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

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Parties

FACTUM OF THE MOVING PARTY, THE CATALYST CAPITAL GROUP INC.

January 15, 2016

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PART I - IDENTITY OF MOVING PARTY, PRIOR COURT & RESULT

1. This proposed appeal raises important issues concerning the enforcement of preservation orders after the plaintiff had made out a strong *prima facie* case for possession and misuse of its confidential information by the defendants. A key question on this proposed appeal is whether a party can disobey a preservation order and destroy evidence without consequence.

2. In the motion below, Justice Glustein (the "Motion Judge") dismissed a contempt motion on the basis that the plaintiff ("Catalyst") had not proven beyond a reasonable doubt that the defendant Brandon Moyse ("Moyse") had breached a preservation order by intentionally deleting data from his computer.

3. Catalyst also sought an order providing for the imaging of electronic devices belonging to Moyse's former employer, the defendant West Face Capital Inc. ("West Face"), for review by an Independent Supervising Solicitor ("ISS"). This relief was required to ensure Moyse's conduct did not nullify a Court order that authorized an ISS to review a forensic image of Moyse's computer.

4. Catalyst seeks leave to appeal the decision of the Motion Judge.

PART II - SUMMARY OF FACTS

1. BACKGROUND TO THIS ACTION

5. Catalyst, a corporation with its head office located in Toronto, Ontario, 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".

6. 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.

7. Moyse was an investment analyst at Catalyst from November 2012 to June 22, 2014. 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").

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

2. THE INTERIM AND INTERLOCUTORY MOTIONS

A. The Interim Motion

9. 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 Respondents' counsel agreed to preserve the status quo with respect to relevant documents in the Respondents' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

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

(a) Moyse agreed not to work at West Face pending the determination of Catalyst's motion for interlocutory relief;

(b) The defendants agreed to preserve their records, 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 the action, except as otherwise agreed to by Catalyst;

(c) Moyse consented to the creation of a forensic image of his personal computer, iPad and smartphone, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(d) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[1]

11. The Interim Order was negotiated by the parties' counsel during a recess at the hearing of a contested motion before Justice Firestone. Moyse was present when his counsel negotiated the terms of the Interim Order.[2]

B. The Interlocutory Motion

12. On November 10, 2014, Justice Lederer granted Catalyst's motion for an Order authorizing an ISS to analyze the Images created pursuant to the Interim Order.[3]

13. The reasons for decision of Justice Lederer in the motion decided on November 10, 2014, (the "Interlocutory Motion") accurately record the key facts relevant to the issues of preservation of digital evidence. The following is a summary of Justice Lederer's relevant findings of fact:

(a) Beginning in March 2014, Moyse and Thomas Dea ("Dea"), a partner at West Face, communicated in writing and in person to discuss the possible employment by Moyse at West Face.

(b) By email dated March 27, 2014, Moyse sent Dea four confidential investment memos belonging to Catalyst. Shortly after doing so, Moyse deleted the email message.

(c) West Face did not inform Catalyst that Moyse had sent it Catalyst's confidential information; instead, even though he understood that the memos contained confidential information, Dea circulated the memos to his partners and to Yu-Jia Zhu ("Zhu"), a vice-president at West Face.

(d) By email dated May 24, 2014, while on vacation, Moyse gave Catalyst notice of his resignation, effective June 22, 2014. Moyse's email made no reference to his having accepted employment with West Face.

(e) Shortly after Catalyst learned that Moyse had resigned to go work for West Face, Catalyst's outside counsel wrote to West Face and to Moyse's counsel to express concerns about Moyse's employment at West Face, and in particular that Moyse

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[1] Order of Justice Firestone dated July 16, 2014, Motion Record ("MR"), Tab 4.
[2] Moyse Cross-Examination, pp. 60-61, qq. 304-313; MR, Tab 25.
[3] Order of Justice Lederer, dated November 10, 2014; MR, Tab 5.

was in breach of his non-competition covenant and/or would communicate Catalyst's confidential information to West Face.

(f) In response, West Face's and Moyse's outside counsel took the position that the restrictive covenants were unenforceable and offered assurances that Moyse would comply with his confidentiality obligations to Catalyst. Neither counsel alerted Catalyst's counsel to the fact that Moyse had already communicated confidential information to West Face.

(g) Catalyst's counsel's reply stated that the defendants' replies and assurances did not go far enough in light of the fact that Catalyst and West Face are competitors and Moyse possessed Catalyst's highly sensitive and proprietary information.

(h) Moyse and West Face insisted on proceeding with Moyse's employment at West Face commencing June 23, 2014. Days later, Catalyst commenced this action and brought its motion for urgent interim and interlocutory relief.

(i) Catalyst retained an IT expert to analyze an image of the computer Moyse used while employed at Catalyst. That analysis revealed that:

(i) on March 28, 2014, over an 11-minute period, Moyse accessed a series of files from an "Investors Letters" directory;

(ii) on April 25, 2014, over a 70-minute period, Moyse accessed dozens of files related to the "Stelco" matter out of "personal curiosity"; and

(iii) on May 13, 2014, over a 20-minute period, Moyse accessed 29 files relating to the Wind Mobile situation.

(j) In his initial affidavit sworn in response to Catalyst's motion, Moyse described Catalyst's concerns about his misuse of confidential information as speculation and innuendo when he knew or should have known it was wrong to do so.

(k) After litigation commenced, West Face disclosed the existence of the March 27 email from Moyse. In cross-examinations, Moyse professed not to understand what makes a memo "confidential".

(l) The Interim Order required Moyse to deliver a sworn affidavit of documents disclosing documents in his power, possession or control relating to Catalyst, prior to the return of the Interlocutory Motion. Moyse's affidavit disclosed over 800 documents, at least 245 of which Catalyst identified as confidential.

(m) Moyse admitted at his cross-examination that he could not say with absolute certainty that his search of his Devices had been exhaustive, and he admitted that between March and May 2014, he deleted documents.[4]

[4] Judgment of Justice Lederer dated November 10, 2014, MR, Tab 6.

3. CATALYST DISCOVERS MOYSE BREACHED THE INTERIM ORDER

A. The ISS Reveals Moyse Purchased and Launched Deletion Software

14. The parties retained Stockwoods LLP to act as the ISS and negotiated a document review protocol (the "Protocol") pursuant to which the ISS was to review the Images.[5]

15. The ISS retained an independent forensic IT expert to assist with its analysis and review of the Images. In its report, the ISS revealed that on the morning of July 16, 2014, Moyse downloaded and installed military-grade deletion software (known colloquially as "scrubbing software" and referred to herein as the "Scrubber") on his personal computer. On July 20, 2014, the night before the Images were created, Moyse ran the Scrubber.

16. The ISS's report stated:

> 45. Given the nature and timing of the software installed, I requested that DEI [the ISS's forensic IT expert] take steps to determine whether the product was installed and whether it could be determined if the product had been used to over-write data or files prior to the computer being imaged. DEI advised me that, based on the creation date of the associated folders, RegClean and Advanced System Optimizer 3 were installed on July 16, 2014 at 8:50 and 8:53 a.m. respectively. **The executable files for the Secure Delete feature are contained within the Advanced System Optimizer 3 folder. On July 20, 2014 at 8:09 p.m., a folder entitled "Secure Delete" was created, which suggests that a user of Moyse's computer took steps to make the use of that function available at that point in time.**
>
> 46. DEI reported to me that the Secure Delete feature of the software provides several options for over-writing (i.e., "securely deleting") files. By default, the setting is "Fast secure delete" which causes a single pass overwriting process in which data is over-written with random characters. The second option is to use three passes using random characters and the third option is the so-called "military-grade" option which uses seven passes overwriting with random characters.
>
> 47. In terms of what may be deleted using this feature, DEI reports that the user may select from any of the following options within the software:
>
> (a) To wipe specific, individual files or folders;
>
> (b) To wipe an entire drive;

[5] The Protocol is attached as Exhibit "C" to the affidavit of Martin Musters, sworn February 15, 2015 ("Musters Feb 2015 Affidavit"), MR, Tab 10C.

> (c) To wipe only "free space", i.e. currently unused or unallocated space which may contain fragmentary data from deleted files which have not yet been over-written either through ordinary usage of the computer or through deliberate over-writing.4
>
> [Footnote 4 text: By way of a more detailed explanation, this technique could be used to destroy evidence that might otherwise be recoverable of "deleted files", i.e., files which the user has instructed the operating system to delete. The ordinary "delete" function of common operating systems does not, when employed, actually result in the destruction of the underlying data, but generally remain present in the "unallocated space" of the hard drive. Unallocated space is space that the operating system treats as available to use for the storage/writing of new data or files. Thus, after a period of ordinary use, unallocated space will gradually be populated or filled in with new data, over-writing the old. Until the unallocated space where a "deleted file" is resident is over-written with new data, forensic recovery software can recover the file. The purpose of over-writing software such as Secure Delete, when applied to wipe all "free space" (aka "unallocated space") is to force the over-writing, with random data, of the latent content. Multiple, repetitive over-writing then simply increases the likelihood that forensic recovery tools cannot be used to recover the "deleted" content.]
>
> 48. I asked DEI to advise me whether there was evidence that the product had been used in any of these ways. DEI reported that the content of the Moyse computer was not consistent with any use of the Secure Delete function to delete all free space and thereby prevent forensic analysis of the drive as a whole, on the assumption that the product indeed writes with random characters as is claimed in the product literature. Further, it is clear that the function was not used to wipe the entire drive, since there were substantial volumes of data produced to us. **DEI cannot determine whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly cannot express any conclusion on that possibility other than to note that it exists.**[6]

17. Upon learning of Moyse's conduct, Catalyst commenced this motion.

B. Moyse Admits He Deleted Web His Browsing History

18. In response to the ISS report, Moyse admitted (as he had to in the face of the conclusive evidence) that he downloaded the Scrubber, but he claimed that he did not use the Scrubber to delete "relevant" data. Moyse claimed that he only deleted data that he unilaterally determined, without the assistance of counsel, was "irrelevant" and therefore outside the scope of the Interim Order. The "irrelevant" information Moyse deleted included his Internet browsing history.[7]

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[6] Report of the ISS, pp. 41-43, Exhibit "T" to the Affidavit of Jim Riley, dated February 18, 2015, MR, Tab 11(T).
[7] Affidavit of Brandon Moyse, affirmed April 2, 2015 ("Moyse Affidavit"), ¶38-41, MR, Tab 20.

19. Moyse explained why he deleted his Internet browsing history by putting his state of mind at issue:

> I was also concerned that the irrelevant information on the images [a reference to Moyse's alleged accessing of pornographic websites] would somehow become part of the public record through this litigation. **At this point it was not clear to me what would happen to the images, which would include the irrelevant personal information.**[8]

20. At his cross-examination, Moyse claimed he tried to get information from his lawyers about the ISS process, but they were not sure how the process would unfold. Despite putting his state of mind at issue and admitting to having communicated with his lawyers about this issue, Moyse refused to produce his communications with his counsel.[9]

21. Moyse claimed he did not run the Scrubber, but he could not explain why a "Secure Delete" folder was created on his computer the night before it was imaged.[10] Moyse claimed that he purchased the Advanced System Optimizer software, which includes the Scrubber, the morning of the Interim Motion because his computer was running slowly and he wanted to "optimize" it.[11]

22. By deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014. The web browsing history included, among other things, his use of personal web-based email services such as "Gmail", evidence of Moyse's use of web-based storage services at issue in this action, and evidence of Moyse's web-searching activity, including, for example, the searches Moyse ran in July 2014 when he was looking for deletion software.[12]

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[8] Moyse Affidavit, ¶40, MR, Tab 20 [emphasis added].
[9] Cross-Examination of Brandon Moyse held May 11, 2015 ("Moyse 2015 Cross"), p. 70-71, qq. 363-67, MR, Tab 25.
[10] Moyse Affidavit, ¶47, MR, Tab 20.
[11] Moyse 2015 Cross, pp. 66-67, qq. 338-345, MR, Tab 25.
[12] Cross-Examination of Kevin Lo, pp. 23-26; qq. 95-105, MR, Tab 26.

C. Expert Evidence Confirms Moyse Most Likely Ran the Scrubber

23. Martin Musters, Catalyst's forensic IT expert ("Musters"), ran independent tests on the operation of the Scrubber. Through his analysis, Musters determined that:

(a) Merely downloading and installing the Scrubber does not lead to the creation of a "Secure Delete" folder on one's computer;

(b) A "Secure Delete" folder is created when a user launches the Scrubber software; and

(c) Although the Scrubber includes a summary log recording a user's deletion activity, it is possible to delete the log to remove evidence that the Scrubber was used to delete documents.[13]

24. The steps required to erase evidence of one's use of the Scrubber are not technically complicated. All the user has to do is use the computer's registry editor software to erase the "registry log" on the computer associated with the Secure Delete software, at which point the summary resets to zero. Information about the registry editor is readily available on the Internet.

D. Inadequate Excuses for Moyse's Conduct

25. Moyse retained Kevin Lo, an IT expert ("Lo"), to respond to Musters' evidence. Lo reviewed a copy of the Image that was provided to him by Moyse's counsel.[14] In his first affidavit, Lo noted, correctly, that the "Secure Delete" folder is created when a user launches the Scrubber, whether or not the user actually uses it to delete data. Lo also noted that he could not find a registry log for Secure Delete on Moyse's computer. Lo relied on the absence of a registry log for Secure Delete to conclude that the Scrubber was not used to delete data from Moyse's computer.[15]

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[13] Musters Feb 2015 Affidavit, ¶12; MR, Tab 10; Supplementary Affidavit of Martin Musters, sworn April 30, 2015, ¶10-19, MR, Tab 13.

[14] Moyse has refused to provide a copy of the Image to Catalyst, so it is impossible for Catalyst to verify the accuracy of Lo's information by replicating his analyses.

[15] Affidavit of Kevin Lo, affirmed April 2, 2015, ¶11-20, MR, Tab 21.

26. In response to this opinion, Musters conducted additional investigations and determined that it is a simple matter to use a computer's registry editor to delete the registry log for the Scrubber. This ability to delete the log for the Scrubber undermined Lo's conclusion, as it demonstrated that the absence of a log did not mean that Moyse did not use the Scrubber.

27. In response to this evidence, Lo affirmed a second affidavit in which he stated that through a review of the metadata for the registry editor on Moyse's computer, Lo could conclude that Moyse never ran the registry editor on his computer. Lo's conclusion was based on the fact that the metadata for the registry editor recorded a "last accessed date" of July 13, 2009, which is the factory default date.[16]

28. Lo's evidence on this point was misleading and is based on facts that he knew were incorrect.

29. As every IT expert knows or ought to know, by default, recent releases of Windows do not update the metadata for the registry editor program to record when the program is run.[17] Thus, the fact that the "last accessed date" for the registry editor on Moyse's computer was recorded as July 13, 2009, was not probative as to whether or not Moyse ran the registry editor.

30. At his cross-examination, Lo's explanation for his mistake was that while he knew that the metadata is not updated, this fact did not occur to him when he swore his affidavit.[18] Despite swearing two affidavits that attempted to support Moyse's position, Lo was unable to point to any evidence that supported his conclusion that Moyse did not use the Scrubber to delete documents.

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[16] Supplementary Affidavit of Kevin Lo, affirmed May 12, 2015, ¶6-9, MR, Tab 22.
[17] Second Supplementary Affidavit of Martin Musters, sworn May 13, 2015, ¶5, MR, Tab 14.
[18] Cross-Examination of Kevin Lo, held May 14, 2015 ("Lo Cross"), pp. 46-49, qq. 210-223, MR, Tab 26.

31. The very nature of this type of software makes it impossible for anyone to know for certain whether it was used, because the data it deletes is deleted forever without a trace, and it is a simple matter of deleting the registry log for the Scrubber to delete the record of its activity.

4. MOYSE'S CREDIBILITY PROBLEMS

32. Moyse has engaged in a long-standing course of conduct that demonstrates he is willing to say whatever he feels is necessary to get what he wants. For example:

(a) He admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[19]

(b) He admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have led a due diligence process in which he merely participated with more senior employees;[20]

(c) Moyse justified the "embellishments" on his deal sheet because he wanted a job, and it was not a "sworn" document;

(d) Moyse now claims that he did not understand all of the terms of his employment agreement with Catalyst, even though he indicated by signing the contract that he had reviewed, understood and accepted the terms of the offer;[21]

(e) Moyse admitted he made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[22]

(f) Moyse admitted that by disclosing a confidential memo to West Face, he knowingly caused Catalyst to breach a non-disclosure agreement;[23]

(g) Moyse admitted he wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device;[24]

(h) Moyse claimed he misrepresented his opinion of his employment at Catalyst in an email to Dea and another partner at West Face;[25]

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[19] Cross-Examination of Brandon Moyse, held July 31, 2014 ("Moyse 2014 Cross"), p. 15, qq. 57-62, MR, Tab 24.
[20] Moyse 2014 Cross, pp. 17-20, qq. 69-91, MR, Tab 24.
[21] Moyse 2014 Cross, pp. 27-28, qq. 126-130, MR, Tab 24.
[22] Moyse 2014 Cross, pp. 85-86, qq. 394-396, MR, Tab 24.
[23] Moyse 2014 Cross, pp. 96-98, qq. 446-452, MR, Tab 24.
[24] Moyse 2014 Cross, pp. 103-106, qq. 473-486, MR, Tab 24.
[25] Moyse 2014 Cross, pp. 126-27, qq. 596-602 and pp. 153-54, q. 729, MR, Tab 24.

(i) Moyse admitted that contrary to his affidavit evidence regarding his "limited" role on the Wind Mobile situation, he was in fact part of the Catalyst deal team for the situation and received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement;[26] and

(j) In his first cross-examination, although asked in general terms what matters he worked on at West Face, Moyse omitted reference, even in general terms, to his work on the Arcan investment, which was only disclosed by West Face in response to the motion below.[27]

33. Catalyst's position is that, based on Moyse's prior conduct of misleading the Court, his undisputed credibility problems, his expert's reliance on incorrect evidence, and the admitted fact that Moyse deleted his web browsing history, the only reasonable inference that the Motion Judge could have drawn from the undisputed evidence in the record is that Moyse used the Scrubber to delete relevant data from his computer.

5. THE UNLIKELY SERIES OF "COINCIDENCES" AT WEST FACE

34. Just as Moyse lacks credibility, so does West Face. According to West Face, the following facts are nothing more than an unfortunate series of coincidences, which only came to light as a result of Catalyst's dogged pursuit of the truth in both the prior motions and the current motion:

(a) Moyse sent West Face Catalyst's confidential information as part of his effort to be hired by West Face;

(b) Catalyst's confidential information was circulated to the partners and vice-president;

(c) West Face hired an analyst from the one investment fund manager it was in competition with to purchase Wind Mobile; and

(d) On his second day at West Face, Moyse performed analysis of Arcan, one of the companies that he had worked on at Catalyst for which he sent a confidential memo to West Face in March 2014.

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[26] Moyse 2014 Cross, pp. 174-75, qq. 803-809, MR, Tab 24.
[27] Moyse 2014 Cross, pp. 171-72, qq. 794-96, MR, Tab 24.

35. These "coincidences" have only been revealed when Catalyst has been able to pursue the truth through its motions.

6. MOYSE WORKED ON A CATALYST-RELATED MATTER AT WEST FACE

36. In the Interlocutory Motion, Catalyst tried to find out what Moyse worked on while he was employed at West Face, but the defendants refused to disclose this information.[28] In its factum for the Interlocutory Motion, West Face stated that it was not involved in any of the transactions that were the subject of the Catalyst investment memos and had no use for the information contained therein.[29]

37. It turns out that during his first week at West Face, Moyse worked on an analysis of Arcan Resources Ltd. ("Arcan"), one of the companies he analyzed in the Catalyst confidential memos he disclosed to West Face.[30] West Face and Moyse actively hid this relevant evidence from Catalyst and Justice Lederer in the Interlocutory Motion.

38. West Face has tried to minimize the significance of it conduct, but the fact remains that relevant evidence was only disclosed after Catalyst brought the motion to appoint an ISS, which, if granted, would have demonstrated that West Face had attempted to withhold relevant evidence from the Court at the return of the motion before Justice Lederer.

7. THE MOTION JUDGE'S DECISION

39. As a result of the evidence revealed by the ISS that Moyse tampered with the evidence preservation and gathering process, the only avenue left to Catalyst to uncover the truth as to whether West Face had received confidential information from Moyse remained on West Face's

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[28] Moyse Answers to Undertakings, Q. 173, MR, Tab 27.
[29] Exhibit "1" to the Cross-Examination of Anthony Griffin held May 8, 2015 ("Griffin Cross"), MR, Tab 28.
[30] Affidavit of Anthony Griffin, sworn March 7, 2015 ("Griffin Affidavit"), ¶52-57, MR, Tab 15.

own computers. Catalyst commenced a motion for an Order finding Moyse in contempt of the Interim Order and for an order appointing an ISS to review the computers of West Face.

40. The Motion Judge dismissed the motion. With respect to the issue of contempt, he held that:

(a) If the words "activities since March 27, 2014" were intended to encompass non-litigation-related activities, then the Interim Order was ambiguous;

(b) Any activities referred to in the Interim Order would have to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation;

(c) Catalyst did not prove beyond a reasonable doubt that Moyse deleted files relevant to his conduct at Catalyst and/or with respect to issues raised in the litigation;

(d) Even if Catalyst had proved beyond a reasonable doubt that Moyse had deleted relevant files from his personal computer, the Motion Judge would have exercised his discretion to decline to make a finding of contempt as such conduct occurred as a result to make "good faith" efforts to comply with the Interim Order while deleting embarrassing personal files that were not relevant to the litigation; and

(e) Catalyst did not prove beyond a reasonable doubt that Moyse ran the Scrubber.[31]

41. With respect to the request for an ISS, the motion judge held that there was no evidence that West Face failed to comply with its production obligations or is evading its discovery obligations.[32]

42. In the motion below, Catalyst also sought injunctive relief. That relief was not granted and Catalyst does not appeal from that decision. It is only appealing the issues related to civil contempt and appointment of an ISS.

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[31] Endorsement of Justice Glustein dated July 7, 2015, MR, Tab 3.
[32] *Ibid.*

PART III - THE PROPOSED QUESTIONS ON APPEAL

43. The proposed questions to be answered on appeal if leave is granted are:

(a) whether the Motion Judge erred by finding that the Interim Order was ambiguous if it was intended to encompass Moyse's personal activities;

(b) whether the Motion Judge erred by finding that Moyse's admitted conduct of deleting his web browsing history did not breach the Interim Order;

(c) whether the Motion Judge erred by failing to draw the only reasonable inference of fact available to be drawn from the known facts, namely, that Moyse used the Scrubber to delete documents from his computer;

(d) whether the Motion Judge erred by finding that even if Moyse had breached the Interim Order, he could decline to hold Moyse in contempt of court; and

(e) whether the Motion Judge erred by refusing to appoint an ISS without giving due consideration of the effect of his decision on Justice Lederer's prior order.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

44. The issue to be determined on this motion is whether leave ought to be granted pursuant to Rule 62.02(4) of the *Rules of Civil Procedure*.[33] In this case, both of the possible routes to leave to appeal are satisfied:

(a) The Motion Decision conflicts with decisions of other courts in Ontario, and it is desirable that leave to appeal be granted; and

(b) There is good reason to doubt the correctness of the Motion Decision and the proposed appeal involves matters of such importance that leave to appeal should be granted.

45. As the Moving Parties can satisfy both of these tests, leave to appeal should be granted.

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[33] RRO 1990, Reg 194.

1. LEAVE SHOULD BE GRANTED PURSUANT TO RULE 62.02(4)(A)

A. The Motion Decision Conflicts with Other Decisions

46. The Motion Decision conflicts with other decisions of the Superior Court of Justice in Ontario on critical issues related to the respect for and sanctity of the Court's process and its Orders. Decisions are conflicting if they present a difference in principle.[34]

47. The Motion Decision conflicts with other decisions in four key respects.

(i) Failure to Properly Apply the Test for Reasonable Doubt to the Evidence

48. Civil contempt has three elements which must be established beyond a reasonable doubt:

(a) the order alleged to have been 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.[35]

49. An order is not unclear just because it is unduly restrictive.[36] Once having knowledge of the order, a person must obey the order in both letter and spirit with every diligence. They cannot escape a finding of contempt by "finessing" the interpretation of an order.[37]

50. In order to constitute contempt, it is not necessary to prove that the alleged contemnor intended to disobey or flout the order of the Court. All that is required is proof beyond a reasonable

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[34] *Holt v. Anderson* (2005), 205 O.A.C. 91 (Div. Ct.), at ¶10, Catalyst Brief of Authorities ("BOA"), Tab 1; *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.), at ¶7, BOA, Tab 2.
[35] *Carey v. Laiken*, 2015 SCC 17 at ¶32-35 ["*Carey*"], BOA, Tab 3.
[36] *Sabourin and Sun Group of Companies* v. *Laiken*, 2013 ONCA 530 at ¶48, BOA Tab 4.
[37] *Ceridian Canada Ltd. v. Azeezodeen*, 2014 ONSC 3801 at ¶32, BOA, Tab 5.

doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice.[38]

51. Although the Motion Judge set out some of these basic principles at the outside of his discussion on the issue of contempt, he failed to properly apply the test established by the Supreme Court to determining whether the allegations have been proven beyond a reasonable doubt.

52. When considering whether allegations have been proven beyond a reasonable doubt, the trier of fact must not weigh one party's evidence against the other party's evidence.[39] Instead, the proper approach is as follows:

(a) First, the trier of fact must consider whether the evidence of the respondent is credible. If so, then a reasonable doubt has been raised. If not, then

(b) Second, the trier of fact must consider whether the evidence of the respondent raised a reasonable doubt. If not, then

(c) Third, the trier of fact must consider whether, on the basis of the evidence which is accepted, he or she is convinced beyond a reasonable doubt by that evidence of the guilt of the respondent.[40]

53. There is no indication that the Motion Judge applied this test. Instead, he appeared to ignore the significant credibility questions at issue with Moyse's evidence.

54. As a result of the Motion Judge's failure to follow established case law on the test regarding credibility and reasonable doubt, the Motion Decision conflicts in principle with other decisions of the Superior Court, as well as those of the Court of Appeal for Ontario and the Supreme Court of Canada.

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[38] *Carey, supra* note 35 at ¶38.
[39] *R. v. W.(D.)*, [1991] 1 S.C.R. 742 ["*W.D.*"], at ¶9,10, BOA, Tab 6.
[40] *W.D.*, *supra* note 39, at ¶11.

(ii) An Impermissible Inference Constituted Speculation and Conjecture

55. In addition to this issue regarding the test for credibility, the Motion Decision also conflicts with established case law due to its failure to apply another well-established legal test related to fact-finding.

56. There is an established test regarding when it is appropriate for the Court to draw an inference based on the evidence. It is a reversible error to draw inferences that do not flow logically and reasonably from established facts, because doing so draws the Motion Judge into the impermissible realms of conjecture and speculation.[41]

57. The Motion Decision conflicts with this well-established law because it contains a conclusion that is disconnected from established fact. The Motion Judge concluded that the evidence does not support a finding beyond a reasonable doubt that Moyse ran the Scrubber. This was a conclusion based on the failure to draw the only reasonable and logical inference available to be drawn from the established facts.

58. The facts established by the evidence proved beyond a reasonable doubt that Moyse:

(a) purchased the Scrubber the morning of the motion for interim relief;

(b) had engaged in Internet searches to research how to permanently delete information from his computer;

(c) deleted his web browsing history the night before his computer was to be imaged;

(d) deleted other damning evidence (his email to Tom Dea sent in March 2014) from his computer when he realized he should not have sent that email; and

(e) launched the Scrubber software the night before his computer was to be imaged.

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[41] *R. v. MacIsaac*, 2015 ONCA 587 at ¶46, BOA, Tab 7.

59. From this established evidence, the **only** reasonable inference that the Motion Judge could have drawn is that Moyse used the Scrubber at the same time as he deleted his web browsing history. Instead, the Motion Judge concluded that Moyse launched the Scrubber software but did not use it, which is both unreasonable and illogical.

60. This was the result of applying principles that conflict with those established and accepted in the case law.

(iii) Application of the Wrong Principles in Discretion to Discharge Contempt

61. The Motion Judge held that even if he had found that Moyse had breached the Interim Order by deleting his web browsing history, he would have exercised his discretion to decline to make a finding of contempt "as such conduct would have occurred as a result of Moyse's 'good faith' efforts to comply with the [Interim Order] while deleting embarrassing personal files which were not relevant to the litigation".[42]

62. This finding is in direct conflict with the applicable case law.

63. In contrast to the reasoning of the Motion Judge, the jurisprudence is clear that the Court's discretion to relieve from a finding of contempt is limited to situations where such a finding 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.

64. In *Carey,* the Supreme Court acknowledged that a judge hearing a contempt motion retains some discretion to decline to make a finding of contempt. However, the examples cited in *Carey* illustrate the scope of this discretion, namely, to avoid an injustice in the circumstances of the case,

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[42] Endorsement of Justice Glustein dated July 7, 2015 at ¶79, MR, Tab 3.

such as where the alleged contemnor took steps to attempt to comply with the order but was unable to do so.[43]

65. An injustice can occur when the alleged contemnor acts in good faith to take reasonable steps to comply with the order. But "reasonable steps" refer to steps taken in an attempt to comply with a mandatory order or where the defendant did everything possible to comply with the terms of the order.[44] By that measure, Moyse falls short of the standard.

66. By applying different reasoning that the established case law, the Motion Decision exhibits principles that conflict with other decisions.

(iv) An ISS Was Already Found to Be An Appropriate Remedy

67. In addition, the Motion Decision conflicts with other decisions in Ontario on the issue of authorizing an ISS, in particular the decision of Justice Lederer in this same case, in which the Court held that the circumstances as between Catalyst, Moyse, and West Face warranted an order authorizing an ISS process.

68. In the motion below, Catalyst sought to have an ISS review forensic images of West Face's corporate servers and the electronic devices of five West Face representatives for the purpose of preparing a report which would detail whether the Images contain or contained Catalyst's confidential and proprietary information and if so, whether any emails exist in relation to this confidential and proprietary information.

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[43] *Carey*, *supra* note 35 at ¶37.
[44] *Ibid.* See also *TG Industries Ltd. v. Williams*, 2001 NSCA 105 at ¶31, BOA, Tab 8.

69. The Motion Judge applied Rule 30.06 and determined that Catalyst had not established that West Face had failed to comply with its production obligations or intentionally deleted materials to thwart the discovery process.[45]

70. The requested relief is equitable in nature, and is therefore subject to the discretion of the Court. But that discretion is not wholly unfettered: the Motion Judge was still required to consider all of the relevant principles, including the need for the court to uphold the integrity of its processes and prior court orders.

71. In the unique circumstances of the motion below, where the Court had ordered an ISS review of Moyse's computer, the ISS issue should not have been treated as a motion *de novo*; rather, it should have been considered in the context of the relief already ordered by Justice Lederer in the prior motion.

72. While the relief sought with respect to the ISS was discretionary in nature, the Motion Judge erred by failing to consider the principle of the importance of the relief sought to the need to maintain the dignity and respect for the Court's process. The appointment of an ISS to review West Face's devices is required in order to redress the damage to the Court's process caused by Moyse's conduct.

73. At the Interlocutory Motion, Moyse's counsel argued that it should be left to Moyse to review and determine what should be produced. Justice Lederer rejected this argument on the basis that this was "another assurance where those made in the past were not sustained."[46] Justice

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[45] Endorsement of Justice Glustein dated July 7, 2015 at ¶57, MR, Tab 3.
[46] Judgment of Justice Lederer dated November 10, 2014 at ¶83, MR, Tab 6.

Lederer ordered that an ISS review the forensic images of Moyse's devices and deliver his report before any examinations for discovery are conducted in this action.

74. The ISS process ordered by Justice Lederer was irredeemably tainted by Moyse's conduct of deleting his web browsing history and running the Scrubber before the image of his computer was made. We will never know what was deleted.

75. However, a second source of the same evidence exists – West Face's devices. An ISS review of West Face's devices will remedy the deficiencies of the first ISS process that were caused by West Face's employee (Moyse) and will ensure that Moyse's subversion of the court's process is not left without a remedy.

76. The Motion Judge failed to consider the context of the motion for an ISS, and as a result, the Motion Decision conflicts with the decision of Justice Lederer.

B. It Is Desirable that Leave be Granted

77. The conflicts between established case law and the Motion Decision raise important jurisprudential issues related to the Court's process and its Orders.

78. It is desirable that leave to appeal be granted so that the Divisional Court can explain the proper approach to credibility issues in the context of civil contempt motions, clarify the circumstances in which inferences ought to be drawn based on the evidentiary record, and set out the conditions in which a motion judge is permitted to exercise his or her limited discretion to decline to make a finding of contempt. Furthermore, granting leave will allow the Divisional Court to clarify how the proper application of the test to authorize an ISS process in circumstances where previous court orders were tainted by a parties' conduct.

79. These questions all raise significant issues related to the sanctity of Court orders and the litigation process.

2. LEAVE SHOULD BE GRANTED PURSUANT TO RULE 62.02(4)(B)

A. There Is Good Reason to Doubt the Correctness of the Motion Decision

80. There is good reason to doubt the correctness of the Motion Decision. The test does not require that the Court determine that the Motion Decision was wrong, but instead simply asks whether there is good reason to doubt its correctness.[47]

81. There are four good reasons to doubt the correctness of the Motion Decision.

(i) "Activities Since March 27, 2014" Include Web Browsing History

82. The Motion Judge erred in interpreting the Interim Order to mean that the phrase "relate to [the Respondents'] activities since March 27, 2014" was not intended to encompass all of the Respondents' activities. The Motion Judge also erred in holding that if this was the intended meaning, then the Interim Order was ambiguous.

83. Paragraph 4 of the Interim Order provided as follows:

> This Court further orders that Moyse and West Face, and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst, **and/or relate to their activities since March 27, 2014,** and/or relate to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst.[48]

84. The Motion Judge held that the phrase "relate to their activities since March 27, 2014" would be ambiguous if it was intended to encompass non-litigation related activities, as "reasonable people could have a different understanding of whether non-work-related activities

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[47] *Irving Paper Ltd. v. Attofino Chemicals Inc.*, 2010 ONSC 2705, at ¶21, BOA, Tab 9.
[48] Order of Justice Firestone dated July 16, 2014, MR, Tab 4 [emphasis added].

were to be included". The Motion Judge concluded that the phrase was thus not intended to include non-work-related activities and therefore only applied to Moyse's Internet browsing history if Catalyst could prove beyond a reasonable doubt that his browsing history included records of his work-related activities.[49]

85. This interpretation is flawed, as it ignores the plain wording of paragraph 4 in the Interim Order, which, in addition to Moyse's "activities", referred to documents relating to "Catalyst" as a separate category of documents that were ordered preserved. The Motion Judge's interpretation of the Interim Order ignored the explicit inclusion of "and/or" to separate "Catalyst" and "activities", which can only be interpreted to mean that the Interim Order was intended to apply not only to activities related to Catalyst, but also to **any** activities engaged in by Moyse since March 27, 2014.

86. The phrase is not ambiguous. "Activity" means a specific deed, action, or function. The Interim Order was intended to ensure that **any** evidence of Moyse's deeds, actions or functions since March 27, 2014, if it resided on his personal computer, would be preserved to ensure that evidence of those deeds, actions or functions could be reviewed by the ISS, an independent third party, to determine if Moyse retained Catalyst's confidential information and/or communicated Catalyst's confidential information to any third parties.

87. The Motion Judge's error lies in the fact that the terms of the Interim Order were broad in nature, in that they required Moyse to preserve evidence of **all** of his activities since March 27, 2014, whether they related to Catalyst or not. The purpose of this broad restriction is evident from the problem Catalyst now faces in its pursuit of the action – Moyse has admittedly deleted his web browsing history from his computer, which makes it impossible to verify whether his web

[49] Endorsement of Justice Glustein dated July 7, 2015, ¶71-73, MR, Tab 3.

browsing activities were relevant to this action. The only source of evidence as to what was deleted by Moyse is through Moyse himself, which is exactly the situation the parties sought to avoid through an Interim Order that required Moyse to preserve documents relating to **all** of his activities since March 27, 2014, for review by an independent third party.

88. It is no defence to a motion for contempt to argue that the order is improper or should not have been granted. Moyse, through his counsel, consented to the terms of Interim Order on July 16, 2014. Four days later, he deleted his web browsing history. If he was concerned that the phrase "activities since March 27, 2014" was so broad as to include embarrassing personal activities, he should have openly addressed that concern when the parties negotiated the terms of the Interim Order, or by subsequent motion to the Court.

89. It is no defence for Moyse to now argue that the broad terms of the consent Interim Order were ambiguous. The Motion Judge erred by accepting this argument. The terms of the Interim Order are clear and unambiguous, and required Moyse's full compliance.

90. By finding that the Interim Order did not prohibit Moyse from deleting any evidence of his activities on the web browser on his computer, the Motion Judge erred.

(ii) The Motion Judge Drew Inferences Disconnected from the Evidence

91. In addition, as discussed in detail above, 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. In particular, the motion judge erred by engaging in impermissible conjecture and speculation by drawing an inference that Moyse has not used the scrubber, which did not flow from logically and reasonably from established facts.

92. By intentionally destroying the record of his web browsing activities since March 27, 2014, Moyse put the Court in the position that the Interim Order was intended to avoid – the Motion Judge erroneously concluded that he had to determine whether Catalyst could prove beyond a reasonable doubt that the web browsing history contained records relevant to the action. That was the wrong question, which led to the wrong result on the motion.

93. A computer user's web browsing history records the user's Google searching activities, access to Internet storage services such as Dropbox, and access to Internet email services such as Gmail.[50] The deletion of the web browsing history destroys the record of that activity.[51]

94. Whether or not Moyse admitted to having used Google search, Dropbox or Gmail on his computer, it is beyond dispute that his web browsing history would have recorded whether he accessed those services from his personal computer or not, and on what dates and times. The point of preserving documents and evidence such as Moyse's web browsing history was to provide the ISS with a record of Moyse's web browsing activities as part of his investigation of Moyse's digital records.

95. It is no defence to a motion for contempt for Moyse to argue that Catalyst had not proven beyond a reasonable doubt that the records he deleted contained relevant information. The question is a breach of a Court Order. In this case, the plain wording of the Interim Order applied to any document that evidences his activities since March 27, 2014, and clearly applied to the web browsing history on his personal computer, which Moyse knew was going to be imaged the day after he deleted that history.

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[50] Lo Cross, pp. 23-25, qq. 95-105, MR, Tab 26.
[51] Lo Cross, pp. 23-26, qq. 97, 104 and 110, MR, Tab 26.

96. By deleting his web browsing history, Moyse put the parties in a position where he was the only person with evidence as to what that history would have revealed. His self-serving evidence on this point should not have been accepted, but in any event, the fact that web browsing history is capable of recording relevant activities is the very reason why it was subject to the Interim Order and should not have been deleted. By doing so, Moyse breached the order and on that basis alone should have been held to have acted in contempt of the Interim Order.

97. Had the Motion Judge made proper and allowable inferences of fact, instead of illogical and unreasonable inferences, he would have made the only determination available to him from the known facts: that Catalyst had proven beyond a reasonable doubt that Moyse had acted contrary to the terms of the Interim Order and in contempt of court. This is especially so given that Moyse had no credible explanation for the fact that the Scrubber was opened the night before he was required to give his computer to his lawyer for the purpose of creating a forensic image.

(iii) Inappropriate for the Court to Exercise Discretion to Discharge Contempt

98. 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.

99. The purpose of a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. The rule of law depends on the ability of the courts to enforce their process and maintain their dignity and respect.[52]

100. In the motion below, the Motion Judge erred in holding that he had the discretion in these circumstances to decline to make a finding of contempt. Paragraph 4 of the Interim Order, while

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[52] *Carey*, *supra* note 35 at ¶30.

positive in its syntax, was prohibitive in nature: Moyse and West Face were ordered to preserve and maintain certain records.

101. One complies with such an order **by not deleting records.** Moyse deleted records that fell within the scope of the Interim Order. When he deleted his web browsing history without **at minimum** consulting first with his counsel or bringing a motion to the Court, Moyse was not exercising diligence or taking reasonable steps to comply with the order; rather, he was taking steps that undermined the spirit and intent of the order.

102. Moyse claimed that his conduct was motivated by his concern regarding the potential that the ISS review might cover some personal activities. However, after putting his state of mind at issue, he refused to disclose his communications with his counsel that he allegedly engaged in to address this concern.

103. These circumstances do not fall within the limited circumstances where an alleged contemnor can be said to have exercised due diligence in an attempt to comply with a court order.[53] Moyse did no such thing and should not escape liability for the consequences of his actions.

(iv) An ISS Had Already Been Found to be Appropriate in These Circumstances

104. Finally, 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.

105. 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. As a result of

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[53] *Carey*, *supra* note 35 at ¶37.

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

106. 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.

107. 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, which was made only in relation to Moyse's devices alone because no one was aware of the fact that Moyse had already taken steps to taint the ISS process.

B. The Proposed Appeal Involves Matters of General Importance

108. The proposed appeal of the Motion Decision involves matters of such public importance that leave should be granted. The matters at issue here transcend the interests of the parties. They are of general public importance to the development of the law and the administration of justice.[54]

109. In particular, the proposed appeal relates directly to the respect for and sanctity of Court Orders. Courts have repeatedly emphasized the importance of upholding the inviolability of Court Orders. In *United Nurses of Alberta v. Alberta Attorney General,* Justice McLachlin, as she then was, held:

> Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.[55]

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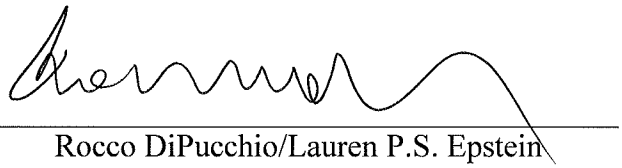
[54] *Greslick v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.), at ¶7, BOA, Tab 10.
[55] [1992] 1 S.C.R. 901 at ¶20, BOA, Tab 11.

110. It is a significant issue of public importance for the Divisional Court to resolve the appropriate analysis to be applied when parties engage in acts designed to delete information on a computer that the Court has ordered should be forensically imaged to find all potential evidence of wrong doing.

PART V - ORDER REQUESTED

111. Catalyst respectfully request that leave be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of January 2016.



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Holt v. Anderson* (2005), 205 O.A.C. 91 (Div. Ct.).
2. *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.* (1992), 7 O.R. (3d) 542 (Div. Ct.).
3. *Carey v. Laiken*, 2015 SCC 17.
4. *Sabourin and Sun Group of Companies* v. *Laiken*, 2013 ONCA 530.
5. *Ceridian Canada Ltd. v. Azeezodeen*, 2014 ONSC 3801.
6. *R. v. W.(D.)*, [1991] 1 S.C.R. 742.
7. *R. v. MacIsaac*, 2015 ONCA 587.
8. *TG Industries Ltd. v. Williams*, 2001 NSCA 105.
9. *Irving Paper Ltd. v. Attofino Chemicals Inc.*, 2010 ONSC 2705.
10. *Greslick v. Ontario Legal Aid Plan* (1988), 65 O.R. (2d) 110 (Div. Ct.).
11. *United Nurses of Alberta v. Alberta Attorney General*, [1992] 1 S.C.R. 901.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Rule 60.11: Contempt Order

Motion for Contempt Order

60.11(1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily.

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

MOTION FOR LEAVE TO APPEAL TO DIVISIONAL COURT

Notice of Motion for Leave

61.03 (1) Where an appeal to the Divisional Court requires the leave of that court, the notice of motion for leave shall,

(a) state that the motion will be heard on a date to be fixed by the Registrar;

(b) be served within 15 days after the making of the order or decision from which leave to appeal is sought, unless a statute provides otherwise; and

(c) be filed with proof of service in the office of the Registrar, within five days after service. R.R.O. 1990, Reg. 194, r. 61.03 (1); O. Reg. 61/96, s. 5 (2); O. Reg. 14/04, s. 29 (1).

Motion Record, Factum and Transcripts

(2) On a motion for leave to appeal to the Divisional Court, the moving party shall serve,

(a) a motion record containing, in consecutively numbered pages arranged in the following order,

(i) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter,

(ii) a copy of the notice of motion,

(iii) a copy of the order or decision from which leave to appeal is sought, as signed and entered,

(iv) a copy of the reasons of the court or tribunal from which leave to appeal is sought with a further typed or printed copy if the reasons are handwritten,

(iv.1) a copy of any order or decision that was the subject of the hearing before the court or tribunal from which leave to appeal is sought,

(iv.2) a copy of any reasons for the order or decision referred to in subclause (iv.1), with a further typed or printed copy if the reasons are handwritten,

(v) a copy of all affidavits and other material used before the court or tribunal from which leave to appeal is sought,

(vi) a list of all relevant transcripts of evidence in chronological order, but not necessarily the transcripts themselves, and

(vii) a copy of any other material in the court file that is necessary for the hearing of the motion;

(b) a factum consisting of a concise argument stating the facts and law relied on by the moving party; and

(c) relevant transcripts of evidence, if they are not included in the motion record,

and shall file three copies of the motion record, factum and transcripts, if any, with proof of service, within thirty days after the filing of the notice of motion for leave to appeal. R.R.O. 1990, Reg. 194, r. 61.03 (2); O. Reg. 61/96, s. 5 (3); O. Reg. 206/02, s. 13 (1).

(3) On a motion for leave to appeal to the Divisional Court, the responding party may, where he or she is of the opinion that the moving party's motion record is incomplete, serve a motion record containing, in consecutively numbered pages arranged in the following order,

(a) a table of contents describing each document, including each exhibit, by its nature and date and, in the case of an exhibit, by exhibit number or letter; and

(b) a copy of any material to be used by the responding party on the motion and not included in the motion record,

and may serve a factum consisting of a concise argument stating the facts and law relied on by the responding party, and shall file three copies of the responding party's motion record and factum, if any, with proof of service, within fifteen days after service of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194,r. 61.03 (3); O. Reg. 61/96, s. 5 (4); O. Reg. 206/02, s. 13 (2).

Notice and Factum to State Questions on Appeal

(4) The moving party's notice of motion and factum shall, where practicable, set out the specific questions that it is proposed the Divisional Court should answer if leave to appeal is granted. R.R.O. 1990, Reg. 194, r. 61.03 (4); O. Reg. 61/96, s. 5 (5).

Date for Hearing

(5) The Registrar shall fix a date for the hearing of the motion which shall not, except with the responding party's consent, be earlier than fifteen days after the filing of the moving party's motion record, factum and transcripts, if any. R.R.O. 1990, Reg. 194, r. 61.03 (5).

Time for Delivering Notice of Appeal

(6) Where leave is granted, the notice of appeal shall be delivered within seven days after the granting of leave. R.R.O. 1990, Reg. 194, r. 61.03 (6).

Costs Appeal Joined with Appeal as of Right

(7) Where a party seeks to join an appeal under clause 133 (b) of the *Courts of Justice Act* with an appeal as of right,

(a) the request for leave to appeal shall be included in the notice of appeal or in a supplementary notice of appeal as part of the relief sought;

(b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal as of right; and

(c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (1); O. Reg. 14/04, s. 29 (2).

Costs Cross-Appeal Joined with Appeal or Cross-Appeal as of Right

(8) Where a party seeks to join a cross-appeal under a statute that requires leave for an appeal with an appeal or cross-appeal as of right,

> (a) the request for leave to appeal shall be included in the notice of appeal or cross-appeal or in a supplementary notice of appeal or cross-appeal as part of the relief sought;
>
> (b) leave to appeal shall be sought from the panel of the Divisional Court hearing the appeal or cross-appeal as of right; and
>
> (c) where leave is granted, the panel may then hear the appeal. O. Reg. 534/95, s. 3; O. Reg. 175/96, s. 1 (2); O. Reg. 206/02, s. 13 (3); O. Reg. 14/04, s. 29 (3); O. Reg. 394/09, s. 24.

Application of Rules

(9) Subrules (1) to (6) do not apply where subrules (7) and (8) apply. O. Reg. 175/96, s. 1 (3).

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/Moving Party

-and-

BRANDON MOYSE et al.
Defendants/Responding Parties

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE MOVING PARTY

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