the appeal.

[5] Sometime in October 2015, Catalyst consented to West Face's motion to quash, but it continued to oppose Mr. Moyse's motion. The Court of Appeal granted Mr. Moyse's motion to quash the appeal on November 17, 2015. The Notice of Motion seeking an extension of time to file a motion for leave and the Notice of Motion for leave to appeal were served November 27, 2015. The motions were heard January 21, 2016.

[6] The delay in this case has been lengthy. A motion for leave to appeal an interlocutory order must be brought within 15 days of the date of the order.

[7] Catalyst argues that the delay was caused by counsel's mistake about the appropriate appeal route. Counsel believed that the Contempt Order was a final order, and the interlocutory Imaging Order could be joined to the appeal of the Contempt Order pursuant to s. 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That provision states:

> The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

Although West Face had raised the jurisdictional issue in July 2015 because the Contempt Order was interlocutory, it did not mention any problem with reliance on s. 6(2). Catalyst states that West Face first signalled the need to obtain leave to appeal the Imaging Order in its motion materials, which were served in September 2015.

[8] In my view, Catalyst has not adequately explained the delay, given the state of the law with respect to appeals to the Court of Appeal and the Divisional Court and the facts of this case.

[9] Catalyst is represented by experienced litigation counsel. With respect to the Imaging Order, Catalyst knew that the order was interlocutory and was advised on July 24, 2015 that jurisdiction was an issue. There is a long line of cases in the Court of Appeal applying s. 6(2), which permits an appeal to the Divisional Court to be joined with an appeal to the Court of Appeal when an appeal "lies to the Divisional Court." If the order under appeal is interlocutory, leave to appeal must first be obtained from a Superior Court justice (see, for example, *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.) and *Waldman v. Thomson Reuters Canada Ltd.*, 2015

ONCA 53 at para. 17). Even if counsel did not know of this line of cases, it had notice by early September 2015 and still continued in the Court of Appeal.

[10] With respect to the dismissal of the Contempt Order, Catalyst was aware of the jurisdictional problem and had the case of *Simmonds v. Simmonds*, 2013 ONCA 479 on July 24, 2015. That case clearly states that the dismissal of a motion for contempt is an interlocutory order.

[11] Moreover, the decision of the Court of Appeal in the present proceeding applied the well known test for determining if an order is final or interlocutory found in *Hendrickson v. Kallio*, [1932] O.R. 675. The Court of Appeal concluded that on that test, "there can be no doubt that the dismissal of the contempt motion is interlocutory" (*The Catalyst Capital Group Inc. v. Moyse*, 2015 ONCA 784 at para. 11).

The merits of the appeal

[12] I turn now to the merits of the appeal, leaving prejudice to be discussed when I assess the justice of the case at the end of these reasons.

[13] In *Enbridge,* above, Gillese J.A. stated that "lack of merit alone can be a sufficient basis on which to deny an extension of time, particularly in cases such as this where the moving party seeks an extension of time to file a notice of leave to appeal, rather than an extension of time to file a notice of appeal…" (at para. 16).

[14] In *Enbridge,* Gillese J.A. considered whether the motion for leave to appeal was likely to be successful. Using the same approach, I conclude that the motion for leave to appeal would likely fail.

The Imaging Order

[15] The test for obtaining leave to appeal found in rule 62.02(4)(a) requires that there be a conflicting decisions – that is, different principles have been applied in the cases to decide a similar legal problem or to guide the exercise of discretion (*Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.)).

[16] Catalyst has identified no conflicting decision. The motions judge applied the test in rule 30.06. He did so in accordance with recognized legal principles and then, based on the facts before him, he exercised his discretion to refuse the order sought. Rule 62.02(4)(a) does not apply.

[17] With respect to rule 62.02(4)(b), there is no good reason to doubt the correctness of the order. The motions judge made an explicit finding, based on the record before him, that there was no evidence that West Face was failing to comply with its production obligations or intentionally destroying evidence (see paras. 52-57 of the Reasons). Accordingly, he concluded that it was not appropriate to make the order sought, which, I note, is an exceptional one.

[18] Catalyst makes much of the fact that Lederer J. made an order dated November 10, 2014 appointing an ISS to identify and review the forensic images from Mr. Moyse's electronic devices. Catalyst suggests that there is good reason to doubt the correctness of the Imaging Order, because the motions judge did not take into account the findings respecting West Face in the reasons for the decision of Lederer J. and the impact of Mr. Moyse's conduct on that order.

[19] I disagree. The decision of Lederer J. was made on the basis of a different evidentiary record, at a different stage of the litigation, and against a different party. Given the motions judge's findings that West Face was more than complying with its production obligations and there was no evidence that West Face had destroyed evidence, he reasonably refused to exercise his discretion to make the Imaging Order against West Face.

[20] Even if I were wrong in my conclusion on the first part of the test, the second part of the test requires that the moving party show the proposed appeal raises an issue of general importance. The proposed appeal raises no issue of law, since the motions judge applied established principles to the specific facts of this case. There is no issue of general importance raised.

The Contempt Order

[21] Again, Catalyst has failed to identify any conflicting decision for the purposes of rule 62.02(4)(a). The motions judge correctly set out the legal principles to be applied in a contempt proceeding at para. 59 of his Reasons.

[22] While Catalyst suggests that the motions judge applied a test for determining reasonable doubt and assessing credibility that conflicts with other case law, I do not agree. Catalyst is seeking to attack findings of credibility and the weighing of the evidence.

[23] With respect to rule 62.02(4)(b), again there is no good reason to doubt the correctness of the order. The motions judge carefully reviewed the evidence and made findings of fact that are clearly explained and are supported by the evidence.

[24] Catalyst argues that the motions judge erred in applying the test for a finding of contempt, as set out in ***Carey v. Laiken***, 2015 SCC 17, because he erred in his interpretation of paragraph 4 of the Consent Order of July 16, 2014. Paragraph 4 ordered West Face and Mr. Moyse to

> … preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed to by Catalyst.

Catalyst argues that this order clearly requires the preservation of all records relating to activities since March 27, 2014.

[25] The first part of the test set out in *Carey* requires the court to determine that the order allegedly breached is clear as to what is to be done or not done (at para. 33). In my view, the motions judge properly applied this part of the test.

[26] The motions judge gave his interpretation of this order at paras. 70 to 71 of his Reasons:

> [71] If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.
>
> [72] Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

[27] When paragraph 4 is read as a whole and in the context of the Consent Order, the motions judge correctly held that "their activities since March 27, 2014" must refer to activities relevant to the action and, in particular, activities related to Catalyst, and it did not require Mr. Moyse to preserve all documents about all his activities since March 27, 2014, even if they had no relevance to the action.

[28] The motions judge concluded that Catalyst failed to prove beyond a reasonable doubt that Mr. Moyse deleted relevant information from the browsing history on his computer, or that he ran the Secure Delete program to delete relevant files from his computer. Those conclusions are supported by the evidentiary record. Moreover, the motions judge indicated that if Mr. Moyse had deleted information covered by the Consent Order, he would exercise his discretion and not find Mr. Moyse in contempt because Mr. Moyse acted in good faith.

[29] Moreover, this is not a case where the proposed appeal raises issues of public importance. The motions judge was dealing with a motion for civil contempt, a motion that is of significant interest to the immediate parties, but does not raise legal issues or issues affecting the administration of justice that warrant the attention of an appellate court. Accordingly, the leave to appeal motion would likely fail.

Prejudice to the responding parties and the justice of the case

[30] Mr. Moyse has been under the cloud of a contempt motion since February 2015. The allegations of misconduct are serious and damaging to his reputation and undoubtedly stressful because the motion sought that he be jailed. I am satisfied that he has suffered prejudice from the delay in pursuing the motion for leave in a timely way because of the nature of this proceeding.

[31] West Face argues that it has suffered prejudice because of the delay in this litigation and its potential impact on proceedings on the Commercial List concerning the sale of WIND Mobile. I accept that there is some prejudice, because the delay impedes the progress of the present litigation and, in turn, may affect litigation on the Commercial List.

[32] Given the delay in this case, the explanation for it, the prejudice (particularly to Mr. Moyse) and, most importantly, the lack of merit to the proposed motions for leave to appeal, the justice of the case does not require an extension of the time to bring a motion for leave to appeal. Accordingly, the motion for an extension of time to file the motion for leave to appeal is dismissed.

[33] The parties have agreed on costs. Catalyst shall pay costs of the motions for an extension of time and for leave to appeal to each of the responding parties, fixed in the total amount of $10,000.00 all in.

K. Swinton J.

Swinton J.

DATE: January 22, 2016

This is Exhibit "20" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law.
Expires April 13, 2018.

Drover, Lisa

From: Milne-Smith, Matthew
Sent: December 16, 2015 6:10 PM
To: Rocco DiPucchio (rdipucchio@counsel-toronto.com); Andrew Winton (awinton@counsel-toronto.com)
Subject: FW: (MWR) Shaw Communications Inc. to Acquire WIND Mobile Corp.

Shaw Communications Inc. to Acquire WIND Mobile Corp.
2015-12-16 23:03:03.958 GMT

Shaw Communications Inc. to Acquire WIND Mobile Corp.

- Enhances Shaw's product offering by expanding mobile service capabilities and enabling development of a best-in-class converged wireline and wireless network

- Unique opportunity to acquire rapidly growing wireless business together with 50 MHz of spectrum in Ontario, Alberta and British Columbia

- Acquisition of WIND represents the most efficient operating and financial entry point into the Canadian wireless landscape

- Time to market and integration will be greatly enhanced via an established operating business and experienced management team

CALGARY, ALBERTA -- (Marketwired) -- 12/16/15 -- Shaw Communications Inc. ("Shaw") (TSX: SJR.B)(NYSE: SJR) announced today that it has agreed to acquire a 100% interest in Mid-Bowline Group Corp. and its wholly-owned subsidiary, WIND Mobile Corp. ("WIND" or the "Company") for an enterprise value of approximately $1.6 billion (the "Transaction").

"The global telecom landscape is quickly evolving towards 'mobile-first' product offerings as consumers demand ubiquitous connectivity from their service providers. The acquisition of WIND provides Shaw with a unique platform in the wireless sector which will allow us to offer a converged network solution to our customers that leverages our full portfolio of best-in-class telecom services, including fibre, cable, WiFi, and now wireless," said Chief Executive Officer, Brad Shaw. "This transaction represents a transformational step in the history of Shaw and we are excited about our future growth prospects in mobile. This growth will be accelerated by combining Shaw's existing customer relationships, trusted brand and wireline and WiFi infrastructure with WIND's impressive asset base, including its existing spectrum position and mobile network."

WIND is Canada's largest non-incumbent wireless services provider, serving approximately 940,000 subscribers across Ontario, British Columbia and Alberta with 50MHz of spectrum in each of these regions. Led by a management team with demonstrated telecom expertise, the Company has achieved impressive growth as evidenced by a 47% increase in its subscriber base over the past two years which has translated into strong growth in revenue and EBITDA. In calendar year 2015, WIN D is expected to generate $485 million in revenue and $65 million in EBITDA. As WIND continues to reinvest in its network and service offering, including a scheduled upgrade to 4G LTE services by 2017, the Company expects that its unique customer value

proposition will result in continued strong growth in the future.

WIND's current management team is led by Chief Executive Officer Alek Krstajic, who has over 20 years of telecom experience. Mr. Krstajic and his team will remain with the Company and will continue to drive the wireless opportunity. "We believe the combination of Shaw and WIND creates a wireless leader with immediate benefits for our customers and employees, giving them more choice, capabilities and opportunities to stay connected," said Mr. Krstajic. "With Shaw's long-term commitment, customer focus and breadth of product offering, this transaction enables us to enter into a new phase of growth."

In 2011, Shaw announced the launch of a carrier-grade WiFi network, Shaw GO WiFi, which has since expanded to over 75,000 hotspots, increasing the value proposition of broadband outside of the home. "The time has come to offer even more mobility to our customers,"
said Mr. Shaw. "By acquiring WIND, we now have immediate scale, spectrum, retail distribution and a network with a clear path to LTE that complements our existing fibre and WiFi infrastructure."

Transaction Terms & Financing

Under the terms of the Transaction, Shaw will acquire 100% of the shares of WIND's parent company, Mid-Bowline Group Corp., by plan of arrangement, for an enterprise value of approximately $1.6 billion based on quarterly financial statements as of September 30, 2015.
Shaw has executed a fully-committed bridge financing facility with the Toronto Dominion Bank and the Canadian Imperial Bank of Commerce.
Shaw is committed to a financing plan that maintains its investment grade status and accordingly will optimize the significant flexibility available to it, including potential debt issuance, asset sales, the issuance of preferred or common equity or any combination thereof. Additional details regarding the longer term financing of the Transaction will be provided prior to close.

The Transaction is subject to the receipt of certain approvals, including those from the Competition Bureau and the Ministry of Innovation, Science & Economic Development (formerly Industry Canada) and court approval of the plan of arrangement. Shareholders of Mid-Bowline Group Corp. have approved the transaction and closing is expected to occur during the third quarter of fiscal 2016.

CIBC World Markets Inc. and TD Securities Inc. acted as financial advisors to Shaw in connection with the Transaction and Dentons Canada LLP provided legal advice.

Management Presentation

Shaw and WIND senior management will hold a conference call with the financial community on Thursday, December 17, 2015 at 6:00 a.m.
MT/8:00 a.m. ET. Members of the media and the public will be able to participate in listen-only mode.

The call details are:

- Canada/U.S. Toll Free: 1-800-319-4610

- Int'l Toll:
http://services.choruscall.ca/links/operatorassisted.html

- Please call five to 10 minutes prior to commencement of the call

- Replay Dial In (available until midnight Thursday, December 31,

2015):

- Canada/U.S. Toll free: 1-800-319-6413

- Int'l toll: +1-604-638-9010

- Passcode: 91023#

There will be an investor presentation associated with the transaction and it will be further discussed during the conference call. The investor presentation will be available at:
http://www.shaw.ca/Corporate/Investors/Presentations-And-Meetings/

This presentation and conference call will also be available on the web live or as a recorded broadcast (until midnight on Thursday, December 31, 2015) at:
http://services.choruscall.ca/links/shaw20151217.html

About Shaw

Shaw Communications Inc. is a diversified communications and media company, serving 3.2 million customers through a reliable and extensive fibre network. Shaw serves consumers with broadband Internet, WiFi, Digital Phone and Video products and services. Shaw Business Network Services provides business customers Internet, data, WiFi, telephony, Video and fleet tracking services. Shaw Business Infrastructure Services offers North American enterprises colocation, cloud and managed services through ViaWest. Shaw Media provides Canadians with engaging programming content through one of Canada's largest conventional television networks, Global Television, and 19 specialty networks including HGTV Canada, Food Network Canada, HISTORY(R) and Showcase. Shaw is traded on the Toronto and New York stock exchanges and is included in the S&P/TSX 60 Index (TSX:
SJR.B)(NYSE: SJR).

About WIND

WIND Mobile is Canada's largest non-incumbent wireless carrier, serving approximately 940,000 subscribers across Ontario, Alberta and British Columbia. WIND is dedicated to offering a differentiated wireless experience for Canadians by offering strong value and exclusive features through easy to understand wireless plans and no-term contracts. Learn more about WIND Mobile at WINDmobile.ca or follow online at facebook.com/WINDmobile or twitter.com/WINDmobile.

Caution Regarding Forward-Looking Statements

Statements in thi
s news release relating to the acquisition of WIND, the related financing, Shaw's credit rating and operational and growth plans and expected business and financial results for Shaw and WIND constitute "forward-looking statements" within the meaning of applicable securities laws. These statements are based on assumptions made by Shaw that it believes are appropriate in the circumstances, including without limit, that: regulatory and court approvals will be received and the other conditions to closing of the transaction will be satisfied; financial markets will be receptive to Shaw's future financing on acceptable terms; expected business and financial results for Shaw and WIND will be realized; the pricing environment for WIND is stable relative to current rates; there is no significant market disruption or other significant changes in economic conditions, competition or regulation; the upgrade to 4G LTE, other growth plans and the converged network solution can be executed in a timely and cost effective manner to yield the results expected for Shaw and WIND; and WIND will provide expected benefits to the Shaw and the service offering for its customers. There is the risk that one or more of

these assumptions will not prove to be accurate and this may affect closing of the transaction and/or the business, operational and financial expectations for Shaw. Undue reliance should not be placed on any forward-looking statement. Except as required by law, Shaw disclaims any obligation to update any forward-looking statement.

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Shaw Communications Inc.
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www.shaw.ca

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Chethan Lakshman, VP External Affairs
chethan.lakshman@sjrb.ca
(403) 930-8448

-0- Dec/16/2015 23:03 GMT

This is Exhibit "21" referred to in the Affidavit of Andrew Carlson sworn December 7, 2016

Meera

Commissioner for Taking Affidavits (or as may be)

Meera Amanda Persaud, a Commissioner, etc.,
Province of Ontario, while a Student-at-Law
Expires April 13, 2018.

Drover, Lisa

From: Milne-Smith, Matthew
Sent: December 21, 2015 4:49 PM
To: 'Commercial List (Toronto.CommercialList@jus.gov.on.ca)'
Cc: 'Rocco DiPucchio (rdipucchio@counsel-toronto.com)'
Subject: 9:30 Request Form
Attachments: TOR_DOCUMENTS-#3287386-v2-Plan_of_Arrangement_Notice_of_Application.pdf; Scheduling Request Form.pdf

To the Commercial List Scheduling Office,

Attached is a 9:30 request form along with related draft Notice of Application. This arises from a proposed plan of arrangement recently announced by which Shaw Communications has agreed to acquire the equity of WIND Mobile Corp. As WIND is a privately-held company and all shareholders will be notified directly of the arrangement, the applicant does not believe that an interim order is required. However, it is anticipated that the plan may be opposed by The Catalyst Capital Group Inc., whose counsel is aware of this intended application, and who is copied on this email.

The Applicant respectfully requests an appointment with Mr. Justice Newbould, as co-ordinator of the Commercial List's trial list, as a mini-trial may be necessary to resolve Catalyst's anticipated objections to the plan of arrangement. Mr. Di Pucchio has kindly advised that he is available the morning of December 23, 2015 if the Court is available. The Applicant will make itself available as necessary.

I thank the Court for its consideration of this matter. Happy Holidays to all.

Best regards,

Matthew Milne-Smith

Commercial List Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

NOTICE OF APPLICATION

TO: THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED BY THE APPLICANT. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a Judge presiding over the Commercial List at 330 University Avenue, 7th Floor, Toronto on a date to be established by the Commercial List Office at 10:00 a.m. or as soon after that time as the matter can be heard.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application, or to be served with any documents in the Application, you or an Ontario lawyer acting for you must forthwith prepare a Notice of Appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your Notice of Appearance, serve a copy of the evidence on the Applicant's lawyer and file it, with proof of service, in the court office where the Application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: December 21, 2015 Issued by: _____

Address of Court Office:
330 University Avenue
7th Floor
Toronto, ON M5G 1R7

TO: THE HOLDERS OF COMMON SHARES OR OPTIONS OF MID-BOWLINE GROUP CORP. SET OUT IN SCHEDULE "A"

AND TO: The Catalyst Capital Group. Inc.
77 King St. W.
Toronto ON M5K 2A1

APPLICATION

1. The Applicant, Mid-Bowline Group Corp. (the "Corporation"), makes application for:

(a) an order concluding as to the fairness to the shareholders and optionholders of the Corporation of, and approving and implementing, the plan of arrangement (the "Plan of Arrangement") proposed by the Corporation pursuant to section 182 of the *Business Corporations Act* (Ontario), as amended (the "OBCA"), substantially in the form attached as Appendix "A" to this Notice of Application; and

(b) such further and other relief as this Honourable Court deems just.

2. THE GROUNDS for the Application are:

(a) all statutory requirements under the OBCA have been fulfilled;

(b) the proposed Plan of Arrangement is in the best interests of the Corporation, is fair and reasonable to the stakeholders of the Corporation, and is put forward in good faith;

(c) section 182 of the OBCA;

(d) rules 14.05(2) and 38 of the *Rules of Civil Procedure*; and

(e) such further and other grounds as counsel may advise and this Honourable Court may permit.

3. THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Application:

(a) the affidavit of Anthony Griffin and such other affidavits as shall be put before the Court, and the exhibits thereto and other materials referred to therein, to be filed; and

(b) such further and other materials as counsel may advise and this Honourable Court may permit.

December 21, 2015

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington St. W.
Toronto, ON M5V 3J7

Matthew Milne-Smith (LSUC #44266P)
Tel: 416.863.5595
Andrew Carlson (LSUC #58850N)
Tel: 416.367.7437

Fax: 416.863.0871

Lawyers for the Applicant

SCHEDULE "A"

LIST OF SHAREHOLDERS

Globalive Turbine Corp. 1
Globalive Turbine Corp. 2
Globalive Turbine 3 LP
Serruya Private Equity Inc.
Luxembourg Famous Star SARL
Tennenbaum Opportunities Partners V, LP
Tennenbaum Opportunities Fund VI, LLC
Special Value Opportunities Fund, LLC
Special Value Expansion Fund, LLC
Tennenbaum Senior Loan Fund IV-B, LP
Tennenbaum Special Situations Fund IX, LLC
Tennenbaum Special Situations IX-O, LP
Siguler Guff Hearst Opportunities Fund, LP
Maycomb Holdings IV, LLC
WAL Telecom L.P.
64NM Holdings, LP
Robert MacLellan
David Carey
Hamid Akhavan
Peter Rhamey
Alek Krstajic

LIST OF OPTIONHOLDERS

Alek Krstajic
Glen Campbell
Bruce Kirby
Bob Boron
Brian O'Shaughnessy
Ted Flanigan
Tamer Saleh
Atif Ahmad
Nora Brooks
John Lucato
Jennifer Douglas
Dean Price
Asser El Shanawany
Hamid Akhavan
Ed Antecol
Radek Krasny
Frank Bassano
Amor Mohammed
Magued Sorial
Ronny Hanna
Charbel Rizk
Wendy Perego
Mathew Flanigan

Pierre Methe
Paul Bourque
Paul Stevens
Brian Lloyd
Adel Awad
Ashraf Demian
Stephen Kalyta
Mark Elson
Chris Golde
Terry Hubbs
Algis Akstinas
Solomon Chung
Krishna Charan
Mootaz El Sowehy
Mohammed Belmqadem
Tony Marinelli
Mohammad Ahmad
Sharon Xu
Mark Smith
Linda Kowlessar
Sujatha Kumar
Globalive Turbine Corp. 1
Brice Scheschuk
Simon Lockie

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182
AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*
AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

Commercial List File No.

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

NOTICE OF APPLICATION

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

Matthew Milne-Smith (LSUC #44266P)
Tel: 416.863.5595
Andrew Carlson (LSUC #58850N)
Tel: 416.367.7437

Fax: 416.863.0871

Lawyers for the Applicant

Commercial List File Number: 15-CL-»

Civil File No.: »

Date: December 21, 2015

SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

9:30 A.M. HEARING REQUEST FORM

A.	PLEASE NOTE: The 9:30 a.m. hearing procedure is only for "*ex parte*, urgent, scheduling and consent matters which will take no more than 10 minutes" (Practice Direction, (2002), 57 O.R. (3rd) 97; paragraph 25.) This restriction will be enforced. This matter is (tick one or more): [ ] *ex parte* [X] urgent [X] scheduling [ ] consent [ ] other - »
B.	Short Title of Proceedings: In Re. a proposed arrangement of Mid-Bowline Group Corp. »
C.	Date(s) Requested: December 23, 2015; January 4, 2016; January 5, 2016 »
D.	The following is a brief description of the matter to be considered at the 9:30 a.m. appointment: »This is a new matter arising from the recently announced transaction whereby Shaw Communications Inc. has agreed to acquire the equity of WIND Mobile Corp. via a plan of arrangement of WIND's indirect shareholder, Mid-Bowline Group Corp. The plan is expected to be contested by The Catalyst Group Inc. The Applicant would like to book time for a fairness hearing and possible mini-trial regarding issues expected to be raised by Catalyst in late January.
E.	The following materials will be necessary for the matter to be considered. (It is the responsibility of the lawyers to confirm that the proper materials are available for the Court.) »Draft Notice of Application
F.	Is any Judge seized of these matters or any judicial conflicts? [X] No [ ] The Honourable Justice »

Counsel for applicant/moving party:		Counsel for other party:	
Party:	Applicant	Party:	»The Catalyst Capital Group Inc.
Counsel:	Matthew Milne-Smith	Counsel:	Rocco Di Pucchio
	Print name and sign or initial		Print name and sign or initial
Address:	DAVIES WARD PHILLIPS & VINEBERG LLP 155 Wellington Street West Toronto ON M5V 3J7	Address:	LAX O'SULLIVAN LISUS GOTTLIEB LLP 145 King St. W., Suite 2750 Toronto ON M5H 1J8
Phone:	416.863.5595	Phone:	416.598.1744
Fax:	416.863.0871	Fax:	416.598.3730
Email:	mmilne-smith@dwpv.com	Email:	rdipucchio@counsel-toronto.com

To be submitted to:

Commercial List Office, 330 University Avenue, 7th Floor, Toronto Ontario
Fax to: (416) 327-6228

You may also convert to PDF and email to Toronto.Commerciallist@jus.gov.on.ca

Endorsement / Disposition ☐ See attached Yellow Endorsement Form.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendants

Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF
PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD OF THE DEFENDANT/MOVING PARTY WEST FACE CAPITAL INC.
(VOLUME 9 OF 19)

DAVIES WARD PHILLIPS & VINEBERG LLP
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Lawyers for the Defendant
WEST FACE CAPITAL INC.