

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

MOVING PARTY'S FACTUM
(MOTION TO EXTEND TIME FOR LEAVE TO APPEAL
RETURNABLE JANUARY 19, 2016)

January 8, 2016

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PART I ~ INTRODUCTION

1. The issue on this motion is straightforward. The plaintiff (“Catalyst”) seeks an extension of time to bring a motion for leave to appeal an order dismissing its motion for contempt and for the appointment of an Independent Supervising Solicitor (“ISS”) to review forensic images of electronic devices belonging to one of the defendants.

2. It is undisputed that Catalyst always intended to appeal the dismissal of the motion below within the relevant time period. The delay is explained by an erroneous belief as to the proper procedural route of appeal. Catalyst appealed to the Court of Appeal, but that appeal was quashed in November 2015. Immediately thereafter, Catalyst sought leave to appeal to the Divisional Court and scheduled this motion.

3. Catalyst seeks leave to appeal an order that, while interlocutory in nature, involves serious concerns regarding the law of contempt and the sanctity of Court Orders. There is no prejudice to the defendants, who have known since July 22 that Catalyst intended to appeal the dismissal of the motion below. The justice of the case supports the relief sought in this motion.

PART II ~ SUMMARY OF FACTS

(A) THE LITIGATION AND PRIOR MOTIONS

4. Catalyst is an independent investment firm that operates in the field of investments in distressed and undervalued Canadian situations for control or influence. In June 2014, Catalyst commenced an action against Brandon Moyse, a former employee (“Moyse”), and West Face Capital Inc. (“West Face”), a competitor of Catalyst’s, in circumstances where Moyse resigned from Catalyst and immediately commenced working at West Face. One of the central issues in the

action is whether Moyse communicating Catalyst's confidential information and communicated that information to West Face.¹

5. Shortly after the action was commenced, Catalyst brought a motion seeking, among other things, to create forensic images of Moyse's electronic devices and to appoint an Independent Supervising Solicitor ("ISS") to review the images of those devices to determine if there was documentary evidence on those devices that Moyse had taken Catalyst's confidential information and/or whether any confidential information was communicated to West Face.²

6. On July 16, 2014, Moyse and West Face consented to an interim order that provided for, among other things, the preservation of the defendants' records that relate to Catalyst, to their activities since March 27, 2014 and/or to any of the matters raised in the action, and for the creation of forensic images of Moyse's electronic devices. Forensic images of Moyse's electronic devices (the "Images") were created on July 21, 2014.³

7. The motion to appoint an ISS was heard and granted by Justice Lederer in the fall of 2014.

In his reasons, Justice Lederer wrote:

Finally, counsel for Catalyst submitted that an independent supervising solicitor should be identified and required to review the forensic images that have been created and held in trust by counsel for Brandon Moyse to identify what, if any, material these images may contain that are confidential to Catalyst. What is personal to Brandon Moyse would be returned to him. Counsel for Brandon Moyse opposed this request. It would be an extraordinary order. It is the view of counsel for Brandon Moyse that material that is confidential to Catalyst will have to be produced. It should be left to Brandon Moyse to review and determine what must be produced.

¹ Affidavit of Andrew Winton, sworn January 8, 2016 ("Winton Affidavit"), ¶2-3; Motion Record ("MR"), Tab 3.

² Winton Affidavit, ¶4; MR, Tab 3.

³ Winton Affidavit, ¶5-6; MR, Tab 3.

The difficulty with this is that it is another assurance where those made in the past were not sustained.

4. The forensic images that were created in compliance with the order of Mr. Justice Firestone shall be reviewed by an independent supervising solicitor identified, pursuant to a protocol to be jointly agreed to by counsel for the parties, or, failing such agreement, by way of further direction of the court.

5. The review of the forensic images by the independent supervising solicitor shall be completed before any examinations-for-discovery are conducted in this action.⁴

(B) THE MOTION BEFORE JUSTICE GLUSTEIN

8. The ISS appointed pursuant to Justice Lederer's order delivered its final report in February 2015. The ISS report revealed that, immediately prior to the making of the Images on July 21, 2014, Moyse downloaded and apparently launched military-grade deletion software that is capable of deleting documents from a computer so that they cannot be recovered through forensic analysis. The ISS was unable to determine if Moyse actually ran the deletion software, but noted that a system folder created the night before the Images were created suggested that the software had been launched prior to the creation of the Images.⁵

9. Catalyst had seen an earlier draft of the ISS's report that included the information concerning Moyse's conduct. Immediately upon learning of Moyse's conduct, Catalyst brought a motion seeking, among other things, to have Moyse held in contempt of court for breaching the Order of Justice Firestone dated July 16, 2014, the creation of forensic images of devices belonging to West Face, and the appointment of an ISS to review those images (the "Contempt and

⁴ Winton Affidavit, ¶7 and Exhibit "D"; MR, Tab 3 and 3-D.

⁵ Winton Affidavit, ¶9-10; MR, Tab 3.

ISS Motion”). The Contempt and ISS Motion also sought an interlocutory injunction to restrict West Face’s control over its shares in Wind.⁶

10. The parties filed voluminous records of evidence in the Contempt and ISS Motion. Catalyst’s evidence included affidavit evidence from a forensic IT investigator who concluded that Moyse most likely used the deletion software to delete files before the Images were created.⁷

11. Moyse and West Face also filed extensive evidence in response to Catalyst’s motion, and cross-examinations of the parties’ affiants took place in May 2015.⁸

12. The Contempt and ISS Motion was heard by Justice Glustein on July 2, 2015. On July 7, 2015, Justice Glustein dismissed all three elements of the motion: the contempt issue, the ISS issue and the interlocutory injunction.⁹

13. In his dismissal of the contempt motion, Justice Glustein acknowledged the undisputed evidence that Moyse deleted his web browsing history after Justice Firestone made his interim order to preserve evidence and before the Images of Moyse’s devices were made. However, Justice Glustein determined that this conduct was not a breach of the order.

14. Justice Glustein dismissed the ISS motion despite the fact that Moyse’s downloading and launching of military-grade deletion software meant that the ISS that reviewed Moyse’s devices could not determine whether documents were deleted by Moyse after Justice Firestone’s order was made.

⁶ Winton Affidavit, ¶11-12; MR, Tab 3.

⁷ Winton Affidavit, ¶13; MR, Tab 3.

⁸ Winton Affidavit, ¶14; MR, Tab 3.

⁹ Winton Affidavit, ¶15; MR, Tab 3.

(C) CATALYST ATTEMPTS TO APPEAL THE DISMISSAL OF THE MOTION BELOW

15. Immediately following receipt of Justice Glustein’s decision, Catalyst instructed its outside counsel (“LOLG”) to appeal Justice Glustein’s dismissal of the contempt and ISS portions of the motion. Catalyst served its notice of appeal on the defendants on July 22, 2015. The appeal was made to the Ontario Court of Appeal on the basis that the appeal of the dismissal of the contempt motion was an appeal from a final order of a judge of the Superior Court and that the appeal of the ISS motion could be joined to the appeal of the contempt motion pursuant to s. 6(2) of the *Courts of Justice Act*.¹⁰

16. By letter dated July 24, 2015, Kris Borg-Olivier, Moyse’s counsel, informed LOLG of Moyse’s position that the order dismissing the contempt motion was interlocutory, not final, and that therefore the appeal lay to the Divisional Court, with leave. Mr. Borg-Olivier informed LOLG that Moyse intended to bring a motion to quash the appeal.¹¹

17. In a separate letter sent that same day, Matthew Milne-Smith, West Face’s outside counsel, informed LOLG that West Face agreed with Moyse’s position. Mr. Milne-Smith took the position that because the appeal of the contempt order lay to the Divisional Court, with leave, section 6(2) of the *Courts of Justice Act* has no application to the appeal of the dismissal of the ISS motion.¹²

18. LOLG did not agree with Mr. Borg-Olivier’s or Mr. Milne-Smith’s reasoning. It was of the opinion that the dismissal of the contempt motion was a final order and that it was therefore possible to resort to section 6(2) of the *Courts of Justice Act* to join the dismissal of the ISS order

¹⁰ Winton Affidavit, ¶16-17; MR, Tab 3.

¹¹ Winton Affidavit, ¶18; MR, Tab 3.

¹² Winton Affidavit, ¶19; MR, Tab 3.

with the appeal of the dismissal of the contempt motion, so that both appeals would be heard together at the Court of Appeal.¹³

19. The defendants brought motions to quash Catalyst's appeal. In the interim, before those motions could be heard, Catalyst perfected its appeal. After the appeal was perfected, LOLG began to prepare materials to respond to the defendants' motions to quash, which were scheduled to be heard on November 5, 2015. In the course of those preparations, LOLG came to realize that section 6(2) of the *Courts of Justice Act* did not permit an appellant to join an appeal that was subject to a leave requirement to an appeal as of right until after leave was granted. This affected the merits of West Face's motion to quash the appeal of the ISS order.¹⁴

20. This realization did not occur until mid-October. Upon realizing the error, LOLG immediately entered into without prejudice discussions with Mr. Milne-Smith to negotiate terms pursuant to which the appeal to the Court of Appeal of the ISS order would be quashed on consent, without prejudice to Catalyst's right to seek leave to the Divisional Court to pursue that appeal. Those terms were negotiated in October 2015, and in the end the West Face motion proceeded on consent.¹⁵

21. Moyse's motion to quash was different. LOLG believed that the law was unsettled as to whether dismissal of a contempt motion was a final or interlocutory order. Moyse's motion to quash was argued on the merits on November 5, 2015.¹⁶

¹³ Winton Affidavit, ¶20; MR, Tab 3.

¹⁴ Winton Affidavit, ¶21-22; MR, Tab 3.

¹⁵ Winton Affidavit, ¶23-24; MR, Tab 3.

¹⁶ Winton Affidavit, ¶25; MR, Tab 3.

22. The Court of Appeal granted Moyse's motion, with reasons dated November 17, 2015. Thereafter, LOLG immediately went about preparing a notice of motion to seek leave to appeal Justice Glustein's dismissal of the ISS and contempt motions.¹⁷

23. Initially, LOLG served and attempted to file a notice of motion that combined Catalyst's motion for leave to appeal with a motion to extend the time to seek leave to appeal. However, the Divisional Court rejected that notice of motion and informed us that the motion to extend the time to seek leave to appeal had to be served and filed separately from the motion for leave to appeal.¹⁸

24. On December 3, 2015, LOLG exchanged correspondence with counsel for Moyse and West Face to update them on the situation and to inquire as to whether their clients would consent to a separate motion to extend the deadline to seek leave to appeal. The defendants did not give their consent, at which point Catalyst scheduled this motion for one of the earliest possible dates.¹⁹

25. At all material times, Catalyst intended to appeal, or seek leave to appeal if necessary, Justice Glustein's order with respect to the contempt and ISS issues decided by him. The delay caused by the failure to seek leave in July was inadvertent, based on its outside counsel's good-faith understanding of Catalyst's rights of appeal and the proper path of appeal.²⁰

26. At all material times, West Face and Moyse were aware that Catalyst intended to appeal Justice Glustein's order and that if their motions to quash were successful, that Catalyst would seek leave to appeal to the Divisional Court. During this time, West Face and Moyse did not advert to any potential prejudice arising from the delay caused by the need to bring the motions to quash

¹⁷ Winton Affidavit, ¶26-27; MR, Tab 3.

¹⁸ Winton Affidavit, ¶27; MR, Tab 3.

¹⁹ Winton Affidavit, ¶28; MR, Tab 3.

²⁰ Winton Affidavit, ¶29; MR, Tab 3.

or otherwise suggest that they have since suffered any prejudice. There is no evidence in the record of any prejudice to the defendants if this motion is granted.²¹

PART III ~ STATEMENT OF ISSUES, LAW & AUTHORITIES

27. Pursuant to the *Rules of Civil Procedure*, a party that intends to seek leave to appeal an interlocutory order of a judge of the Superior Court of Justice is required to serve its notice of motion for leave to appeal within fifteen days of the making of the order or decision from which leave to appeal is being sought.²²

28. If this deadline is missed, the moving party must seek leave to extend the time for filing a notice of appeal. If the parties do not consent to the extension, then a motion must be brought to the Court from which leave to appeal is being sought.²³

(A) THE TEST TO EXTEND TIME TO APPEAL IS NOT ONEROUS

29. The factors that the Court is required to consider on a motion to extend time for filing a notice of appeal do not place an onerous burden on the moving party. Those factors are:

- (a) whether the appellant formed an intention to appeal within the relevant time period;
- (b) the length of the delay and explanation for the delay;
- (c) any prejudice to the respondent;
- (d) the merits of the appeal; and
- (e) whether the “justice of the case” requires it.²⁴

²¹ Winton Affidavit, ¶30; MR, Tab 3.

²² *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 62.02(3) and 61.03.1(3)(a).

²³ *Rules of Civil Procedure*, rule 3.02.

30. These factors apply equally to a motion to extend time to seek leave to appeal. On a motion to extend time to seek leave, the fourth factor still focuses on whether the appeal is “not without merit” and does not consider the merits of the motion for leave to appeal.²⁵

31. The merits threshold is a very low one. The Court does not weigh the relative merits of the appeal, it only needs to be satisfied that the appeal has “some merit”.²⁶

(B) CATALYST SATISFIES THE TEST TO EXTEND TIME TO APPEAL

32. Catalyst submits that the evidence strongly supports its motion to extend the time to seek leave to appeal. All five of the factors favour an extension of time.

(i) Catalyst Intended to Appeal within the Relevant Time Frame

33. There is no dispute that Catalyst formed an intention to appeal Justice Glustein’s decision within the relevant time period – it served its notice of appeal on July 22, 2015, which is within the 15-day deadline applicable to motions for leave to appeal.

(ii) The Delay is not a Lengthy One is and Fully Explained

34. The delay was not lengthy and is fully explained by the confusion as to whether the dismissal of the contempt motion was a final or interlocutory decision and whether Catalyst could join the appeal of the ISS decision to the contempt appeal. It cannot be said in this case that Catalyst sat on its rights or has no explanation for the delay.

²⁴ *Rizzi v. Moore*, 2007 ONCA 350 at ¶16.

²⁵ *Parker v. Pfizer Canada Inc.*, 2012 ONSC 6604 at ¶2.

²⁶ *Falus v. Martap Developments 87 Limited*, 2012 ONSC 5163 at ¶7-8.

(iii) There is no Prejudice to the Responding Parties

35. There is no prejudice to the responding parties. They have known since July that Catalyst intended to appeal the ISS and contempt decisions. To date they have not alerted Catalyst to the existence of any prejudice caused by the delay in seeking leave to appeal.

36. Leave to appeal motions are now heard in writing within a few weeks of commencement of the motion. If leave to appeal is granted, then prejudice is a non-issue because the Court will have decided that the decision warrants a second look by a panel of the Divisional Court. If leave to appeal is not granted, the responding parties will not be prejudiced by having to wait an additional few weeks to obtain that outcome.

(iv) It Cannot be Said that the Appeal is Without Merit

37. The appeal is not without merit. In the motion below, Moyse admitted that he deleted his web browsing history between the date of Justice Firestone's preservation order and the date that the Images were made.

38. In these circumstances, it is certainly arguable that Moyse intentionally breached the preservation order and that Justice Glustein erred in holding that Moyse was not in contempt. It is undisputed that contempt of court, especially as concerns an interlocutory order to preserve evidence, is quasi-criminal in nature. It is a serious matter that goes beyond the rights of the parties.

39. Moreover, the ISS order that was dismissed is intricately linked to Moyse's conduct and the affect it had on Justice Lederer's order. Justice Glustein did not turn his mind to whether or not Moyse's conduct, if proven on a balance of probabilities to have interfered with the ISS process,

warranted granting an ISS order with respect to West Face's devices so as to preserve the integrity of the process ordered by Justice Lederer.

40. These are not insignificant issues, and at the very least they warrant a consideration by a judge of the Divisional Court on the issue of whether leave to appeal ought to be granted.

(v) *The Justice of the Case Favours an Extension of Time*

41. In the circumstances of this case, it would be unjust to deny Catalyst an extension of time. Commencing an appeal to the wrong court due to a misconception of whether an order is final or interlocutory is a common enough occurrence that an extension of time to commence an appeal, or seek leave to appeal, is routinely granted.

42. The defendants have known that Catalyst intended to appeal Justice Glustein's order for several months. They will suffer no injustice if the Court allows Catalyst to seek leave to appeal the contempt and ISS orders. In contrast, Catalyst will suffer the injustice of having its appeal efforts thwarted due a misunderstanding of the procedural route of appeal and not due to anything concerning the merits of its appeal.

43. The circumstances of this case strongly favour granting Catalyst the relief it seeks so that it can seek leave to appeal Justice Glustein's order.

PART IV ~ ORDER REQUESTED

44. Catalyst respectfully requests an Order extending the time for filing a notice of motion for leave to appeal the Order of Justice Glustein dated July 7, 2015, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of January, 2016.

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SCHEDULE “A”

LIST OF AUTHORITIES

1. *Rizzi v. Moore*, 2007 ONCA 350.
2. *Parker v. Pfizer Canada Inc.*, 2012 ONSC 6604.
3. *Falus v. Martap Developments 87 Limited*, 2012 ONSC 5163.

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY - LAWS

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

3.02 (1) Subject to subrule (3), the court may by order extend or abridge any time prescribed by these rules or an order, on such terms as are just.

(2) A motion for an order extending time may be made before or after the expiration of the time prescribed.

(3) An order under subrule (1) extending or abridging a time prescribed by these rules and relating to an appeal to an appellate court may be made only by a judge of the appellate court.

(4) A time prescribed by these rules for serving, filing or delivering a document may be extended or abridged by filing a consent.

61.03.1

(2) The notice of motion for leave to appeal shall state that the court will hear the motion in writing, 36 days after service of the moving party’s motion record, factum and transcripts, if any, or on the filing of the moving party’s reply factum, if any, whichever is earlier.

(3) The notice of motion,

(a) shall 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

(b) shall be filed with proof of service in the office of the Registrar within five days after service.

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.

(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.

(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers.

(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifications, to the notice of motion for leave.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and- BRANDON MOYSE et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

MOVING PARTY'S FACTUM
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