Divisional Court File No. 648/15
Superior Court of Justice 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

RESPONDING FACTUM OF THE DEFENDANT/RESPONDING PARTY, BRANDON MOYSE

Motions to Extend Time for Leave to Appeal and Leave to Appeal
Returnable January 21, 2016

January 18, 2016

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PART I. OVERVIEW

1. The Catalyst Capital Group Inc. ("Catalyst"), relied entirely on unfounded speculation as the basis for its unsuccessful attempt to have the defendant, Brandon Moyse ("Moyse") found in contempt of court and committed to jail. Four and a half months after Justice Glustein dismissed its interlocutory motion (the "Contempt Decision"), Catalyst brought a motion asking this court to grant it:

(a) an extension of time to seek leave to appeal the Contempt Decision; and

(b) leave to appeal the Contempt Decision.

2. Catalyst's motions should be dismissed. Moyse responds to both motions in this factum. Catalyst fails to meet the test for an extension of time, and in any event, the Contempt Decision is the very kind of fact-specific decision from which leave to appeal should not be granted:

(a) Catalyst's delay in seeking leave to appeal was lengthy and unjustified. Catalyst initially sought to appeal the decision of Justice Glustein to the Court of Appeal. Counsel for Moyse advised Catalyst that its proper appeal route was to the Divisional Court. Catalyst neither responded to that correspondence, nor served a placeholder motion to seek leave to appeal. It simply pursued its appeal in the Court of Appeal. Only after that putative appeal was quashed did Catalyst belatedly seek leave to appeal to this court;

(b) Moyse has been prejudiced as a result of the lengthy delay. Catalyst sought to commit Mr. Moyse to jail, and has made serious attacks on his character and integrity, which are repeated in Catalyst's factums on these motions, and which have hung over him for almost a year. He will continue to labour under these serious unresolved allegations if the court grants the extension of time sought by Catalyst; and

(c) Most importantly, and determinative of both motions, Catalyst's motion for leave to appeal is without merit. Catalyst cannot identify any decisions that conflict with Justice Glustein's decision, or a reason to doubt the correctness of his order. Catalyst's real complaint is with Justice Glustein's findings of fact, exercises of discretion, and determinations of credibility, all of which were amply supported by the record before him. The motions should be dismissed.

PART II. SUMMARY OF FACTS

A. The underlying action

3. This action arose out of Moyse's decision to resign his employment at Catalyst to begin working for the co-defendant, West Face Capital Inc. ("West Face"). Shortly after Moyse announced his intention to move to West Face, Catalyst commenced this action and brought a motion seeking injunctive relief.

4. On July 16, 2014, the parties attended before Justice Firestone on Catalyst's motion for injunctive relief. The parties ultimately consented to an order (the "Consent Order"), which included, among other things, terms requiring Moyse to:

(a) preserve and maintain all relevant records in his power, possession or control;

(b) deliver a sworn affidavit of documents setting out all documents in his power, possession or control that related to his employment with Catalyst; and

(c) turn over all his personal computer and electronic devices for the taking of a forensic image of the data served on his devices, to be conducted by a professional firm as agreed to between the parties.[1] [emphasis added]

5. In January 2015, Catalyst brought a motion seeking broad relief against West Face. In February 2015, Catalyst amended its notice of motion to seek relief with respect to Moyse. It sought an order declaring Moyse in contempt of the Consent Order and committing Moyse to jail.[2]

6. Catalyst alleged that Moyse committed the following contemptuous acts:

(a) he deleted his personal browsing history immediately prior to turning over his personal computer for imaging; and

(b) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.[3]

7. The parties argued Catalyst's motions before Justice Glustein on July 2, 2015.

B. The decision below

8. On July 7, 2015, Justice Glustein dismissed Catalyst's motions in their entirety.[4]

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[1] Order of Justice Firestone, dated July 16, 2014 ["Consent Order"], Motion Record of the Plaintiff Catalyst Capital Group Inc. (Plaintiff's Motion for Leave to Appeal, Returnable January 21, 2016) ["Catalyst MR"] Tab 4, p. 28.

[2] Amended Notice of Motion, dated February 6, 2015, Exhibit "A" to the Affidavit of Philip de L. Panet, sworn January 13, 2016 ["Panet Affidavit"], Motion Record of the Defendant West Face Capital Inc. (Plaintiff's Motion to Extend Time and for Leave to Appeal, Returnable January 21, 2016) ["West Face MR"] Tab 1-A, p. 24.

[3] Endorsement of Justice Glustein, dated July 7, 2015 ["Reasons"] at para. 61, Catalyst MR Tab 3, p. 23.

9. In his reasons, Justice Glustein summarized the relevant legal principles, relying heavily on the Supreme Court's recent decision, *Carey v. Laiken*, which set out the framework for contempt proceedings:

> (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.
>
> (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;
>
> (iii) Any reasonable doubt must be resolved in favour of the person or entity alleged to have breached the order;
>
> (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"; and
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> (v) The court retains a discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith. [5]

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[4] Order of Justice Glustein, dated July 7, 2015, Catalyst MR Tab 2, p. 13.

[5] Reasons at para. 59, Catalyst MR Tab 3, pp. 22-23, citing *Carey v. Laiken,* 2015 SCC 17 ["*Carey*"] at paras. 30-37, Book of Authorities of the Respondent Brandon Moyse ["Moyse BOA"] Tab 1, and *Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (Ont. C.A.) at para. 27, Moyse BOA Tab 2.

10. Justice Glustein then carefully reviewed the evidence before him in light of those principles. Justice Glustein accepted Moyse's evidence that he was concerned and embarrassed by some of the content related to adult entertainment websites on his computer, and that, prior to turning over his personal computer in compliance with the Consent Order, he deleted and attempted to "clean" his internet browser history.[6]

11. Justice Glustein held that the evidence in the record did not establish beyond a reasonable doubt that Moyse:

(a) deleted relevant information as a result of deleting his personal browsing history;[7] or

(b) scrubbed relevant files from his personal computer prior to delivering it.[8]

1. No evidence that Moyse deleted relevant information in his personal browsing history

12. Justice Glustein rejected Catalyst's submission that the evidence established beyond a reasonable doubt that Moyse deleted relevant information as a result of deleting his personal browsing history. He held that the Consent Order only required Moyse to preserve and maintain records "that relate to Catalyst", "relate to [Moyse's, West Face's and Catalyst's] activities since March 27, 2014" or "are relevant to any of the matters raised in this action."[9]

13. Catalyst had submitted that Moyse's deletion of his personal browsing history could have resulted in deletion of evidence concerning searches of his "Dropbox" files,

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[6] Reasons at paras. 62-68, Catalyst MR Tab 3, pp. 23-24.
[7] Reasons at paras. 69-79, Catalyst MR Tab 3, pp. 24-25.
[8] Reasons at paras. 80-87, Catalyst MR Tab 3, pp. 26-27.
[9] Reasons at paras. 69-70, Catalyst MR Tab 3, p. 24.

which could have been relevant to the allegations against him. Justice Glustein carefully reviewed the expert forensic evidence and Moyse's own evidence,[10] and concluded that Catalyst could at most "speculate" that Moyse may have deleted references to searches of Dropbox files.[11] Neither the evidence nor Catalyst's speculation established beyond a reasonable doubt that Moyse had deleted such information.[12]

14. Furthermore, Justice Glustein agreed with Moyse's submission that the Consent Order did not require Moyse to maintain a record of adult entertainment websites he had visited, as these were not activities that would be relevant to Moyse's conduct at Catalyst and/or with respect to the issues raised in the litigation.[13] He noted that if the Consent Order was in fact intended to encompass such activities (and other non-litigation related activities), then the Consent Order was ambiguous "as reasonable people could have a different understanding of whether non-work related activities were to be included."[14] If the order was ambiguous, Moyse could not be found in contempt of that order, even if he had breached it.[15]

15. Justice Glustein finally concluded that even if Moyse's conduct had resulted in the deletion of relevant Dropbox searches from his personal computer, he would exercise his discretion and decline to make a finding of contempt as that outcome would

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[10] Reasons at paras. 75-78, Catalyst MR Tab 3, p. 25.
[11] Reasons at para. 74, Catalyst MR Tab 3, pp. 24-25.
[12] Reasons at para. 78, Catalyst MR Tab 3, p. 25.
[13] Reasons at para. 72, Catalyst MR Tab 3, p. 24.
[14] Reasons at para. 71, Catalyst MR Tab 3, p. 24.
[15] *Toronto Transit Commission v. Ryan*, [1998] O.J. No. 51 (ON SC), at para. 17, Moyse BOA Tab 3.

have resulted from Moyse's "good faith" efforts to comply with the Consent Order while deleting embarrassing personal files which were not relevant to the litigation."[16]

2. No evidence beyond reasonable doubt of "scrubbing" relevant files

16. Justice Glustein then considered and rejected Catalyst's submission that Moyse had run a program called "Secure Delete" to delete relevant files from his personal computer and was thereby in contempt of the Consent Order. He reviewed the evidence of the parties' respective forensic experts, and Moyse's own evidence.[17] He concluded that the evidence did not establish beyond a reasonable doubt that Moyse breached the Consent Order by scrubbing relevant files with the "Secure Delete" program.[18]

C. Catalyst appeals to the Court of Appeal

17. On July 22, 2015 (fifteen days after Justice Glustein released his reasons), Catalyst served a notice of appeal from the Contempt Decision to the Court of Appeal.[19]

18. Two days later, on July 24, 2015, counsel for Moyse put Catalyst on notice that the Court of Appeal did not have jurisdiction to hear its appeal because an order dismissing a motion for contempt is interlocutory. Counsel for Moyse directed counsel for Catalyst to the applicable provisions of the *Rules of Civil Procedure* and the *Courts of Justice Act*, and to the Court of Appeal's recent unanimous decision in *Simmonds v. Simmonds*, which held that an order dismissing a motion for a contempt order is interlocutory and that an appeal therefore does not lie to the Court of Appeal.[20] Counsel

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[16] Reasons at para. 79, Catalyst MR Tab 3, p. 25.
[17] Reasons at paras. 81-85, Catalyst MR Tab 3, p. 26.
[18] Reasons at para. 86, Catalyst MR Tab 1-C, pp. 26-27.
[19] Notice of Appeal, July 22, 2015, Exhibit "E" to Panet Affidavit, West Face MR Tab 1-E, p. 70.
[20] Letter from K. Borg-Olivier to A. Winton, July 24, 2015, enclosing copy of *Simmonds v. Simmonds*, 2013 ONCA 479, Exhibit "F" to Panet Affidavit, West Face MR Tab 1-F, p. 81.

for West Face wrote to counsel for Catalyst that same day advising that West Face agreed with Moyse's position.[21]

19. Counsel for Catalyst never responded to either correspondence. It did not serve a placeholder notice of motion for leave to appeal to the Divisional Court. It did not amend its notice of appeal to request that the Court of Appeal transfer the appeal to the Divisional Court if it held it did not have jurisdiction. Instead, it pursued its appeal to the Court of Appeal in a high-risk strategy.

20. Having received no response, Moyse moved to quash Catalyst's appeal. For reasons released November 17, 2015, the Court of Appeal granted Moyse's motion and quashed Catalyst's appeal.[22]

21. Ten days after receiving the reasons of the Court of Appeal, and over four months after counsel for Moyse had alerted Catalyst to the proper appeal route, Catalyst served its notice of motion for leave to appeal the interlocutory order of Justice Glustein to this court and requested an extension of time to do so.[23]

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[21] Letter from M. Milne-Smith to A. Winton and R. Di Pucchio, July 24, 2015, Exhibit "G" to Panet Affidavit, West Face MR Tab 1-G, p. 84.

[22] Reasons of the Ontario Court of Appeal, November 17, 2015, Exhibit "O" to Panet Affidavit, West Face MR Tab 1-O, p. 137.

[23] Notice of Motion dated November 27, 2015, Exhibit "R" to the Affidavit of Andrew Winton, sworn January 7, 2016 ("Winton Affidavit"), Catalyst Motion Record on Motion to Extend Time for Leave to Appeal, dated January 8, 2016 ("Catalyst Extension of Time MR"), Tab 3-R, p. 295-308. After being advised by this court that it was required to serve and file its motion to extend the time to seek leave to appeal separately, Catalyst served and filed a new notice of motion dated December 9, 2015: Winton Affidavit, Catalyst Extension of Time MR, Tab 3, p. 27, paras. 27-28.

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

A. Response to Catalyst's motion for extension of time to seek leave to appeal

22. There is one issue to be determined on Catalyst's motion for an extension of time: does justice require that the Divisional Court exercise its discretion to extend the time for the Catalyst to file its motion for leave to appeal?[24]

23. The court will consider the following factors in considering whether to grant an extension of time:

(a) whether Catalyst formed an intention to appeal within the relevant period;

(b) the length of the delay and explanation for it;

(c) any prejudice to Moyse; and,

(d) the merits of the appeal.[25]

24. While all four factors are typically taken into account in making this determination,[26] the weight accorded to each will vary in emphasis according to the circumstances of the particular case.[27] However, the merits of the appeal are frequently dispositive, particularly where leave to appeal is required.[28]

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[24] *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, Rule 3.02(1); *Bratti v. Wabco Standard Trane Inc.*, 1994 CanLII 1261 (Ont. C.A.) at p. 2, Moyse BOA Tab 4.

[25] *Monteith v. Monteith*, 2010 ONCA 78 ["*Monteith*"] at para. 11, Moyse BOA Tab 5.

[26] *Mortazavi v. University of Toronto*, 2013 ONCA 66 at para. 21, Moyse BOA Tab 6.

[27] *Miller Manufacturing and Development Co. v. Robert J. Alden et al.*, 1979 CarswellOnt 461 (Ont. Sup. Ct. [C.A.]) at para. 5, Moyse BOA Tab 7.

[28] *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 ["*Enbridge*"] at paras. 15-16, Moyse BOA Tab 8.

25. In considering the justice of the case, the public interest in the finality of judgments is a very important consideration, as is the respondent's right to a final resolution of the litigation.[29]

26. Moyse does not dispute that Catalyst had formed the intention to appeal within the time for bringing an appeal. However, the remaining factors weigh in favour of dismissing Catalyst's motion for an extension of time:

(a) Catalyst delayed four months before seeking leave to the appropriate court, even though Moyse put its counsel on immediate notice that the proper appeal route was to the Divisional Court, with leave;

(b) Catalyst's allegations against Moyse are serious and damaging, and continue to hang over his head, as does the threatened penalty of jail time; and

(c) There is no merit to Catalyst's proposed motion for leave to appeal, or to the appeal itself, for the reasons set out in Section B, below.

1. Delay in seeking leave to appeal

27. Under r. 61.03.1(3)(a),[30] a notice of motion for leave to appeal an interlocutory order must be served within 15 days of the making of that order.

28. Catalyst served and filed its notice of motion on the Extension Motion 143 days (4 months, 20 days) after the dismissal of Catalyst's motions.

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[29] *Rizzi v. Mavros*, 2007 ONCA 350 at para. 25, Moyse BOA Tab 9; *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2005 SCC 33 at p. 2, Moyse BOA Tab 10.

[30] This rule governs motions for leave to appeal to the Court of Appeal, but also applies to motions for leave to appeal to the Divisional Court pursuant to r. 62.02(3).

29. Catalyst seeks to justify its delay on the basis of its purported belief that the Court of Appeal had jurisdiction over the appeal, despite being put on notice by Moyse that its position was manifestly incorrect.

30. In those cases where parties seeking an extension of time to appeal have explained their delay on the basis that they had initially appealed to the wrong court, courts have typically considered the following factors in assessing whether to grant the extension:

(a) whether the party seeking the extension is unrepresented, in which case the court is more likely to, but will not necessarily, grant the extension;[31]

(b) when the party seeking the extension was on notice that he or she was appealing to the wrong court, and whether that notice informed his or her subsequent conduct;[32] and

(c) whether the original, if incorrect, appellate court declined to exercise its discretion to transfer the appeal to the correct court.[33]

31. Catalyst's delay cannot be excused on the basis that it did not know it should have sought leave to appeal to the Divisional Court:

(a) Catalyst was represented by experienced counsel;

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[31] *Beard Winter LLP v. Shekhdar*, 2009 CarswellOnt 6325 (ONSC [Div. Ct.]) at para. 12, Moyse BOA Tab 11; in contrast, see: *Schwilgin v. Szivy*, 2015 ONCA 816 ["*Schwilgin*"] at paras. 8-11, Moyse BOA Tab 12.

[32] *Bagnulo v. Complex Services Inc*, 2014 ONSC 3311 (Div. Ct.) ["*Bagnulo*"] at paras. 30, 32 Moyse BOA Tab 13; *Roach v Oniel*, 2005 CarswellOnt 734 (ONSC [Div. Ct.]) ["*Roach*"] at paras. 7-8, 12, Moyse BOA Tab 14.

[33] *Bagnulo* at paras. 31, 56, Moyse BOA Tab 13.

(b) counsel for Moyse and counsel for West Face put counsel for Catalyst on immediate notice that it was appealing to the wrong court, but Catalyst never responded to or engaged with counsel for Moyse on this issue;

(c) Catalyst did not ask the Court of Appeal to exercise its discretion to transfer the appeal to this court.

32. Typically, where a party requesting an extension had actual notice that it was appealing to the wrong forum but declined to cure the jurisdictional problem in a timely way, the court will not find that the delay has been reasonably explained:

> Obviously, [the delay resulting from commencing the appeal in the wrong court] is the responsibility of plaintiff's counsel. Further, counsel for the LAO advised plaintiff's counsel of the error in a timely way and the plaintiff nevertheless failed to cure the problem. I can therefore see no good reason for the delay between mid August and October 27 when [plaintiff's counsel] finally conceded his error.[34] [Emphasis added.]

2. Prejudice to Moyse if the extension is granted

33. Courts have recognized that a respondent will typically suffer a degree of emotional and financial harm when an appeal is delayed.[35] This is particularly so in this case, where Catalyst has put Moyse's liberty, reputation, and integrity at stake.

34. Allowing Catalyst an extension of time to bring its motion would prolong proceedings which have already been unduly lengthy. Catalyst's approach has left these meritless allegations hanging over Moyse since they were first made in February 2015. The underlying litigation has been paralyzed due to Catalyst's delay.

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[34] *Roach* at para. 12, Moyse BOA Tab 14. See also: *Schwilgin* at paras. 7-11, Moyse BOA Tab 12, and *Bagnulo* at para. 30, Moyse BOA Tab 13.

[35] *Howard v Martin*, 2014 ONCA 309 at para. 33, Moyse BOA Tab 15. See also: *Monteith* at para. 14, Moyse BOA Tab 5; *Enbridge* at para. 17, Moyse BOA Tab 8.

3. There is no merit to the proposed motion for leave to appeal

35. As set out above, the merits of the proposed motion for leave to appeal are frequently dispositive of a motion for an extension of time. Despite the importance of the merits to the court's analysis, Catalyst's factum on its motion for an extension of time includes only a cursory, superficial consideration of the merits of its appeal (and no discussion at all of the merits of its leave motion).

36. Catalyst relies on this court's decision in *Parker v. Pfizer Canada Inc.* to argue that in considering whether to grant an extension of time, the court does not consider the merits of the leave motion, but looks only at the proposed appeal, under the "merits" prong of the test.[36] In fact, this court frequently considers the merits of the proposed motion for leave, rather than the proposed appeal.[37]

37. For the reasons set out in the following section, Catalyst has little prospect of success on its motion for leave to appeal. Where an appeal is clearly without merit, the motion for an extension of time will be denied, even if other factors militate in favour of granting an extension.[38]

B. Catalyst's motion for leave to appeal should be dismissed

38. In the event this court grants Catalyst an extension of time, the only remaining issue to be determined is whether Catalyst should be granted leave to appeal. Moyse

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[36] Factum of the Catalyst Capital Group Inc. Motion to Extend Time for Leave to Appeal, at para. 30, citing *Parker v. Pfizer Canada Inc.* 2012 ONSC 6604, Catalyst Book of Authorities on Motion to Extend Time for Leave to Appeal, Tab 2.

[37] See e.g. *Liberty Mutual Insurance Company v. Venneri*, 2009 CanLII 22802 (ON SC) at para. 18, Moyse BOA Tab 16; *Craig v. Riocan Real Estate Investment Trust*, 2015 ONSC 307 at para. 15, Moyse BOA Tab 17.

[38] *Nguyen v. Economical Mutual Insurance Co*, 2015 ONCA 828 at para. 13, Moyse BOA Tab 18.

submits that Catalyst has not met either of the "onerous" tests for obtaining leave to appeal an interlocutory order.[39]

39. The Contempt Decision is fact-specific, and therefore exactly the kind of case which the leave process is designed to screen out: "[t]he motion for leave creates a gatekeeping function to ensure that only appeals that do transcend the interests of the litigants receive the attention of a three judge panel of the Divisional Court."[40] Catalyst really seeks to re-litigate Justice Glustein's finding of fact. Indeed, much of its factum before this court is copied verbatim from its submissions before Justice Glustein.

1. The test for leave

40. An appeal of an interlocutory order to the Divisional Court requires leave under r. 62.02(4)(a) or r. 62.02(4)(b). Leave will not be granted unless either:

> (a) there is
>
> a. a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal; and
>
> b. it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
>
> (b) there
>
> a. appears to the judge hearing the motion good reason to doubt the correctness of the order in question and
>
> b. the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.[41] [Emphasis added.]

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[39] *Bell Expressvu Ltd. Partnership v. Morgan*, 2008 CarswellOnt 7000 (Div. Ct.) at para. 1, Moyse BOA Tab 19.

[40] *Sweda Farms Ltd. et al. v. Egg Farmers of Ontario et al*, 2014 ONSC 3797 (Div. Ct.), at para. 8, Moyse BOA Tab 20.

[41] *Rules of Civil Procedure* R.R.O. 1990, Reg. 194, r. 62.02(4).

41. Both r. 62.02(4)(a) and r. 62.02(4)(b) involve a two-part test. In each case, both aspects of the two-part test must be met before leave is granted.[42]

42. Catalyst fails both tests.

(a) Catalyst fails the test under r. 62.02(4)(a)

43. While Catalyst submits that Justice Glustein's order conflicts with other decisions in a number of respects, it has not identified any decision which conflicts with his statement of the applicable legal principles. This is fatal to Catalyst's attempt to obtain leave to appeal under r. 62.02(4)(a).

44. A "conflicting decision" under r. 62.02(4)(a) exists only where the court uses different legal principles to decide a comparable legal problem or to guide the exercise of the court's discretion. A conflicting decision does not exist where a court applies established legal principles appropriate to the facts, but exercises its discretion differently.[43]

(i) Alleged failure to properly apply the test for reasonable doubt

45. Catalyst submits that Justice Glustein's application of the test for reasonable doubt conflicts with the test for determining whether allegations have been proven beyond a reasonable doubt.[44] On closer examination, it is apparent that Catalyst's real complaint is not that Justice Glustein used a different or incorrect legal principle to assess Moyse's credibility, but rather that Justice Glustein accepted Moyse's evidence as credible.

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[42] *1554366 Ontario Inc. v. Fryett,* 2015 ONSC 5089 at para. 8, Moyse BOA Tab 21.
[43] *McDonald v. United States of America*, 2014 ONSC 5819 at para. 30, Moyse BOA Tab 22.
[44] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal, at para. 51.

46. Justice Glustein did not fail to assess and determine Moyse's credibility. It is apparent from his reasons that he found Moyse's evidence sufficiently credible to give rise to reasonable doubt precluding a finding of contempt: he specifically relied on Mr. Moyse's evidence when holding that Catalyst had not met its burden of proof.[45] Judges are not required to specifically state that they believe or disbelieve a witness in order to make credibility findings.[46]

(ii) Allegations Justice Glustein drew an "impermissible inference"

47. Catalyst next submits that Justice Glustein drew an "impermissible inference" by "draw[ing] inferences that do not flow logically and reasonably from established facts."[47]

48. Once again, on closer examination, Catalyst's argument is not that Justice Glustein used different legal principles to decide a comparable legal problem, but rather that he failed to draw the inference which Catalyst had urged.

49. This is patently clear from Catalyst's argument in which it recites the "facts" "established by the evidence" which "proved beyond a reasonable doubt" that Moyse breached the Consent Order. These are the inferences which Catalyst had urged before Justice Glustein and he had rejected as speculation.[48]

50. Justice Glustein's holding that Catalyst failed to meet its burden of proof was amply supported by the evidence.

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[45] See e.g. Reasons at paras. 78, 86, Catalyst MR Tab 3, pp. 25-27.
[46] *R. v. Steele*, 1998 CarswellOnt 3769 (O.C.J. Gen. Div.) at para. 14, Moyse BOA Tab 23.
[47] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal at para. 56.
[48] Reasons at para. 74, Catalyst MR Tab 3, pp. 24-25.

51. With respect to Catalyst's argument that Moyse ran the "Secure Delete" program to delete relevant files from his computer, the forensic experts on the motion (including Catalyst's own expert) agreed that the presence of a Secure Delete folder on Moyse's system is not evidence that he ever ran the program.[49]

52. Catalyst nevertheless submits in its factum on this motion that the "expert evidence confirms Moyse most likely ran the Scrubber [Secure Delete]".[50] In support of this, Catalyst relies on evidence that a Secure Delete folder is created when a user *launches* the Secure Delete program.[51]

53. This is misleading: a Secure Delete folder, such as the one found on Moyse's computer, is created as soon as a user clicks Secure Delete, but before the product is used for any other purpose.[52] Critically, Catalyst does not disclose the undisputed fact that the Secure Delete folder is created even if a user does not delete a single file.[53]

54. Thus, contrary to Catalyst's submission that it was "unreasonable and illogical" for Justice Glustein to conclude that Moyse launched Secure Delete but did not use it delete relevant files,[54] his conclusion was in fact entirely reasonable and supported by the evidence.

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[49] Reasons at paras. 81-84, Catalyst MR Tab 3, p. 26; Amended Report of the Independent Supervising Solicitor, March 13, 2015 ["Amended ISS Report"] at para. 48, Exhibit "D" to the Affidavit of Brandon Moyse, affirmed April 2, 2015 ["Moyse Affidavit"] Catalyst MR Tab 20-D, p. 2534; Affidavit of Kevin Lo, affirmed April 2, 2015 ["Lo Affidavit"] at para. 13, Catalyst MR Tab 21, p. 2594; Transcript of Cross-Examination of Martin Musters, May 19, 2015 ["Musters Cross"] q. 78-83, 93, Motion Record of the Respondent Brandon Moyse ["Moyse MR"] Tab 1, pp. 6-7.

[50] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal, at para. 23

[51] See Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal, at paras. 23(b), 58(d), 59.

[52] Lo Affidavit at para. 13, Catalyst MR Tab 21, p. 2594; Musters Cross, q. 78-83, 93, Moyse MR Tab 1, pp. 6-7.

[53] Lo Affidavit at para. 13, Catalyst MR Tab 21, p. 2594.

[54] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal, at para. 59

55. Further, without citing to any evidence in the record, Catalyst asserts that Moyse could easily have deleted evidence that he had run Secure Delete to delete files from his computer. It baldly states as a "fact" that it is "not technically complicated" and "relatively simple" to erase evidence of one's use of Secure Delete, and that this information is "readily available on the Internet."[55]

56. Catalyst made these same submissions before Justice Glustein. He rejected them,[56] as he had to, given that they are directly contradicted by the evidence in the record. Martin Musters, Catalyst's own forensic expert, conceded a critical error in his evidence on this point: the "publicly available" information which had formed the basis for his opinion that it was "relatively simple" to erase one's use of Secure Delete did not, in fact, pertain to Secure Delete at all. In fact, the information cited by Musters explained how to remove a particular program which, it turned out, remained on Moyse's computer when it was imaged. Musters was forced to concede that he could not provide the court with any assistance as to how to evidence of one's use of the Secure Delete program can be erased.[57]

57. That Catalyst repeats these assertions before this court is shocking.

58. Justice Glustein accepted that the forensic evidence was consistent with Moyse's evidence that he did not run the Secure Delete program, but rather investigated the products offered in a suite of software products (of which Secure Delete was one of

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[55] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal, at paras. 24, 26.

[56] Reasons at para. 84-85, Catalyst MR Tab 3, p. 26.

[57] Supplementary Affidavit of Martin Musters, sworn April 30, 2015 at para. 8, Catalyst MR Tab 13, p. 717; Musters Cross, q. 162, Moyse MR Tab 1, p. 12; Letter from A. Winton to M. Milne-Smith and R. Centa, May 21, 2015, Moyse MR Tab 2, p. 38.

many) contained in a program called Advanced System Optimizer.[58] Justice Glustein also noted that 833 relevant documents still remained on Moyse's computer when it was imaged, as well as the Secure Delete program and purchase receipts, from which one would reasonably infer that Moyse was not engaged in an exercise of wrongdoing and cover-up.[59]

59. Second, with respect to Catalyst's argument that by deleting his browser history Moyse deleted relevant evidence, Justice Glustein held that the evidence did not support a finding beyond a reasonable doubt that there were relevant Dropbox files on Moyse's personal computer, or that any such files were lost when Moyse deleted his browsing history.[60] There was simply no such evidence in the record.

(iii) Alleged Application of Wrong Principles in Discretion to Decline to Find Contempt

60. Catalyst submits that Justice Glustein's determination to exercise his discretion to decline to make a finding of contempt based on the undisputed facts before him conflicts with other decisions in Ontario and elsewhere.[61] Catalyst has not however put forth any cases which conflict with Justice Glustein's exercise of discretion.

61. Once again, Catalyst's real complaint is not that Justice Glustein identified the wrong principles, but with his application of the appropriate legal principles to the facts before him. Justice Glustein cited the Supreme Court's recent decision confirming that even where the necessary elements are established beyond a reasonable doubt, the

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[58] Moyse Affidavit at para. 46, Catalyst MR Tab 20, p. 2458.
[59] Amended ISS Report, para. 44, Catalyst MR Tab 20-D, p. 2532.
[60] Reasons at para. 74, Catalyst MR Tab 3, pp. 24-25.
[61] Notice of Motion for Leave to Appeal at para 25(c), Catalyst MR Tab 1, p. 6.

court retains a residual discretion to decline to make a finding of contempt where an alleged contemnor made a good faith attempt to comply with the order and where such a finding would work an injustice in the circumstances of the case.[62]

62. Consistent with that legal principle, Justice Glustein observed that he would exercise his discretion to decline to make a finding of contempt in this case.[63] This conclusion was amply supported by the credible evidence in the record before him that Moyse acted in good faith and took reasonable steps to comply with the Consent Order.[64]

(iv) It is not desirable that leave be granted

63. Unable to identify any conflicting decisions, it follows that Catalyst cannot meet the second branch of the test for leave under r. 62.02(4)(a). On this second branch, the "desirability that leave be granted" is linked to the question of whether the law is unsettled. Where there is a true conflict, the question is whether it is desirable that leave be granted in order for an appellate court to provide clarity on the particular issue. Where the party seeking leave is unable to demonstrate that there are conflicting decisions on a matter of law of general importance, it follows that it would not be desirable that leave be granted.[65]

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[62] *Carey* at para 37, Moyse BOA Tab 1.

[63] Reasons at para. 79, Catalyst MR Tab 3, p. 25.

[64] Moyse Affidavit at para. 48, Catalyst MR Tab 20, p. 2459; Transcript of the Cross-Examination of Brandon Moyse, May 11, 2015 ["Moyse Cross"] at q. 523, Catalyst MR Tab 25, p. 2755; Moyse Cross at q. 512-513, Catalyst MR Tab 25, p. 2753.

[65] *Gill (Litigation guardian of) v. Waters*, 2014 ONSC 5364 at para. 18, Moyse BOA Tab 24.

(b) The test for leave under r. 62.02(4)(b) is not met

64. Catalyst then submits that there are three reasons to doubt the correctness of Justice Glustein's decision on the Contempt Decision. In considering whether there is good reason to doubt the correctness of the decision pursuant to r. 62.02(4)(b), the court is to ask itself whether the correctness of the decision is open to "very serious debate" and, if so, if it is a decision that warrants resolution by a higher level of judicial authority.[66]

65. Though Catalyst attempts to frame Justice Glustein's alleged errors as questions of law which may transcend the interests of the parties to this litigation, Catalyst really takes issue with Justice Glustein's findings of fact and exercises of discretion, without identifying any palpable and overriding error. The Contempt Decision was "fact specific and his findings of credibility were based on the evidence before him".[67] Leave should be denied.

(i) Justice Glustein's interpretation of the Consent Order

66. Catalyst takes issue with Justice Glustein's interpretation of the Consent Order, which required Moyse to preserve all documents relevant to his "activities since March 27, 2014". Pursuant to the Consent Order, Moyse and West Face were required, among other things, 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.[68]

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[66] *Brownhall v. Canada*, 2006 CanLII 7505 (ON SC) at para. 30, Moyse BOA Tab 25.
[67] *Sirdi Sai Sweets v. McCarthy Tetrault*, 2015 ONSC 3060 (Div. Ct.) at para. 10, Moyse BOA Tab 26.
[68] Consent Order at para. 4, Catalyst MR Tab 4, p. 29.

67. Justice Glustein interpreted the Consent Order as follows:

> 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".
>
> 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.
>
> 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.[69]

68. Catalyst now submits for the first time on this motion for leave to appeal[70] that the Consent Order required Moyse to preserve evidence of "all of his activities since March 27, 2014, whether they related to Catalyst or not."[71]

69. Had Catalyst taken the position on the motions below that the Consent Order required Moyse to preserve everything, including records of his searches of adult entertainment web sites, it is clear that Justice Glustein would have held that the order was ambiguous and therefore could not be enforced through a contempt proceeding.[72]

70. Notwithstanding Catalyst's submissions, the correctness of Justice Glustein's interpretation of the Consent Order is not open to "very serious debate". Read alongside the balance of the paragraph and the Consent Order as a whole, the phrase "their activities since March 27, 2014" could only have referred to activities relevant to issues in the action, and particularly to activities with respect to Catalyst. In the absence of

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[69] Reasons at paras. 70-72, Catalyst MR Tab 3, p. 24.

[70] Catalyst did not take this position on the motion before Justice Glustein: see Reasons at para. 72, Catalyst MR Tab 3, p. 24.

[71] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal, at para. 87.

[72] Reasons at para. 71, Catalyst MR Tab 3, p. 24.

more explicit language, it cannot be that Moyse was required to preserve all documents about all of his activities from March 27, 2014 onward, including those with no relevance whatsoever to the action.

(ii) Justice Glustein's interpretation of the Consent Order, again

71. Catalyst then submits that Justice Glustein erred by engaging in "impermissible conjecture and speculation" and drew inferences "disconnected from the evidence".[73]

72. Catalyst's real complaint is once again with Justice Glustein's holding that the Consent Order only required Moyse to preserve documents relevant to issues in the action, and particularly to his activities with respect to Catalyst.[74] Catalyst repeats its argument that simply by deleting his browser history, Moyse was in breach of the Consent Order.

73. However, as described above, Justice Glustein's holding that the Consent Order required Moyse to preserve only documents relevant to issues in the action is not open to very serious debate.

74. Moreover, Justice Glustein's conclusion that Catalyst failed to established beyond a reasonable doubt that Moyse deleted relevant information when he cleared his browser history was amply supported by the record. The evidence did not support a finding beyond a reasonable doubt that there were relevant Dropbox files on Moyse's

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[73] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal at para. 91.
[74] Factum of the Catalyst Capital Group Inc. on Motion for Leave to Appeal at paras. 92-95.

personal computer at all, or that any such files were lost when Moyse deleted his browsing history.[75]

(iii) Justice Glustein's exercise of discretion

75. Finally, Catalyst submits that it was "inappropriate" for Justice Glustein to exercise his discretion to decline to make a finding of contempt. It then recites evidence which it submits should have caused him to exercise his discretion differently, but it does not identify any palpable and overriding error in Justice Glustein's exercise of discretion.

76. As described above, Justice Glustein set out and applied the correct legal principles. It was open to him, on the evidence before him, to hold that he would exercise his discretion and decline to make a finding of contempt.

(iv) Issues are only of importance to the parties

77. With respect to the second branch of r. 62.02(4)(b), it is not enough that the proposed appeal involves matters of particular importance to the litigants. The party seeking leave must establish that the issues raised in the proposed appeal are of public importance, in that they relate to the development of the law and the administration of justice broadly.[76]

78. The proposed appeal does not transcend the interests of the parties or rise to the level of a matter of public importance, so as to engage the second branch of r. 62.02(4)(b).

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[75] Reasons at para. 74, Catalyst MR Tab 3, pp. 24-25.

[76] *Greslik v. Ontario Legal Aid Plan*, 1988 CarswellOnt 436 (Div. Ct.) at para. 7, Moyse BOA Tab 27.

79. This is apparent from Catalyst's articulation of the proposed "issue of public importance" on this appeal, which is nothing more than a recitation of Catalyst's theory of this case:

> [T]he appropriate analysis ... 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 [*sic*].

80. Particularly in light of Catalyst's failure to demonstrate any conflict in the relevant jurisprudence, there is no reason to believe that the proposed appeal would be of real interest to anybody but the parties. This conclusion alone is sufficient to deny leave to appeal under r. 62.02(4)(b). Leave should not be granted.

C. The justice of the case weighs against granting the extension and leave

81. Considered together, all of these factors weigh heavily against granting either of Catalyst's motions. Catalyst presumably sought to appeal the Contempt Decision directly to the Court of Appeal in an attempt to avoid the leave requirement, knowing that its proposed appeal is devoid of merit and fails both branches of the leave test. It delayed for over four months in seeking leave to appeal by the proper route, completely ignoring the advice that it was in the wrong court.

82. Moyse's credibility and integrity remain at issue, and his liberty at stake. He is entitled to a final resolution to this proceeding.

PART IV. ORDER REQUESTED

83. Moyse asks this court to dismiss the appellant's motion to extend the time to perfect its motion for leave to appeal, or in the alternative, its motion for leave to appeal, with costs of both motions payable by Catalyst to Moyse.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of January, 2016

Robert A. Centa / Kristian Borg-Olivier / Denise Cooney

Paliare Roland Rosenberg Rothstein LLP
Lawyers for the Defendant (Responding Party) Brandon Moyse

SCHEDULE "A"

1. *1554366 Ontario Inc. v. Fryett,* 2015 ONSC 5089, Book of Authorities Tab 21
2. *Bagnulo v. Complex Services Inc*, 2014 ONSC 3311 (Div. Ct.), Book of Authorities Tab 13
3. *Beard Winter LLP v. Shekhdar*, 2009 CarswellOnt 6325 (ONSC [Div. Ct.]), Book of Authorities Tab 11
4. *Bell Expressvu Ltd. Partnership v. Morgan*, 2008 CarswellOnt 7000 (Div. Ct.), Book of Authorities Tab 19
5. *Bratti v. Wabco Standard Trane Inc.*, 1994 CanLII 1261 (Ont. C.A.), Book of Authorities Tab 4
6. *Brownhall v. Canada*, 2006 CanLII 7505 (ON SC), Book of Authorities Tab 25
7. *Carey v. Laiken,* 2015 SCC 17, Book of Authorities Tab 1
8. *Craig v. Riocan Real Estate Investment Trust*, 2015 ONSC 307, Book of Authorities Tab 17
9. *Enbridge Gas Distribution Inc. v. Froese,* 2013 ONCA 131, Book of Authorities Tab 8
10. *Gill (Litigation guardian of) v. Waters*, 2014 ONSC 5364, Book of Authorities Tab 24
11. *Greslik v. Ontario Legal Aid Plan*, 1988 CarswellOnt 436 (Div. Ct.), Book of Authorities Tab 27
12. *Howard v Martin*, 2014 ONCA 309, Book of Authorities Tab 15
13. *Janssen-Ortho Inc. v. Novopharm Ltd.*, 2005 SCC 33, Book of Authorities Tab 10
14. *Liberty Mutual Insurance Company v. Venneri*, 2009 CanLII 22802 (ON SC), Book of Authorities Tab 16
15. *McDonald v. United States of America*, 2014 ONSC 5819, Book of Authorities Tab 22

16. *Miller Manufacturing and Development Co. v. Robert J. Alden et al.*, 1979 CarswellOnt 461 (Ont. Sup. Ct. [C.A.]), Book of Authorities Tab 7

17. *Monteith v. Monteith*, 2010 ONCA 78, Book of Authorities Tab 5

18. *Mortazavi v. University of Toronto*, 2013 ONCA 66, Book of Authorities Tab 6

19. *Nguyen v. Economical Mutual Insurance Co*, 2015 ONCA 828, Book of Authorities Tab 18

20. *Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (Ont. C.A.), Book of Authorities Tab 2

21. *R. v. Steele*, 1998 CarswellOnt 3769 (O.C.J. Gen. Div.), Book of Authorities Tab 23

22. *Roach v Oniel*, 2005 CarswellOnt 734 (ONSC [Div. Ct.]), Book of Authorities Tab 14

23. *Rizzi v. Mavros*, 2007 ONCA 350, Book of Authorities Tab 9

24. *Schwilgin v. Szivy*, 2015 ONCA 816, Book of Authorities Tab 12

25. *Sirdi Sai Sweets v. McCarthy Tetrault*, 2015 ONSC 3060 (Div. Ct.), Book of Authorities Tab 26

26. *Sweda Farms Ltd. et al. v. Egg Farmers of Ontario et al*, 2014 ONSC 3797 (Div. Ct.), Book of Authorities Tab 20

27. *Toronto Transit Commission v. Ryan*, [1998] O.J. No. 51 (ON SC), Book of Authorities Tab 3

SCHEDULE "B"

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

General Powers of Court

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.

Times in Appeals

(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.

Consent in Writing

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

...

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.

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.

(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.

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.

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.

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.

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.

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.

Application of Rules

(9) Subrules (1) to (6) do not apply where subrules (7) and (8) apply.

...

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.

(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.

Motion in Writing

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

Notice of Motion

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

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.

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.

(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.

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.

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

THE CATALYST CAPITAL GROUP INC. Plaintiff/Moving Party	-and-	BRANDON MOYSE et al. Defendants/Responding Parties

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

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