

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 RESPONDING DEFENDANT WEST FACE CAPITAL INC.
(Catalyst's Motion for Leave to Appeal, returnable January 21, 2016)**

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PART I - INTRODUCTION

1. This factum of the Defendant West Face Capital Inc. ("**West Face**") addresses the motion by the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), for leave to appeal from the interlocutory Order of Justice Glustein dated July 7, 2015. Because of the urgency of this matter, Catalyst's motion for leave to appeal is being heard orally together with its motion for an extension of the deadline within which to file its motion for leave to appeal, rather than pursuant to the Court's usual practice of first deciding whether an extension of time should be granted, and only considering the motion for leave to appeal subsequently if the requested extension is granted.

2. The facts relevant to both of Catalyst's motions are set out in detail in West Face's separate factum responding to Catalyst's motion for an extension of time (the ("**Extension Factum**"), which should be read together with this factum. West Face relies on and incorporates the submissions made in its Extension Factum.

3. By way of brief summary of those submissions, however, there is no excuse for Catalyst's four-month delay in filing its motion for leave to appeal. Catalyst's delay will cause significant prejudice to West Face if tolerated by the Court, and there is no merit to Catalyst's proposed appeal. The "justice of the case" does not demand that Catalyst be granted an extension of time – rather, it demands that Catalyst's request for an extension be refused. This motion for leave, then, should be moot.

4. However, even if Catalyst is granted the requested extension of time, its motion for leave to appeal must still be dismissed. For the reasons set out below, Catalyst

cannot satisfy any of the components of either of the two conjunctive tests for obtaining leave to appeal from the decision of Justice Glustein concerning the Imaging Motion. Catalyst has not put forward **any** decisions that conflict with or cast doubt on the correctness of Justice Glustein's well-reasoned, fact-based, discretionary decision. Nor has Catalyst provided any compelling basis to establish why it would somehow be desirable to grant it leave to appeal a discretionary decision refusing to permit it to engage in an extraordinary, unwarranted and intrusive fishing expedition. Catalyst has not come close to demonstrating why its proposed appeal as against West Face raises matters of importance that transcend the interests of the parties, such that leave to appeal can or should be granted.

5. Catalyst's sole argument in support of its motion for leave to appeal against West Face is that an Independent Supervising Solicitor must be appointed to review West Face's records because Mr. Moyse deleted the Internet browsing history on his computer. This argument is a *non sequitur*. Even assuming, contrary to the evidence, that Mr. Moyse deleted anything relevant, **and** that he had previously sent confidential information to West Face, West Face has an obligation to produce all relevant evidence in its possession. Justice Glustein found no evidence that West Face had attempted to conceal or destroy evidence—on the contrary, West Face voluntarily made voluminous disclosure before the case had even proceeded to the discovery phase. As such, there is no basis for Catalyst's motion for leave to appeal, and it should be dismissed.

PART II - ISSUE

6. As set out in West Face's Extension Factum, Catalyst's motions raise two issues:

- (a) whether Catalyst should be granted an extension of time to serve and file its motion for leave to appeal from the decision of Justice Glustein dated July 7, 2015; and
- (b) if the requested extension of time is granted, whether Catalyst should be granted leave to appeal from the decision of Justice Glustein dated July 7, 2015.

7. This factum addresses the second issue. To the extent that the various factors relevant to Catalyst's motion for an extension of time are relevant to Catalyst's motion for leave to appeal (notably, the discretionary nature of Justice Glustein's decision and the lack of merit of Catalyst's proposed appeal), the submissions made by West Face in its Extension Factum are relied upon and incorporated by reference by West Face in opposing Catalyst's motion for leave to appeal.

PART III - LAW AND ARGUMENT

A. Catalyst Should not be Granted Leave to Appeal

8. The test for obtaining leave to appeal to the Divisional Court is set out in Rule 62.02(4):

62.02(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.
(emphasis added)

9. The test for granting leave to appeal under Rule 62.02(4) is well-settled. Courts in Ontario have recognized repeatedly that leave to appeal to the Divisional Court in respect of discretionary interlocutory decisions should rarely be granted. Accordingly, the requisite test that must be met before leave to appeal can be granted is a "very strict one." Each of the two branches for granting leave involves a two-part, conjunctive test. In other words, both aspects of the two-part test must be met before leave to appeal can be granted on either branch.¹ In the case at bar, Catalyst cannot meet *either* requirement, let alone *both* requirements, of either test under Rule 62.02(4).

10. As set out below, the caselaw describes additional principles governing the test for leave to appeal under Rule 62.02(4).² Leave to appeal should rarely, if ever, be granted in respect of an interlocutory decision of a motions judge who exercises his discretion in accordance with well-settled principles of law to determine discrete and idiosyncratic issues (as Justice Glustein did here).

i. The Test Under Rule 62.02(4)(a) is Not Satisfied

11. As noted above, the first test under Rule 62.02(4) requires the moving party to establish that "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

¹ *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, unreported decision dated October 30, 2015, Court File No. 297-15 at para. 51 (Div. Ct.), West Face Book of Authorities, Tab 1; *Hunt v. Carr*, [2015] O.J. No. 168 at para. 13 (S.C.J.), West Face Book of Authorities, Tab 13.

² For a helpful summary of the applicable principles, see: *Mask v. Silvercorp*, [2014] O.J. No. 3708, at paras. 8-12 (Div. Ct.), West Face Book of Authorities, Tab 15; *Hunt v. Carr*, [2015] O.J. No. 168 at paras. 12-14 (S.C.J.), West Face Book of Authorities, Tab 13; *Economical Insurance Co v. Fairview*, [2011] O.J. No. 5863 at para. 9 (Div. Ct.), West Face Book of Authorities, Tab 10.

judge hearing the motion, desirable that leave to appeal be granted." In this case, Catalyst has not satisfied either element of this conjunctive test as against West Face.

(1) No "Conflicting" Decision

12. The first requirement for leave under Rule 62.02(4)(a) is that there be a "conflicting" decision." A "conflicting decision" is one in which different legal principles are chosen to decide a comparable legal problem or to guide the exercise of the Court's discretion. Conversely, an alleged inconsistency that merely reflects different judges reaching different results based on different facts or circumstances, or exercising their discretion differently in different circumstances, is not a "conflicting decision" within the meaning of the Rule.³

13. There are no decisions that conflict with the decision of Justice Glustein respecting the Imaging Motion. Rather, his decision was supported by a long line of consistent authority. Justice Glustein specifically held that relief sought by Catalyst against West Face could only be granted "if there is good reason to believe that the responding party has not complied with its production obligations."⁴ The test that he applied is well-settled, and hardly controversial.

14. Justice Glustein specifically adopted the test that he applied from *Brown v. First Contact Software Consultants Inc.*⁵ The same principles have been adopted in a

³ *Mask v. Silvercorp*, [2014] O.J. No. 3708, at para. 8 (Div. Ct.), West Face Book of Authorities, Tab 15; *Economical Insurance Co v. Fairview*, [2011] O.J. No. 5863 at para. 9 (Div. Ct.), West Face Book of Authorities, Tab 10.

⁴ *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 47 (S.C.J.), West Face Book of Authorities, Tab 6.

⁵ *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 49 (S.C.J.), West Face Book of Authorities, Tab 6, citing *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 (S.C.J.), West Face Book of Authorities, Tab 5.

number of other recent cases.⁶ Justice Glustein applied those established principles to the specific circumstances of this case and found as fact that "Catalyst has not met its burden to establish that West Face has engaged in any destruction of evidence or in any conduct 'designed to hide or delete electronic or other information'."⁷ His decision in that regard was amply supported by the evidence. West Face's arguments regarding Justice Glustein's dismissal of the Imaging Motion are addressed in more detail at paragraphs 58-73 of its Extension Factum, and are incorporated by reference here.

15. Catalyst argues that Justice Lederer's November 2014 decision ordering an ISS process with respect to Mr. Moyse constitutes a "conflicting decision" within the meaning of Rule 62.02(4)(a). It is no such thing. While Justice Lederer's decision may have arisen in the same litigation, it is a prototypical example of a different judge reaching a different result on different facts against a different party. Catalyst has pointed to no erroneous principle of law on which Justice Glustein allegedly relied.

16. In any event, Justice Glustein's decision is perfectly consistent with the decision of Justice Lederer. Catalyst originally sought an ISS process against both West Face and Mr. Moyse in the proceedings before Justice Lederer, but abandoned its request for relief against West Face. No relief was, in fact, granted against West Face by Justice Lederer. Nor did Justice Lederer find that West Face had not complied or would not comply with its production obligations. Justice Glustein decided that there was no

⁶ See e.g. *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] O.J. No. 6082 at paras. 13-14 (S.C.J.), West Face Book of Authorities, Tab 23; *Plaza Consulting Inc. v. Grieve*, [2013] O.J. No. 3769 at paras. 42-44 (S.C.J.), West Face Book of Authorities, Tab 18; *Rossi v. Vaughan*, [2010] O.J. No. 203 at para. 11 (Master), West Face Book of Authorities, Tab 20; *Nicolardi v. Daley*, [2002] O.J. No. 595 at para. 33 (S.C.J.), West Face Book of Authorities, Tab 17.

⁷ *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 57 (S.C.J.), West Face Book of Authorities, Tab 6.

evidence to support such a finding. There was no basis to assert before Justice Lederer or Justice Glustein, let alone establish, that West Face had not produced or would not produce records demonstrating the conveyance by Mr. Moyse to West Face of confidential information belonging to Catalyst, if any such documents did in fact exist. Indeed, West Face has already produced all email communications involving Mr. Moyse and, on a counsel's eyes only basis, all identifiable documents that Mr. Moyse accessed or worked on during the brief period of less than one month that he was employed by West Face. West Face has done nothing to undermine Justice Lederer's order against Mr. Moyse, and Justice Glustein's decision is perfectly consistent with it.

17. On this basis alone, the requisite test for granting leave to appeal pursuant to Rule 62.02(4)(a) has not been satisfied.

(2) It is Undesirable that Leave to Appeal be Granted

18. The second conjunctive requirement for obtaining leave to appeal under Rule 62.02(4)(a) is that the Court must be satisfied that it is desirable for leave to be granted. In considering this requirement, the Court should have regard to several factors including: (i) what is at stake in the order being challenged; (ii) the likelihood of the appeal being successful; and (iii) problems of expense and delay.⁸ Each of these factors makes it highly undesirable for leave to appeal to be granted.

19. As a starting point, for the reasons described in paragraphs 58-73 of West Face's Extension Factum, it is most unlikely that the proposed appeal concerning West Face would be successful. Indeed, the proposed appeal involving West Face borders on

⁸ *Mask v. Silvercorp*, [2014] O.J. No. 3708, at para. 9 (Div. Ct.), West Face Book of Authorities, Tab 15.

being frivolous. For the reasons already described, Justice Glustein's discretionary decision is thorough, well-reasoned, well-supported, and consistent with the applicable law.

20. The factors of expense, delay, and what is at stake on the proposed appeal also make it undesirable to grant leave. West Face requires an expeditious determination of the claims Catalyst has asserted against it to remove any lingering doubt concerning the right and ability of West Face to manage on behalf of its investors approximately \$500 million in proceeds that West Face expects to receive shortly from the sale of WIND Mobile to Shaw. Granting leave to appeal would delay the resolution of Catalyst's claims on a timely and efficient basis.⁹ Meanwhile, the issue at stake in the proposed appeal does not extend beyond the parties to this proceeding, and is relatively trivial. There is no reason to believe an ISS process would uncover relevant evidence beyond what West Face has already produced voluntarily to Catalyst, including by way of Affidavit of Documents, most of it almost a year ago.

21. For these reasons, neither branch of the applicable test under Rule 62.02(4)(a) has been satisfied.

ii. The Test for Leave Under Rule 62.02(4)(b) is not Met

22. To obtain leave to appeal under Rule 62.02(4)(b), an appellant must establish good reason to doubt the correctness of the Order in respect of which leave to appeal is

⁹ *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-2, West Face Book of Authorities, Tab 12. In *Hryniak*, the Supreme Court emphasized the need for our Courts to respect and give effect to the overriding principles of efficiency and proportionality expressed in Rule 1.04(1.1).

sought, **and** that the proposed appeal concerns a matter of general importance. Catalyst cannot satisfy either branch of this test.

(1) The Decision is Correct

23. The first branch of the test under Rule 62.02(4)(b) requires the party seeking leave to demonstrate that there is good reason to doubt the correctness of the order.¹⁰

24. In this case, as noted in West Face's Extension Factum under the fourth element of the test for an extension of time at paragraphs 58-73 of West Face's Extension Factum, the discretionary decision of Justice Glustein refusing to grant the relief requested against West Face is consistent with the evidence presented and with a long line of well-settled authority. Indeed, in deciding Catalyst's motion Justice Glustein applied properly the most lenient test that might have been relevant to Catalyst's claim for relief against West Face, and concluded that, on the evidence, that test had not been satisfied. There was ample evidence to support that finding. There can be no good reason to doubt the correctness of his decision in this regard.

(2) No Issue of General Importance

25. The second requirement for leave to appeal under Rule 62.04(2)(b) is that the proposed appeal must concern a matter of general importance. To establish a matter of general importance, the moving party must establish that the matter in question is of importance to the public, or to the development of the law or the administration of

¹⁰ *Mask v. Silvercorp*, [2014] O.J. No. 3708, at para. 11 (Div. Ct.), West Face Book of Authorities, Tab 15.

justice, and that the importance of the matter transcends the interests of the particular parties.¹¹

26. In this case, Justice Glustein was not asked or required to establish or expand any new proposition or law or practice, or to modify or overturn an established legal principle. Nor did he purport to do so. Instead, Justice Glustein simply applied well established principles of law, supported by numerous authorities, to the unique circumstances at issue here. Such a highly fact-specific and discretionary decision cannot satisfy the requirement of general importance.¹²

27. The Imaging Order was made in purely private, commercial litigation. While Catalyst's delay has made the dismissal of this motion extraordinarily important to West Face, its proposed appeal in respect of the Imaging Order involves no new or novel issue of law or practice that merits the attention of this Court.

PART IV - ORDER REQUESTED

28. West Face respectfully requests that an Order be made:

- (a) denying Catalyst leave to appeal the Imaging Order;
- (b) granting to West Face its costs of this motion, in an amount to be fixed by the Court; and

¹¹ *Mask v. Silvercorp*, [2014] O.J. No. 3708, at para. 12 (Div. Ct.), West Face Book of Authorities, Tab 15.

¹² *Economical Insurance Co. v. Fairview Assessment Centre Inc.*, [2011] O.J. No. 5863 at para. 14 (Div. Ct.), West Face Book of Authorities, Tab 10.

- (c) granting to West Face such further and other relief as counsel may advise and this Honourable Court may permit.

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

A handwritten signature in black ink, appearing to read 'Kent E. Thomson', written over a horizontal line.

Kent E. Thomson
Matthew Milne-Smith
Davies Ward Phillips & Vineberg LLP

Of counsel to the Defendant,
West Face Capital Inc.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Catalyst Capital Group Inc. v. Moyse*, 2015 O.J. No. 3636 (S.C.J.)
2. *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.)
3. *Waldman v. Thomson Reuters Canada Ltd.*, [2015] O.J. No. 395 (C.A.)
4. *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.)
5. *Merling v. Southam Inc.*, [2000] O.J. No. 123 (C.A.)
6. *Cole v. Hamilton (City)*, [2002] O.J. No. 4688 (C.A.)
7. *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2004] O.J. No. 10 (C.A.)
8. *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131 (C.A.)
9. *Concerned Residents Assn. of North Dumfries v. Preston Sand and Gravel Co.*, 2015 ONSC 2086 (S.C.J.)
10. *Bagnulo v. Complex Services Inc.*, 2014 ONSC 3311 (Div. Ct.)
11. *Roach v. Oniel*, 2005 CarswellOnt 734 (Div. Ct.)
12. *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521 (C.A.)
13. *Kempf v. Nguyen*, [2015] O.J. No. 750 (C.A.)
14. *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 (S.C.J.)
15. *Rossi v. Vaughan*, [2010] O.J. No. 203 (Master)
16. *Nicolardi v. Daley*, [2002] O.J. No. 595 (S.C.J.)
17. *Addison Chevrolet Buick GMC Ltd. v. General Motors of Canada Ltd.*, unreported decision dated October 30, 2015, Court File No. 297-15 (Div. Ct.)
18. *Hunt v. Carr*, [2015] O.J. No. 168 (S.C.J.)
19. *Mask v. Silvercorp*, 2014 ONSC 4647 (Div. Ct.)
20. *Economical Insurance Co v. Fairview*, 2011 ONSC 7535 (Div. Ct.)
21. *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] O.J. No. 6082 (S.C.J.)
22. *Plaza Consulting Inc. v. Grieve*, [2013] O.J. No. 3769 (S.C.J.)

23. *Hryniak v. Mauldin*, 2014 SCC 7

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act

R.S.O. 1990, c. C.43

[...]

Court of Appeal jurisdiction

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

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

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

© a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;

(d) an order made under section

Combining of appeals from other courts

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

[...]

Divisional Court jurisdiction

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

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

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

(c) a final order of a master or case management master.

[...]

Rules of Civil Procedure

R.R.O. 1990, Reg. 194

[...]

EXTENSION OR ABRIDGMENT

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.

(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.

[...]

WHERE AFFIDAVIT INCOMPLETE OR PRIVILEGE IMPROPERLY CLAIMED

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

- (a) order cross-examination on the affidavit of documents;
- (b) order service of a further and better affidavit of documents;
- (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged; and
- (d) inspect the document for the purpose of determining its relevance or the validity of a claim of privilege.

[...]

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.

[...]

MOTION FOR LEAVE TO APPEAL TO COURT OF APPEAL

Motion in Writing

61.03.1 (1) Where an appeal to the Court of Appeal requires the leave of that court, the motion for leave shall be heard in writing, without the attendance of parties or lawyers.

Notice of Motion

(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.

[...]

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.

(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.

[...]

THE CATALYST CAPITAL GROUP INC.
Plaintiff

BRANDON MOYSE ET AL
and Defendants

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**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

Proceeding commenced at Toronto

**FACTUM OF THE RESPONDING DEFENDANT
WEST FACE CAPITAL INC.
(returnable January 21, 2016)**

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