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 an Extension of Time, returnable January 21, 2016)

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PART I - INTRODUCTION

1. These are combined motions brought by the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**") for a more than four-month extension of time to seek leave to appeal, and if leave to extend time is granted, for leave to appeal itself.[1] Catalyst's motions arise from the interlocutory Order of Justice Glustein dated July 7, 2015. There is no merit to either of Catalyst's motions. There are a total of eight factors for this Court to consider in deciding Catalyst's motions. Not one of them supports granting the relief sought.

2. Catalyst's motions threaten to delay litigation to determine the fate of over $500 million – the expected proceeds the Defendant West Face Capital Inc. ("**West Face**") will receive in the very near future from the sale of the shares of WIND Mobile Inc. to Shaw Communications Inc. ("**Shaw**"). West Face acquired an interest in WIND Mobile as part of a consortium of four principal investors (the "**Investors**") who purchased WIND Mobile in September 2014 for a total purchase price of $300 million. On December 16, 2015, Shaw announced that it had reached an agreement to acquire WIND Mobile from the Investors for $1.6 billion. Closing of the transaction is subject to Court and regulatory approval, but is expected to occur in March or April 2016.

3. Catalyst was one of the unsuccessful bidders for WIND Mobile in 2014. Catalyst claims that it is entitled to West Face's share of the sale proceeds, and that West Face cannot use or distribute those proceeds until Catalyst's claim has been adjudicated – all because a former junior analyst for Catalyst, the Defendant Brandon Moyse, worked for West Face for less than one month in the Summer of 2014.

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[1] This factum will address Catalyst's motion for an extension of time to seek leave to appeal and should be read first. West Face is filing a separate factum confined to the issue of leave to appeal, if necessary.

4. Catalyst seeks leave to appeal Justice Glustein's decision rejecting Catalyst's motion for, among other things, the appointment of an Independent Supervising Solicitor (the "**ISS**") to create forensic images of, and inspect, the computer records of West Face. The proposed appeal, however, has no merit as against West Face and neither an extension of time nor leave to appeal should be granted. Catalyst presented no evidence to meet the high burden that it was required to satisfy in its efforts to obtain this extraordinary and intrusive remedy against West Face. Among other things, Catalyst adduced no evidence to demonstrate that West Face had concealed or destroyed any evidence whatsoever or that West Face had breached or would breach its production obligations in any way. In fact, Catalyst brought the underlying motion for the appointment of an ISS as against West Face before the parties had even reached the discovery phase of this proceeding, and before West Face had delivered its affidavit of documents.

5. Catalyst claimed that the appointment of an ISS as against West Face was somehow necessary to give effect to an order that Justice Lederer had previously issued against Mr. Moyse in November 2014 in which he appointed an ISS to review Mr. Moyse's electronic devices. Mr. Moyse deleted his browsing history before turning over his computer for imaging and inspection. Catalyst claimed that the only way it could determine whether Mr. Moyse had conveyed its confidential information to West Face was to appoint an ISS to review the computer records of West Face. There were any number of insurmountable problems with Catalyst's motion, however, including the following:

(a) *First*, as stated above, Catalyst adduced no evidence whatsoever to demonstrate that West Face either had failed to honour or would fail to honour its production obligations. Catalyst adduced no evidence to demonstrate that the very same records that might be reviewed by an ISS had not been or would not be produced by West Face during the discovery phase of this

proceeding. As a result, Catalyst's motion was based on a false premise that went to the heart of the relief sought;

(b) *Second*, the evidence demonstrated to the contrary that West Face has consistently made more than ample disclosure at every turn in this litigation, and has done so on a timely basis. Among other things, West Face has disclosed all of its communications with Mr. Moyse, and has offered repeatedly to participate in a process for the disclosure of all confidential documents of West Face that Mr. Moyse accessed during the period of less than one month that he worked at West Face;

(c) *Third*, Catalyst's motion for extraordinary relief against West Face was most assuredly not brought on the basis that either Mr. Moyse or West Face had misconducted themselves by failing to disclose relevant documentation or information. Rather, Catalyst commenced its motion after the ISS appointed by Justice Lederer in respect of Mr. Moyse's records advised that applying an initial set of search terms to Mr. Moyse's electronic devises had produced too many "hits" to enable it to conduct a manual review of Mr. Moyse's records. Rather than wait for the results of the ISS's review of Mr. Moyse's records, Catalyst brought its ill-conceived motion against West Face, even though there was no proper basis on which the relief sought by Catalyst against West Face could or should have been granted. In the circumstances, Catalyst's motion against West Face was doomed to failure.

6. Justice Glustein exercised his discretion properly in dismissing Catalyst's motion against West Face. In doing so, His Honour relied on a long line of consistent authority which establishes that an order for compulsory inspection of an opposing party's computers is only permitted where there is evidence demonstrating that the party in question may destroy or conceal evidence if the order is not granted. Justice Glustein found correctly that there was no such evidence against West Face in this case. On the contrary, there is a wealth of evidence that West Face has complied fully with its disclosure obligations, and has done so on a timely basis. Catalyst attempts to visit on West Face honest mistakes made by Mr. Moyse in deleting irrelevant documents from his personal computer – conduct that West Face had no knowledge of or role in. Catalyst has identified no case in which a Justice of this Court, or frankly any other Canadian court, has granted the extraordinary relief sought

by it against West Face in circumstances such as these. Moreover, Catalyst has identified no reason why the ordinary discovery process will not adequately protect its interests.

7. Justice Glustein's dismissal of Catalyst's motion for relief against West Face is an interlocutory order. Leave to appeal to the Divisional Court was required.

8. Nonetheless, Catalyst purported to appeal Justice Glustein's dismissal of its motion against West Face directly to the Court of Appeal without seeking leave. It did so on the ostensible basis that Justice Glustein had also dismissed Catalyst's motion for a finding of contempt against Mr. Moyse for deleting his Internet browsing history before turning his computer over for preservation and, eventually, review by the ISS. Catalyst took the unfounded position that: (i) Justice Glustein's dismissal of its contempt motion was final in nature; (ii) as a result, that it had a direct right of appeal to the Court of Appeal from Justice Glustein's dismissal of its contempt motion; **and** (iii) it was somehow entitled, without obtaining leave to appeal, to "piggyback" its appeal from the interlocutory West Face decision onto its appeal to the Court of Appeal from the Moyse contempt decision.

9. As explained below, none of this was true. Justice Glustein's dismissal of Catalyst's motion for a contempt order was interlocutory in nature, rather than final. Catalyst had no right to appeal that decision to the Court of Appeal. In any event, Catalyst had no right to appeal to the Court of Appeal from Justice Glustein's decision dismissing its claim for relief against West Face. Instead, Catalyst was required at all times to obtain leave to appeal from the Divisional Court, and to do so on a timely basis. This was <u>not</u> a close call.

10. Catalyst's mistakes were obvious, and were brought to its attention immediately after they were made. Two days after receiving Catalyst's Notice of Appeal to the Court of Appeal in July 2015, counsel for West Face and Mr. Moyse both notified counsel to Catalyst that it

had no right of appeal to the Court of Appeal. Catalyst disregarded this advice. Instead of moving immediately for leave to appeal to the Divisional Court, Catalyst insisted on pursuing its appeals to the Court of Appeal. West Face and Mr. Moyse were left with no choice but to bring motions to quash Catalyst's appeals to the Court of Appeal. West Face's motion materials included twenty years of consistent Court of Appeal jurisprudence holding that Catalyst was required to seek leave to appeal the West Face decision (which Catalyst accepted was interlocutory) regardless of whether it had an appeal as of right from the Moyse decision. Six weeks after receiving these materials, Catalyst finally abandoned its appeal as against West Face. Catalyst then waited six more weeks to initiate a motion before this Court for an extension of time to seek leave to appeal.

11. Catalyst's mistakes and obstinacy have resulted in a delay in pursuing its proposed appeal of more than six months. Rather than serving a Notice of Motion for Leave to Appeal by July 22, 2015 as required by the *Rules of Civil Procedure*, Catalyst is only now having its motion for leave to appeal heard. This delay has caused significant prejudice to West Face because of the pending sale of WIND Mobile. This prejudice arises in view of Catalyst's position that West Face should not be permitted to dispose of its proceeds of sale (of approximately $500 million) until Catalyst's claims against West Face arising from the hiring of Mr. Moyse have been finally determined. Inexplicably, Catalyst has taken the position that its claims against West Face cannot be determined until its appeal from Justice Glustein's decision has been finally resolved.

PART II - THE FACTS

i. Catalyst's Motion Before Justice Lederer

12. Catalyst and West Face are investment firms. In the Spring and Summer of 2014, Catalyst, West Face and other parties were exploring an acquisition of WIND Mobile from its then-owner, VimpelCom Inc. At the time, Brandon Moyse was a 26 year-old junior analyst at Catalyst. In May 2014, Mr. Moyse decided to leave Catalyst and join West Face, with a start date of June 23, 2014.[2]

13. Prior to joining West Face, Mr. Moyse advised Catalyst of his decision. Catalyst immediately advised West Face that it had concerns about, among other things, Mr. Moyce's involvement in a "telecom file". West Face understood that the "telecom file" likely pertained to the sale of WIND Mobile. As a result, West Face implemented an ethical wall **before** Mr. Moyse started work at West Face to ensure that he had no communications with anyone at West Face about WIND Mobile, and had no access to West Face's physical or electronic documents concerning WIND Mobile.[3]

14. On June 26, 2014, Catalyst sued the Defendants and commenced a motion for, among other things: (i) an injunction preventing Mr. Moyse from working at West Face for the six month period of the non-compete covenant in his employment agreement with Catalyst; and (ii) the appointment of an ISS to create forensic images of all of the electronic devices of both West Face and Mr. Moyse for preservation. Catalyst later abandoned this claim for ISS related relief as against West Face before arguing the motion.[4]

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2 Panet Affidavit at para. 5, West Face Record, Tab 1, p. 3. There is a typo in the Panet Affidavit. Mr. Moyse was 26, not 27, in the Spring of 2014.

3 Panet Affidavit at para. 5, West Face Record, Tab 1, p. 3.

4 Notice of Motion dated June 26, 2014, Catalyst Record, Tab 3-B.

15. On July 16, 2014, the parties entered into an Interim Consent Order pursuant to which Mr. Moyse agreed to be put on leave from West Face and to turn over his electronic devices for preservation. West Face similarly imaged its computer systems for preservation. In this manner, the Interim Consent Order preserved the status quo pending the resolution of Catalyst's interlocutory motion.[5]

16. As a result, Mr. Moyse worked at West Face for less than a month before he was placed on leave. He never returned to West Face in the period after July 16, 2014. The ethical wall remained in place throughout Mr. Moyse's brief tenure at West Face. There is no evidence that Mr. Moyse told West Face anything about Catalyst's negotiations or plans for WIND Mobile either prior to, during or following his brief period of employment at West Face.

17. On July 23, 2014, one week after Mr. Moyse was put on leave from West Face, Catalyst entered into exclusive negotiations with VimpelCom to acquire WIND Mobile. Catalyst was unable to reach an agreement with VimpelCom, however, either during this period of exclusivity or subsequently.[6] Once Catalyst's period of exclusivity expired without a deal being reached, the Investors resumed negotiations with VimpelCom. They reached an agreement to acquire WIND Mobile on September 16, 2014.[7]

18. On October 27, 2014, Justice Lederer heard Catalyst's motion for an interlocutory injunction enforcing Mr. Moyse's non-compete covenant, and appointing an ISS to review

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5 Panet Affidavit at para. 6, West Face Record, Tab 1, p. 3; Winton Affidavit at paras. 4-5, Catalyst Record, Tab 3, p. 17.

6 Panet Affidavit at para. 7, West Face Record, Tab 1, p. 3-4.

7 Panet Affidavit at para. 7, West Face Record, Tab 1, p. 3-4.

Mr. Moyse's computer records.[8] Justice Lederer granted Catalyst's motion on November 10, 2014.

19. Importantly, Justice Lederer granted no relief against West Face. Contrary to the assertion at the outset of Catalyst's factum on its motion for leave to appeal, Catalyst did not "make out" a "strong *prima facie* case" for "possession and misuse" of Catalyst's confidential information by "the Defendants". Nor did Justice Lederer make any such finding. Rather, Justice Lederer stated explicitly in his Reasons that he saw "no reason to go beyond finding that there is a serious issue to be tried" (a much lower threshold than a strong *prima facie* case) in deciding Catalyst's claim for interlocutory relief against Mr. Moyse.[9] Moreover, a fair reading of Justice Lederer's decision makes clear that the "serious issue to be tried" related to whether Mr. Moyse had breached the confidentiality and non-compete covenants in his employment agreement with Catalyst, rather than to whether West Face "possessed and misused" any confidential information of Catalyst concerning WIND Mobile. Indeed, Justice Lederer could not have made such a finding because there was then, and continues to be, no evidence that Mr. Moyse ever communicated to West Face any confidential information of Catalyst concerning WIND Mobile.[10] To be precise, the **only** evidence before Justice Lederer suggesting that Mr. Moyse may have communicated any **potentially** confidential information to West Face was an email sent to West Face on March 27, 2014 to which he attached four writing samples. These writing samples had nothing to do with WIND Mobile, and Catalyst has never claimed any prejudice as a result of the disclosure of these writing samples to West Face.

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8 Panet Affidavit at para. 8, West Face Record, Tab 1, p. 4.

9 Reasons for Judgment of Justice Lederer dated November 10, 2014, at para. 75, Catalyst Record, Tab 3-D, p. 84.

10 At paragraph 38 of his Reasons, Justice Lederer noted: "There is no evidence that any of the material accessed by Brandon Moyse through the files of Catalyst have been disclosed to West Face". See also paragraph 34. Catalyst Record, Tab 3-D, pp. 72 & 74.

20. Nevertheless, this March 27, 2014 email has become the layer of sand on which Catalyst has built its entire case against West Face. While Catalyst professed to Justice Lederer that the March 27 email confirmed its "worst fears",[11] Catalyst's subsequent motion before Justice Glustein revealed that: (i) Catalyst never pursued an investment in any of the four companies (including Arcan) that were referred to in Mr. Moyse's writing samples, even though Catalyst claimed previously that information about these companies was both important and confidential; and (ii) in January 2015, Catalyst directed its own counsel to unseal the Court file containing the March 27, 2014 email.[12] This confirmed that Catalyst did not, in fact, consider that Mr. Moyse's writing samples contained highly sensitive work product of Catalyst that revealed its investment valuation methodologies, as it had argued during the motion before Justice Lederer.

21. In short, Catalyst's reliance on Justice Lederer's decision, both before Justice Glustein and now, is seriously misplaced. Justice Lederer's decision is much more significant for what it did **not** do than for what it did. Justice Lederer granted **no** relief against West Face, despite the fact that Catalyst had requested such relief in its Notice of Motion of June 26, 2014.

B. Catalyst's Motion Before Justice Glustein

22. On December 23, 2014, the ISS wrote to counsel for Mr. Moyse and Catalyst to advise that "the search terms applied have resulted in what [the ISS] regarded as an

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11 Reasons for Judgment of Justice Lederer dated November 10, 2014, at para. 42, Catalyst Record, Tab 3-D, p. 75.

12 Cross-Examination of James Riley dated May 13, 2015, qq. 252-269. See also Affidavit of Anthony Griffin dated March 7, 2015, at paras. 50 & 129-132, Catalyst Motion Record for Leave Record, Tab 15, pp. 750, 780-782.

excessive number of 'hits' for purposes of manual document review."[13] The ISS did not suggest, and in fact has never suggested or found, that there was any evidence to suggest or establish that Mr. Moyse had transmitted confidential information of Catalyst to West Face (beyond any information that may have been contained in the four writing samples referred to above). West Face disclosed those writing samples six business days after Catalyst commenced this action.[14]

23. On January 13, 2015, however, notwithstanding that the ISS had not even started its document review, Catalyst commenced the motion that was ultimately heard by Justice Glustein in July 2015. Included in this motion was a request by Catalyst for an order authorizing the ISS to review forensic images of all of West Face's electronic devices, for the stated purpose of identifying **whether** West Face had misused any confidential information belonging to Catalyst (the "**Imaging Motion**").[15] Catalyst maintains incorrectly, both in paragraph 11 of Mr. Winton's affidavit and in paragraph 17 of Catalyst's factum for leave to appeal, that it commenced the Imaging Motion only **after** learning that Mr. Moyse had downloaded a "secure delete" program.[16] This is simply wrong. The ISS's report makes clear that his review of Mr. Moyse's records (which led to the discovery of Mr. Moyse's downloading of the secure delete program) only commenced on January 19, 2015 – six days **after** Catalyst launched its Imaging Motion.[17] In other words, Catalyst commenced its Imaging Motion based exclusively on the request of the ISS for clarification regarding excessive "hits" returned by preliminary search terms. Catalyst knew nothing about

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13 Report of the Independent Supervising Solicitor dated February 27, 2015 ("**ISS Report**"), para. 10, Catalyst Record, Tab 3.F, p. 99.

14 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 55 (S.C.J.), West Face Book of Authorities, Tab 6.

15 Panet Affidavit at para. 9, West Face Record, Tab 1, p. 4-5.

16 Winton Affidavit paras.10-11, Catalyst Record, Tab 3, p. 18-19.

17 ISS Report, paras. 17-21, Catalyst Motion Record, Tab 3.F, pp. 101-103.

Mr. Moyse's purchase of the secure delete program when it brought its Imaging Motion against West Face in January 2015.

24. After reviewing Mr. Moyse's computer records, the ISS found no evidence that Mr. Moyse had transmitted, or West Face had received, confidential information of Catalyst.[18] Nor is there any evidence that West Face concealed, destroyed or failed to produce relevant evidence. On the contrary, at the time Catalyst brought its motion against West Face, the parties had yet to reach the discovery phase of this proceeding. Neither West Face nor Catalyst had delivered an affidavit of documents.

25. It was not until February 6, 2015 that Catalyst amended its motion to seek an order imprisoning Mr. Moyse for contempt (the "**Contempt Motion**"). Catalyst did so based on the ISS's finding that Mr. Moyse had purchased a secure delete program for his computer. Mr. Moyse explained subsequently under oath that he had only used that program to delete his irrelevant personal Internet browsing history for reasons of privacy, and had not deleted anything relevant to the matters in issue in this proceeding.[19] His explanation was accepted by Justice Glustein in dismissing the Contempt Motion.

26. West Face filed a voluminous responding motion record on March 10, 2015, and provided counsel to Catalyst with copies of all emails to, from or copied to Mr. Moyse found in West Face's computer records. West Face also offered to produce to the ISS all documents on West Face's computer system that were identified as having been accessed by Mr. Moyse during the brief period that he was employed by West Face.[20]

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18 Winton Affidavit at Exhibit "F", para. 59; Catalyst Record, Tab 3F, p. 139.

19 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 62 (S.C.J.), West Face Book of Authorities, Tab 6.

20 *Ibid* at para. 56.

27. Catalyst's motion was argued before Justice Glustein on July 2, 2015.[21] Five days later, Justice Glustein released his Endorsement dismissing Catalyst's motion in its entirety.[22] He later awarded West Face and Mr. Moyse a total of $160,000 in costs between them in respect of Catalyst's motion.[23] Those costs have yet to be paid.

28. In dismissing the Imaging Motion, Justice Glustein determined that there was "no evidence that West Face has failed to comply with its production obligations, let alone intentionally deleted materials to thwart the discovery process or evade its discovery obligations".[24] On the contrary, His Honour noted that West Face had produced "voluminous" documents "voluntarily", "immediately", "once put in issue", and "even before discovery".[25] While Justice Glustein considered whether the Imaging Motion required Catalyst to satisfy the onerous test required to obtain an *Anton Piller* order because Catalyst's motion was brought prior to productions having been exchanged and discoveries having been conducted, he agreed with West Face that Catalyst could not even satisfy the lower burden applied in cases where imaging orders are sought following documentary discovery under Rule 30.06.[26]

29. Justice Glustein also dismissed Catalyst's contempt motion against Mr. Moyse. He held that the Interim Order issued on consent in July 2015 had only prohibited the deletion of relevant evidence, and that Catalyst had offered only speculation that Mr. Moyse may

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21 Panet Affidavit at paras. 10-12, West Face Record, Tab 1, p. 5-6.
22 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 (S.C.J.), West Face Book of Authorities, Tab 6.
23 Panet Affidavit at Exhibit "C", West Face Record, Tab C.
24 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 52 (S.C.J.), West Face Book of Authorities, Tab 6.
25 *Ibid at* paras. 53-56.
26 *Ibid* at para. 43.

have done so.[27] Justice Glustein further found the evidence did not establish that Mr. Moyse had used the "secure delete" function on his computer.[28]

30. As stated above, Justice Glustein's decision was interlocutory in nature, in respect both of his dismissal of the Imaging Motion and in respect of his dismissal of the contempt motion. Thus, pursuant to Rule 61.03(1)(b), Catalyst's motion for leave to appeal any or all aspects of Justice Glustein's decision lay to the Divisional Court and was due on July 22, 2015.

31. Catalyst did not, however, seek leave to appeal. This is so even though Catalyst concedes that it understood at all times that Justice Glustein's order dismissing its Imaging Motion was interlocutory in nature. Instead, Catalyst contended that Justice Glustein's dismissal of the Contempt Motion was final in nature, and therefore appealable as of right to the Court of Appeal.[29] Catalyst also claimed that it could appeal Justice Glustein's dismissal of the Imaging Motion directly to the Court of Appeal without seeking leave to appeal, by marrying its appeal concerning the Imaging Motion with its appeal from Justice Glustein's Order dismissing the Contempt Motion. Catalyst filed its Notice of Appeal to the Court of Appeal on July 22, 2015.[30]

32. Two days later, on July 24, 2015, Mr. Moyse's counsel and West Face's counsel both put counsel for Catalyst on notice that according to binding and dispositive authority of the Court of Appeal, Justice Glustein's order dismissing the Contempt Motion was interlocutory in nature, rather than final, and that leave to appeal to the Divisional Court was required

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27 *Ibid* at para. 74.

28 *Ibid* at para. 86.

29 Panet Affidavit at para. 16, West Face Record, Tab 1, p. 7; Winton Affidavit at para. 17, Catalyst Record, Tab 3, p. 20.

30 Winton Affidavit at paras. 20 and 22, Catalyst Record, Tab 3, p. 20-21; Panet Affidavit at para. 16, West Face Record, Tab 1, p. 7.

both in respect of the Contempt Motion **and** in respect of the Imaging Motion. Catalyst did not respond, however, and instead persisted in pursuing its appeals in the Court of Appeal. The Defendants were forced to bring concurrent motions to quash Catalyst's purported appeals.[31]

33. On September 11, 2015, West Face filed its motion record, factum and book of authorities in support of its motion to quash. These materials included numerous decisions of the Court of Appeal, which hold that in order to join an appeal from an interlocutory order with an appeal of a final order before the Court of Appeal, it is necessary to first obtain leave to appeal the interlocutory order.[32] West Face noted that even if Justice Glustein's contempt decision was, in fact, final in nature, the Court of Appeal "would still have no jurisdiction ... to hear the appeal of the [Imaging Motion], because Catalyst has not obtained leave to appeal" from that Order.[33]

34. Catalyst, again, ignored this binding authority. Catalyst's position (as expressed in paragraphs 22 and 23 of Mr. Winton's affidavit and repeated in paragraphs 19 and 20 of its factum for an extension) that it did not realize until mid-October 2015 that the law "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" is remarkable. This is tantamount to an admission that Catalyst's counsel conducted no review of the relevant law when they chose Catalyst's

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31 Panet Affidavit at paras. 17-18, West Face Record, Tab 1, p. 7-8; *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.), West Face Book of Authorities, Tab 21.

32 Panet Affidavit at Exhibit "I", paras. 13-23.

33 Panet Affidavit at para. 22, West Face Record, Tab 1, p. 8-9; Panet Affidavit at Exhibit "I", paras. 13-23. See also e.g., *Waldman v. Thomson Reuters Canada Ltd.*, [2015] O.J. No. 395 at para. 17 (C.A.), West Face Book of Authorities, Tab 22; *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.), West Face Book of Authorities, Tab 2; *Merling v. Southam Inc.*, [2000] O.J. No. 123 (C.A.), West Face Book of Authorities, Tab 16; *Cole v. Hamilton (City)*, [2002] O.J. No. 4688 (C.A.), West Face Book of Authorities, Tab 7; *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2004] O.J. No. 10 (C.A.), West Face Book of Authorities, Tab 9.

appeal route in July 2015, and did not bother to read West Face's brief, eleven-page factum on its motion to quash for over a month after it was delivered.

35. It was not until October 15, 2015 that counsel for Catalyst finally contacted counsel to West Face in an effort to resolve West Face's motion to quash. Catalyst ultimately consented to West Face's motion, and agreed to pay West Face its costs of that motion in the amount of $2,500.[34] October 15 was eight days after Catalyst's deadline to file responding materials on West Face's motion to quash. No such materials were filed.

36. Although Catalyst abandoned its position as against West Face, it refused to abandon its position as against Mr. Moyse. As a result, Mr. Moyse was forced to pursue his motion to quash Catalyst's appeal of the Contempt Motion on a contested basis. That motion was granted by Associate Chief Justice Hoy and Justices MacFarland and Lauwers on November 17, 2015. In granting Mr. Moyse's motion, the Court relied on the very same binding authority Mr. Moyse and West Face had previously provided to Catalyst on July 24, 2015, almost four months earlier.

37. Catalyst did not move to extend the deadline to file its motion for leave to appeal Justice Glusteins' dismissal of the Imaging Motion until November 27, 2015. This was more than **four months** after the deadline for seeking leave to appeal had passed. Catalyst brought its motion for an extension more than **eleven weeks** after West Face provided Catalyst with numerous decisions of the Court of Appeal establishing unambiguously that Catalyst had proceeded in the wrong court. Catalyst's motion to extend time is now

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[34] Panet Affidavit at paras. 25-31, West Face Record, Tab 1, p. 9-11.

returnable on January 21, 2016, almost **six months** after the expiration of Catalyst's deadline to seek leave to appeal to the Divisional Court from Justice Glustein's decision.[35]

38. Catalyst's delay is extraordinary and inexcusable. Had Catalyst complied with its obligations and brought its motion for leave to appeal in this Court by July 22, 2015, that motion would have been decided months ago. Catalyst's request for leave to appeal would either have been dismissed, or an appeal to the Divisional Court would have been well underway on an expedited basis.

39. Catalyst's delay has caused significant prejudice to West Face because of the pending sale of WIND Mobile to Shaw. That prejudice arises from Catalyst's twin positions that: (i) West Face must hold its proceeds from the sale of WIND Mobile in escrow until Catalyst's claims against West Face arising from the hiring of Mr. Moyse have been finally determined; and (ii) Catalyst's claims against West Face cannot be determined until the issues raised in the Imaging Motion have been finally resolved and all appeal routes have been exhausted.[36]

40. Any delay in West Face being able to either re-deploy in new investments, or redeem to investors, the over $500 million in proceeds that West Face will receive from the sale to Shaw of its shares of WIND Mobile, would be highly problematic. Among other things:

(a) West Face is a fiduciary for its investors and is retained to actively manage its investors' money. Any restriction on West Face's ability to do so will deny investors the very services they have retained West Face to perform, while causing serious damage to West Face's reputation and undermining its ability to attract investors;[37]

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35 Panet Affidavit at para. 33, West Face Record, Tab 1, p. 11-12.
36 Panet Affidavit at paras. 39-40, West Face Record, Tab 1, p. 14.
37 Panet Affidavit at para 44, West Face Record, Tab 1, p. 15-16.

(b) West Face's investors will be deprived of the opportunity to earn favourable investment returns, and West Face will be deprived of the opportunity to earn incentive and management fees it could otherwise have received;[38]

(c) West Face may not be able to honour the redemption requests of certain investors, contrary to their expectations of being able to redeem their investments after the sale of WIND Mobile is completed;[39]

(d) West Face will have to pay administrative and currency hedging costs in respect of the proceeds it receives from the sale of WIND Mobile without being able to earn competitive returns from managing that capital;[40] and

(e) West Face's incentive fees in certain funds may be diluted by the delay in redeeming its investment in WIND Mobile.[41]

41. Had Catalyst brought its motion for leave to appeal before the proper Court in a timely manner, many if not all of these risks could and would have been avoided. West Face has therefore suffered significant prejudice from Catalyst's inordinate delay.

PART I - ISSUES

42. These motions raise two issues:

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

(b) if the requested extension of time is granted, whether Catalyst should also be granted leave to appeal the decision of Justice Glustein dated July 7, 2015.

43. This factum addresses the first issue only. The second issue – whether leave to appeal should be granted – is addressed in West Face's separate factum responding to Catalyst's motion for leave to appeal.

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38 Panet Affidavit at paras 45, 54, 55, 61 and 65-66, West Face Record, Tab 1, p. 16, 19 and 23.
39 Panet Affidavit at paras 46, 48 and 52, West Face Record, Tab 1, p. 16-18.
40 Panet Affidavit at paras 56-58, West Face Record, Tab 1, p. 20.
41 Panet Affidavit at paras 62-64, West Face Record, Tab 1, p. 22.

PART II - LAW AND ARGUMENT

A. The Time for Catalyst's Motion for Leave to Appeal Should not be Extended

44. The test on a motion to extend time is well-settled. The overarching principle is whether the "justice of the case" demands that the extension be given. Each case depends on its own facts, but the Court is to take into account all relevant considerations, including: (i) whether the moving party formed a *bona fide* intention to appeal to the Divisional Court within the relevant time period; (ii) the length of, and explanation for, the delay in question; (iii) any prejudice to the responding parties that may be caused, perpetuated or exacerbated by the delay; and (iv) the merits of the proposed appeal.[42]

i. Catalyst had no *Bona Fide* Intention to Appeal to the Divisional Court

45. This Court has held that for the purposes of determining whether to extend the time to appeal (or the time for seeking leave to appeal), proceeding with an appeal to the wrong court does not evidence the requisite *bona fide* intention to appeal.

46. That issue was recently considered by this Court in *Bagnulo v. Complex Services Inc.*, on facts remarkably similar to those at issue here. In *Bagnulo*, the plaintiff filed a Notice of Appeal with the Court of Appeal in respect of decisions dismissing her claim and awarding costs against her. The defendant informed the plaintiff that her appeal lay to the Divisional Court, rather than the Court of Appeal, but the plaintiff persisted and refused to

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[42] *Enbridge Gas Distribution Inc. v. Froese*, [2013] O.J. No. 896 at para. 15 (C.A.), West Face Book of Authorities, Tab 11. See also *Concerned Residents Assn. of North Dumfries v. Preston Sand and Gravel Co.*, [2015] O.J. No. 1574 at para. 4 (S.C.J.), West Face Book of Authorities, Tab 8.

abandon her appeal to the Court of Appeal. The Defendant brought a motion to the Court of Appeal to quash the appeal, which was ultimately granted.[43]

47. On her subsequent motion before this Court to extend the time for serving and filing a Notice of Appeal to the Divisional Court, the plaintiff argued that she had a *bona fide* intention to appeal, and that it was only as a result of an error on the part of her counsel that her appeal had been launched to the Court of Appeal rather than the Divisional Court. The Divisional Court rejected that argument and held that the plaintiff had no *bona fide* and continuing intention to appeal in circumstances where the plaintiff took no steps to correct her jurisdictional error despite being warned that her appeal had been commenced in the wrong court.[44] The Divisional Court denied the plaintiff's motion to extend time to serve and file a Notice of Appeal.[45]

48. There are good policy reasons to support this approach. If pursuing an appeal to the wrong court after being placed on notice of the mistake in question (as happened here), or after being confronted with a motion to quash (as also happened here), constituted a *bona fide* intention to appeal, it would dilute the incentive of litigants to exercise proper care by appealing to the proper court on a timely basis. The inevitable result would be to waste the resources both of this Court and of the Court of Appeal. Respondents would be left to suffer the consequences, with a motion for an extension of time to file a motion for leave to appeal the inevitable result even if a motion to quash were successful. Such a result would neither

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43 *Bagnulo v. Complex Services Inc.*, [2014] O.J. No. 2630 at paras. 6-7 (Div. Ct.), West Face Book of Authorities, Tab 3.

44 *Bagnulo v. Complex Services Inc.*, [2014] O.J. No. 2630 at paras. 14 and 26-28, West Face Book of Authorities, Tab 3.

45 *Bagnulo v. Complex Services Inc.*, [2014] O.J. No. 2630 at para. 58, West Face Book of Authorities, Tab 3.

be fair nor appropriate, and would hardly be consistent with the efficient and proper administration of justice.

49. The facts of this case are very similar to those in *Bagnulo*. Just like the plaintiff in *Bagnulo*, Catalyst was warned long ago by counsel to West Face and Mr. Moyse that any appeal from Justice Glustein's decision lay to the Divisional Court, with leave. Counsel to West Face and Mr. Moyse specifically directed Catalyst to controlling authority from the Court of Appeal that rendered its position hopeless. Catalyst clung to its position, however, and did nothing to remedy its mistake either within the period prescribed by the Rules for seeking leave to appeal to the Divisional Court or subsequently.[46]

50. Despite repeated warnings (and Catalyst's concession) that it had pursued its proposed appeal in the wrong court, Catalyst took no steps to obtain an extension of time for seeking leave to appeal until November 27, 2015, when it finally served a Notice of Motion to extend the time for filing its motion for leave to appeal. That Notice of Motion was served: (i) nearly **five months** after Justice Glustein's decision was rendered; (ii) more than **four months** after West Face and Mr. Moyse informed Catalyst that it had appealed to the wrong court; (iii) more than **two and a half months** after West Face served its factum on its motion to quash the appeal of the Imaging Order; (iv) more than **six weeks** after Catalyst acknowledged that it required leave to appeal the Imaging Order; and (v) more than **three weeks** after the Court of Appeal quashed Catalyst's appeal concerning the dismissal of its Imaging Motion (on consent).[47]

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46 Panet Affidavit at para. 17, West Face Record, Tab 1, p. 7; *Catalyst Capital Group Inc. v. Moyse*, 2015 ONCA 784 at para. 15, West Face Book of Authorities, Tab 6.

47 Panet Affidavit at paras. 13, 17, 21, 24, 29 and 31, West Face Record, Tab 1, p. 6-8 and 10-11.

51. Catalyst's failure to heed explicit and well-founded warnings provided to it by West Face stand firmly in the path of any claim Catalyst might make that it had a continuing, *bona fide* intention throughout the relevant period to appeal to the Divisional Court.

ii. Catalyst's Inordinate and Inexplicable Delay

52. Catalyst has not offered an adequate explanation for its delay in filing this motion.

53. In *Bagnulo*, the Divisional Court held that the plaintiff's delay in appealing to the Divisional Court was unreasonable in light of warnings she had received from opposing counsel pointing out the jurisdictional problem, and in view of her failure to respond to those warnings in a reasonable and timely fashion.[48]

54. Similarly, in *Concerned Residents Assn. of North Dumfries v. Preston Sand and Gravel Co.*, this Court held that inadvertence of counsel was an insufficient explanation for a delay of three months and 22 days in pursuing properly an application for leave to appeal to the Divisional Court. The Court refused to extend the time to serve and file a motion for leave to appeal.[49]

55. Catalyst's delay in this case is similarly unreasonable. The delay between the expiration of the deadline for Catalyst to file its motion for leave to appeal (July 22, 2015) and the date it first served a Notice of Motion purporting to seek leave to extend time (November 27, 2015) was roughly two weeks longer than the delay at issue in *Concerned Residents*.

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48 *Bagnulo v. Complex Services Inc.*, [2014] O.J. No. 2630 at paras. 30-32 (Div. Ct.), West Face Book of Authorities, Tab 3. See also *Roach v. Oniel*, 2005 CarswellOnt 734 at para. 12, West Face Book of Authorities, Tab 19 in which the Court held that there was "no good reason for a delay" in appealing where the delay was caused by counsel's error in appealing to the wrong court, in circumstances where they were informed of that error by opposing counsel.

49 *Concerned Residents Assn. of North Dumfries v. Preston Sand and Gravel Co.*, [2015] O.J. No. 1574 at paras. 7-9 (S.C.J.), West Face Book of Authorities, Tab 8.

56. Catalyst's explanation for its delay is plainly insufficient. Catalyst now asserts that its delay in seeking leave "was inadvertent, based on outside counsel's good-faith understanding of Catalyst's rights of appeal and the proper path of appeal."[50] Counsel's inadvertence is a particularly poor explanation for Catalyst's delay in circumstances such as these where Catalyst is a sophisticated commercial litigant engaged in burdensome "real time" litigation that received repeated warnings from opposing counsel starting two days after it served its misguided Notice of Appeal.

iii. West Face will be Prejudiced if an Extension is Granted

57. As stated above, West Face will experience substantial prejudice if Catalyst is granted an extension of time to seek leave to appeal from Justice Glustein's dismissal of the Imaging Motion. Any significant delay associated with adjudicating Catalyst's claims against West Face has the potential to prevent or inhibit West Face from dealing with more than $500 million it will receive from the imminent sale of its interest in WIND Mobile. As an investment manager, an inability to manage its clients' investments is anathema to West Face. Prejudice from Catalyst's delay includes potential lost returns to investors, damage to West Face's reputation, inability to redeem investors' funds, wasted expenses on capital that cannot be invested, and lost opportunity for West Face to earn management and incentive fees.[51]

iv. Catalyst's Proposed Appeal of the Imaging Motion Is Entirely Without Merit

58. In *Enbridge Gas Distribution Inc. v. Froese*, the Court of Appeal held that lack of merit in the proposed appeal can, alone, be a sufficient reason to dismiss a request for an

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50 Winton Affidavit at para. 29, Catalyst Record, Tab 3, p. 22-23.

51 Panet Affidavit at paras. 38-66, West Face Record, Tab 1, p. 13-23.

extension of time. This is particularly so in cases where the moving party seeks an extension of time to file a motion for leave to appeal, rather than an extension of time to file a notice of appeal.[52]

59. There is no reason to doubt the correctness of Justice Glustein's decision with respect to his dismissal of the Imaging Motion. In exercising his discretion to dismiss that Motion, Justice Glustein applied properly the most generous legal standard that may have been available to Catalyst in the circumstances. His findings of fact regarding West Face's conduct were amply supported by the evidence and are not in dispute. His exercise of discretion was not only reasonable, but manifestly correct.

(1) The Dismissal of the Imaging Motion Is Entitled to Deference

60. Catalyst concedes, as it must, that the dismissal of its Imaging Motion was a discretionary exercise of Justice Glustein's equitable jurisdiction.[53] Such discretionary decisions are owed a high degree of deference.

61. Appellate courts should never interfere lightly with the discretionary decisions of a motions judge. An appellate court may not interfere with a discretionary decision merely because it would have exercised its discretion differently if it had heard the motion in question at first instance. Unless the motions judge considered irrelevant factors, failed to

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52 *Enbridge Gas Distribution Inc. v. Froese*, [2013] O.J. No. 896 at para. 16 (C.A.), West Face Book of Authorities, Tab 11. See also *Concerned Residents*, *supra* at para. 24, West Face Book of Authorities, Tab 8.

53 Winton Affidavit at Exhibit "O", para. 80; Catalyst Record, Tab 3O, p. 277.

consider relevant factors or reached an unreasonable conclusion, a discretionary decision must be respected.[54]

(2) The Imaging Motion Was Correctly Decided

62. Catalyst does not argue that the Imaging Motion was wrongly decided on its own merits. Nor could it. Justice Glustein chose not to apply the higher standard applicable to *Anton Piller* orders, which is arguably the correct test for the appointment of an ISS before discovery. Instead, Justice Glustein applied the more lenient standard applicable on a motion under Rule 30.06 for the appointment of an ISS following discovery in circumstances where parties have failed to discharge properly their production obligations. Justice Glustein applied this more lenient standard even though Catalyst brought its motion against West Face before the parties had reached the discovery phase in this proceeding.[55]

63. Justice Glustein held correctly that under Rule 30.06, "the court will only order further and better production if there is good reason to believe that the responding party has not complied with its production obligations."[56] In *Brown v. First Contact Software Consultants Inc.*,[57] Justice Stinson rejected a request to image the plaintiff's computer hard drives for preservation purposes in the absence of proof "that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information."[58] In this case, Catalyst did not even allege, let alone establish, that West Face had engaged or will

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54 *Boucher v. Public Accountants Council (Ontario)*, 2004 CarswellOnt 2521 at para. 19, West Face Book of Authorities, Tab 4. See also: *Kempf v. Nguyen*, [2015] O.J. No. 750 at para. 118, West Face Book of Authorities, Tab 13.

55 West Face ultimately produced its affidavit of documents on January 8, 2015.

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

57 *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 (S.C.J.), West Face Book of Authorities, Tab 5.

58 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 49, West Face Book of Authorities, Tab 6.

engage in conduct of this nature. For this reason alone, Catalyst's request for an Order permitting an ISS to inspect West Face's computer records was, and is, entirely misplaced.

64. Rather than fault Justice Glustein for his selection or application of the appropriate threshold test, Catalyst claims that its motion "should have been considered in the context of the relief already ordered by Justice Lederer in the prior motion".[59] There is no merit to Catalyst's argument, for at least three reasons.

65. *First*, Catalyst's motion was, in fact, considered by Justice Glustein "in the context of" the motion that was previously heard by Justice Lederer and the relief he had granted against Mr. Moyse. Indeed, that context was referred to extensively by Catalyst, at every turn. That said, Catalyst itself did not treat its Imaging Motion against West Face as some sort of continuation of its motion against Mr. Moyse that Justice Lederer had heard months before. Indeed, as set out above, Catalyst commenced the Imaging Motion against West Face before it knew any of the facts it later claimed constituted contempt by Mr. Moyse. At no time did Catalyst suggest that Justice Lederer was seized of the matter and that its motion against West Face should proceed before him. Nor could Catalyst properly have done so. Justice Lederer ordered an ISS process with respect to Mr. Moyse, not West Face. Contrary to Catalyst's suggestion, Justice Glustein's dismissal of the Imaging Motion against West Face did nothing to "nullify" Justice Lederer's previous order against Mr. Moyse.

66. *Second*, Catalyst's argument is predicated on the incorrect premise that Mr. Moyse committed contempt, thereby subverting the ISS process with respect to his computer records and necessitating a further ISS process with respect to West Face. Catalyst claims that the relief it sought against West Face was (and is) necessary to "ensure that Moyse's

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[59] Catalyst Record, Tab 3.O, p. 278.

subversion of the court's process is not left without a remedy."[60] However, Justice Glustein reached the opposite conclusion, and found that Catalyst had not proven that there was any "subversion of the court's process"—*i.e.*, contempt.[61] Mr. Moyse's evidence under oath was that he only deleted his irrelevant personal browsing history, and did so for privacy reasons. **He did not delete any documents or other information relevant to Catalyst's complaints, allegations or claims**.[62] Justice Glustein accepted this explanation, and was fully entitled to do so. As the Interim Order only required Mr. Moyse to preserve relevant evidence,[63] Mr. Moyse's deletion of his personal browsing history was neither contemptuous nor improper. If there was no contempt, there was nothing to be remedied.

67. *Finally*, even if none of this were true and Mr. Moyse had, in fact, committed contempt, there was no evidence to demonstrate that unleashing an extraordinary and intrusive ISS process **against West Face** was in any way necessary or appropriate. West Face played no role in and had no knowledge of any of the activities engaged in by Mr. Moyse that Catalyst now complains of in its efforts to hold him in contempt. If Mr. Moyse had, in fact, improperly disclosed to West Face confidential information belonging to Catalyst, West Face would be required to produce all such evidence in the ordinary course of litigation, just like any other civil litigant. The law does not presume that an independent defendant will breach its discovery obligations simply because a co-defendant has been accused of doing so.

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60 Winton Affidavit at Exhibit "O", Catalyst Record, Tab 3O, p. 278.

61 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at paras. 86-87, West Face Book of Authorities, Tab 6.

62 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at paras. 62-68, West Face Book of Authorities, Tab 6.

63 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 70, West Face Book of Authorities, Tab 6.

68. Indeed, Justice Glustein squarely rejected the suggestion that West Face had done anything improper, and found that Catalyst had offered no evidence to the contrary:

> [52] There is no evidence that West Face has failed to comply with its production obligations, let alone intentionally deleted materials to thwart the discovery process or evade its discovery obligations.[64]

69. On the contrary, Justice Glustein found as a fact that West Face had gone out of its way to make timely disclosure, and gone well beyond what was required of it:

> [54] West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer.
>
> ...
>
> [56] Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.[65]

70. In short, Justice Glustein denied Catalyst's motion for the Imaging Order for the simple reason that there was no evidence supporting the grant of such an extraordinary remedy, even on the basis of the lowest threshold test that might have been applied to Catalyst's request for relief. All that Catalyst could put forward before Justice Glustein was unbridled speculation based primarily on one allegedly "suspicious coincidence", namely

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64 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 51, West Face Book of Authorities, Tab 6.

65 *Catalyst Capital Group Inc. v. Moyse*, [2015] O.J. No. 3636 at para. 54 and 56, West Face Book of Authorities, Tab 6.

that West Face "hired an analyst from the one investment fund manager it was in competition with to purchase WIND Mobile". There was, and is, nothing to Catalyst's suggestion. The simple fact of the matter is that the distressed investment industry in which both Catalyst and West Face operate has a small number of participants. The fact that both West Face and Catalyst (among others) were interested in exploring an acquisition of WIND Mobile (a distressed company) is hardly suspicious or coincidental—indeed, both were doing so **well before** Mr. Moyse switched firms.

71. The only other "coincidence" referred to by Catalyst concerns Arcan, one of the companies referred to in the writing sample Mr. Moyse provided to West Face in March 2014. This too is a "red herring". Catalyst never pursued an investment in Arcan. Although West Face did so, Catalyst has never claimed (let alone established) that West Face's investment in Arcan was somehow based upon or caused by anything contained in Mr. Moyse's writing sample. Nor has Catalyst claimed that it was prejudiced in any way by West Face's investment in Arcan.

72. Catalyst's pursuit of the Imaging Motion was, and remains, a naked request to engage in an extraordinary and unwarranted fishing expedition. Under Ontario law, "[t]here is no right to rummage through an opponent's filing cabinets (or in this case, computers) to see if there is anything interesting."[66] Our courts have held that it "would be no more than a fishing expedition" if a party were granted the right to explore an opponent's electronic files based on nothing more than a vague allegation that undisclosed documents exist.[67] That, however, is precisely what Catalyst seeks to achieve.

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66 *Rossi v. Vaughan*, [2010] O.J. No. 203 at para. 11 (Master), West Face Book of Authorities, Tab 20.

67 *Nicolardi v. Daley,* [2002] O.J. No. 595 at para. 33 (S.C.J.), West Face Book of Authorities, Tab 17.

73. Catalyst offered no authority for the extraordinary position it advanced during the motion before Justice Glustein and seeks to advance in its proposed appeal. Its position is undermined by and inconsistent with a wealth of contrary authority. The lack of merit to the proposed appeal is obvious, and weighs heavily against granting Catalyst an extension of time in which to seek leave to appeal. To the extent that the merits of Catalyst's request for leave to appeal are also relevant to the test for an extension, that factor also weighs heavily against Catalyst for the reasons explained in West Face's factum responding to Catalyst's motion for leave to appeal.

PART III - ORDER REQUESTED

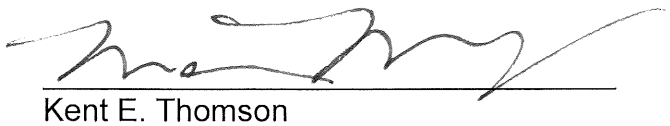
74. West Face respectfully requests that an order be made:

(a) denying Catalyst's motion to extend the time to serve and file a motion for leave to appeal the Imaging Order;

(b) awarding West Face its costs of this motion, in an amount to be fixed by the Court; and

(c) granting 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.



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;

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

(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 and BRANDON MOYSE ET AL
Defendants

Court File No.: CV-14-507120

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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