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

ONTARIO
SUPERIOR COURT OF JUSTICE

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

MOTION RECORD OF THE DEFENDANT WEST FACE CAPITAL INC. RE: MOTION TO EXTEND TIME AND FOR LEAVE TO APPEAL (Returnable January 21, 2016)

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AFFIDAVIT OF PHILIP de L. PANET
(Sworn January 13, 2016)

I, PHILIP de L. PANET, of the City of Toronto, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the General Counsel and Secretary of the Defendant West Face Capital Inc. ("**West Face**"), and have held that position since December 1, 2014. In that role I have personally supervised the instant litigation and been kept apprised of all relevant developments by West Face's counsel (Jeff Mitchell and Andrew Pushalik of Dentons LLP through until February 2015, and Matthew Milne-Smith and Andrew Carlson of Davies Ward Phillips & Vineberg LLP thereafter). I have also become aware of events in the litigation preceding my arrival at West Face as a result of conversations with counsel and the relevant participants, my review of various court filings, and

attendance at court and during various cross-examinations. As a result, I have personal knowledge of the matters set out in this Affidavit, except where I have relied on information from others, in which case I have identified the source of my information and believe it to be true.

2. I am swearing this Affidavit in response to the motion by the Plaintiff, The Catalyst Capital Group Inc. ("**Catalyst**"), for an Order extending the time to file its motion for leave to appeal the interlocutory Order of Justice Glustein made July 7, 2015, and for leave to appeal that decision.

3. The delay of Catalyst in pursuing its motion for leave to appeal in the Divisional Court has caused significant prejudice to West Face, including in respect of a pending $1.6 billion transaction for the sale of WIND Mobile Inc. to Shaw Communications Inc. ("**Shaw**"). On December 16, 2015, Shaw announced that it has agreed to acquire WIND Mobile by way of Plan of Arrangement. A term of the Plan of Arrangement is that Shaw take the shares of WIND Mobile free and clear of any lien or encumbrance.

4. In the case at bar, Catalyst has asserted a constructive trust over West Face's equity holding in WIND Mobile, which is to be sold to Shaw pursuant to the Plan of Arrangement. West Face's estimated proceeds from this sale are over $500 million. Catalyst has taken the position that its claim against West Face cannot be fairly decided without resolution of one of the issues raised by its proposed appeal, and that until its claim is decided, West Face should be required to hold the proceeds of sale from the

WIND Mobile transaction in escrow. A delay in being able to deploy the proceeds of sale will cause significant prejudice to West Face and its investors.

Background to the Motion

5. This motion arises from Brandon Moyse's decision to resign from Catalyst and join West Face in June 2014. At the time, Mr. Moyse was a 27 year-old junior analyst at Catalyst. Shortly before he joined West Face, Catalyst claimed that he was prohibited from working for West Face by the non-competition provisions of his employment agreement with Catalyst. Catalyst also advised West Face that Mr. Moyse had confidential information relating to a "telecom file". Prior to being notified of Catalyst's concerns, West Face was already negotiating to acquire WIND Mobile from its then owner, VimpelCom Inc. As a prophylactic measure, West Face therefore implemented an ethical wall to preclude Mr. Moyse from communicating with others at West Face any information he may have had concerning Catalyst's pursuit of WIND Mobile. That ethical wall was established before Mr. Moyse joined West Face on June 23, 2014.

6. Mr. Moyse worked at West Face for less than one month. On July 16, 2014, he was placed on leave pursuant to the terms of a consent Interim Order pending Catalyst's interlocutory motion to enjoin him from working at West Face for the six-month term of the non-competition provision in his employment agreement with Catalyst.

7. On July 23, 2014, Catalyst entered into exclusive negotiations with VimpelCom to acquire WIND Mobile, during which time West Face and the consortium

of investors (the "**Investors**") with which West Face was acting had no further negotiations with VimpelCom. Catalyst's exclusive negotiating period expired on August 18, 2014 without concluding a deal. The Investors then re-initiated negotiations with VimpelCom, and ultimately entered into a transaction to acquire VimpelCom's interest in WIND Mobile on September 16, 2014.

8. On November 10, 2014, Mr. Justice Lederer granted an interlocutory injunction preventing Mr. Moyse from working for West Face until the expiration of his non-competition covenant on December 23, 2014. At the same time, Mr. Justice Lederer appointed an Independent Supervising Solicitor (the "**ISS**") to review Mr. Moyse's personal electronic devices for any evidence of the transmission by him to West Face of the confidential information of Catalyst. That role was played by Brendan van Niejenhuis of the Stockwoods firm.

Catalyst Moves for Interlocutory Relief against West Face and Mr. Moyse

9. On January 13, 2015, after receiving a request from the ISS for clarification concerning how to manage the number of "hits" generated by the initial list of computerized search terms, Catalyst commenced a motion seeking two forms of interlocutory relief against West Face:

(a) first, an injunction restraining West Face (and its officers, directors, employees, agents or any persons acting under its direction or on its behalf) from: (i) participating in the management and/or strategic direction of WIND Mobile; and (ii) participating in the advanced wireless services

spectrum auction that was being conducted at the time by Industry Canada; and

(b) second, an Order authorizing the ISS to create and 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.

10. On January 21, 2015, the parties attended Motion Scheduling Court, and agreed to the following schedule for Catalyst's motion:

(a) February 16, 2015: Catalyst to file its motion record

(b) March 9, 2015: Defendants to file their responding motion records

(c) March 19, 2015: Argument of motion

11. On February 6, 2015, Catalyst amended its motion to seek an Order that Mr. Moyse be committed to jail for contempt of an earlier interim consent Order of Justice Firestone dated July 16, 2014. A copy of Catalyst's Amended Notice of Motion dated February 6, 2015 is attached as Exhibit "**A**". Catalyst ultimately filed its motion record on February 19, 2015, three days after the scheduled date for its motion record.

12. After West Face delivered its responding materials on Tuesday, March 10, 2015, Catalyst asked to adjourn the motion so that it could file reply materials. These materials were not received until May 1, 2015. Catalyst's motion was eventually heard by Justice Glustein on Thursday, July 2, 2015, almost seven months after Catalyst had

filed its original Notice of Motion and almost four months after West Face filed its responding motion record.[1] By the end of this hearing before Justice Glustein, Catalyst had narrowed the relief it was seeking to the following three remedies:

(a) first, an interlocutory injunction prohibiting West Face from voting its equity interest in WIND Mobile pending a determination of the issues raised in the action (the "**Voting Injunction**");

(b) second, an interlocutory Order authorizing the ISS to create and review forensic images of West Face's servers and the electronic devices used by five individuals at West Face, to take place before discovery (the "**Imaging Order**"); and

(c) third, an Order declaring that Mr. Moyse was in contempt of the interim consent Order of Justice Firestone dated July 16, 2014 (the "**Contempt Order**").

13. On Tuesday July 7, 2015, Justice Glustein released reasons dismissing Catalyst's motion in its entirety. A copy of Justice Glustein's Order is attached as Exhibit "**B**". A copy of Justice Glustein's Endorsement is attached as Exhibit "**C**".

14. Subsequently, on August 26, 2015, Justice Glustein released his Costs Endorsement, pursuant to which he ordered Catalyst to pay West Face and Mr. Moyse costs of $90,000 and $70,000 respectively, within 30 days. A copy of Justice Glustein's Costs Endorsement is attached as Exhibit "**D**".

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[1] The motion was originally returnable on June 11, 2015 before Justice Chapnik, but was adjourned at that time. The next available date to the parties was July 2, 2015.

a Catalyst Purports to Appeal to the Court of Appeal Without Seeking Leave

15. On July 22, 2015, Catalyst served Notice of Appeal and Appellant's Certificate in which it purported to appeal directly to the Court of Appeal from Justice Glustein's dismissal of both the Imaging Order (against West Face) and the Contempt Order (against Mr. Moyse). Catalyst did not appeal the Voting Injunction. Nor did Catalyst seek leave to appeal from the Divisional Court.

16. This is so even though Catalyst's Notice of Appeal recognized that Justice Glustein's dismissal of the Imaging Order was an interlocutory order. Catalyst took the position in its Notice of Appeal, however, that Justice Glustein's dismissal of the Contempt Order was a final order, and that the Court of Appeal had jurisdiction to hear its appeals of both the Contempt Order and the Imaging Order on the basis of sections 6(1) and 6(2) of the *Courts of Justice Act*. A copy of Catalyst's Notice of Appeal is attached as Exhibit "**E**".

17. Two days later, Kris Borg-Olivier, counsel to Mr. Moyse, sent a letter to Andrew Winton, counsel to Catalyst, advising that Catalyst's position was not correct in law, based on the Court of Appeal's decision in *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.) (which held that the dismissal of a motion for contempt is interlocutory in nature, rather than final). Mr. Borg-Olivier enclosed a copy of the Court of Appeal's decision for Mr. Winton's reference, and advised that if Catalyst did not withdraw its Notice of Appeal within five business days, Mr. Moyse would bring a motion to quash Catalyst's appeal. A copy of Mr. Borg-Olivier's letter dated July 24, 2015 is attached as Exhibit "**F**". That same day Mr. Milne-Smith at Davies sent a similar letter on behalf of

West Face to Mr. Winton and his co-counsel Rocco DiPucchio. A copy of Mr. Milne-Smith's letter is attached as Exhibit "**G**".

18. To my knowledge, Catalyst never responded to either of these letters.

Mr. Moyse and West Face Move to Quash Catalyst's Appeal

19. On Tuesday August 4, 2015, Mr. Moyse served Catalyst with a Notice of Motion to quash Catalyst's appeal to the Court of Appeal. As Monday, August 3 was a holiday, this was the first business day after the deadline by which Mr. Borg-Olivier and Mr. Milne-Smith had requested Catalyst withdraw its appeal. West Face served its Notice of Motion to quash the appeal the following day (Wednesday, August 5). In short, both West Face and Mr. Moyse commenced their motions to quash Catalyst's appeal within two weeks of Catalyst filing its Notice of Appeal in the Court of Appeal.

20. On September 9, 2015, Mr. Moyse served his motion record, factum, and book of authorities in respect of his motion to quash Catalyst's appeal.

21. On September 11, 2015, West Face served its motion record, factum, and book of authorities in respect of West Face's motion to quash Catalyst's appeal. West Face's motion record included an Amended Notice of Motion. A copy of West Face's motion record is attached as Exhibit "**H**". A copy of West Face's factum is attached as Exhibit "I".

22. In its factum, West Face noted that even if Justice Glustein's dismissal of the Contempt Order constituted a final order (which it did not), the Court of Appeal "would still have no jurisdiction under section 6(2) of the *Courts of Justice Act* to hear

the appeal of the interlocutory [Imaging Order], because Catalyst has not obtained leave to appeal".[2] West Face cited numerous cases supporting this position, and included them in its book of authorities.[3]

23. Catalyst took no steps to regularize its proposed appeals, including by seeking an extension of time in the Divisional Court to seek leave to appeal, even after it received this controlling authority indicating that even if the Contempt Order were final, an appeal of the Imaging Order could not lie to the Court of Appeal unless leave to appeal was first obtained.

24. On September 17, 2015, the parties received a letter from the Court of Appeal advising that the motions to quash of Mr. Moyse and West Face would be heard together on November 5, 2015. A copy of this letter is attached as Exhibit "**J**".

25. Pursuant to Rule 61.16(4)(b), Catalyst's responding materials were due within 25 days after service of the moving parties' motion records and facta – in this case, by October 6, 2015. However, Catalyst failed to deliver its responding materials.

26. On October 7, 2015, Mr. Milne-Smith of Davies sent an email to Catalyst's counsel, Mr. Winton, advising that Catalyst's factum was overdue, and asking whether he could expect it immediately. Mr. Winton responded that same day, advising that he had inadvertently mis-scheduled the due date for Catalyst's materials. Mr. Winton undertook to deliver them by Tuesday, October 13, 2015 (the day after Thanksgiving Monday).

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2 West Face's Motion to Quash Factum dated September 10, 2015, at para. 17.

3 See West Face's Motion to Quash Factum dated September 10, 2015, at paras. 1, 4, & 13-23.

27. Nevertheless, Catalyst did not deliver its responding materials on October 13. As a result, Mr. Milne-Smith and Robert Centa, counsel to Mr. Moyse, sent follow up emails to Mr. Winton on Thursday, October 15 and Friday, October 16 respectively.

28. A copy of an email chain capturing all of these emails is attached as Exhibit "**K**".

29. I am informed by Mr. Milne-Smith and believe that ultimately, on or around October 15, 2015, Mr. Winton called Mr. Milne-Smith and had a without prejudice conversation that ultimately resulted in Catalyst consenting to West Face's motion to quash the appeal of the Imaging Order. This occurred:

(a) almost *three months <u>after</u>* the deadline for Catalyst to file its motion for leave to appeal Justice Glustein's dismissal of the Imaging Order had expired;

(b) almost *three months <u>after</u>* West Face had advised Catalyst that the Court of Appeal did not have jurisdiction to hear Catalyst's appeal of the Imaging Order;

(c) five weeks after West Face had served its motion record, factum and book of authorities, setting out West Face's position that leave to appeal from the Imaging Order was required regardless of whether the appeal of the Contempt Order lay to the Court of Appeal; and

(d) three weeks before the scheduled hearing of West Face's motion to quash Catalyst's appeal (which was to be heard November 5, 2015).

30. On October 30, 2015, Mr. Milne-Smith sent a motion confirmation form to the Court of Appeal confirming that he had conferred with Mr. Winton and that West Face's motion to quash Catalyst's appeal of the Imaging Order was proceeding on consent. A copy of this form is attached as Exhibit "**L**". A further letter clarifying that it was only West Face's motion to quash, and not also Mr. Moyse's, that was proceeding on consent, is attached as Exhibit "**M**".

31. The Court of Appeal made an Order on consent quashing Catalyst's appeal of the Imaging Order during the hearing on November 5. The Order was issued and entered the following day. Section 3 of the Order fixed the costs of West Face's motion to quash in the amount of $2,500 and required that that amount be paid to West Face by Catalyst forthwith. A copy of the Court of Appeal's Order quashing Catalyst's appeal of the Imaging Order is attached as Exhibit "**N**".

32. Mr. Moyse's motion to quash Catalyst's appeal of Justice Glustein's dismissal of the Contempt Order was heard on a contested basis on November 5, 2015. On November 17, 2015, the Court of Appeal released its decision allowing Mr. Moyse's motion to quash and quashing Catalyst's appeal of the Contempt Order. A copy of the Court of Appeal's Reasons is attached as Exhibit "**O**".

Catalyst Moves for Leave to Extend the Time for Filing its Motion for Leave to Appeal

33. On November 27, 2015—almost five months after Justice Glustein's decision was released, and more than four months after the deadline for seeking leave to appeal to the Divisional Court had passed, Catalyst finally served a Notice of Motion

purporting to seek: (i) leave to appeal to the Divisional Court from the Order of Justice Glustein dated July 7, 2015, including Justice Glustein's dismissal of the Imaging Order sought against West Face; and (ii) leave to extend the time for filing its motion for leave to appeal.

34. On December 3, 2015, Mr. Winton sent to counsel for West Face and Mr. Moyse an email advising that the Divisional Court had refused to accept Catalyst's Notice of Motion because it did not follow the Court's protocol for seeking an extension of time for filing a motion for leave to appeal. In this same email, Mr. Winton wrote: "When the appeals to the Court of Appeal were quashed, we left it as unsettled as to whether the defendants would consent to the extension of time to seek leave to appeal. Can you please let us know if your respective clients will oppose the motion for an extension of time." Both Mr. Centa and Mr. Milne-Smith responded to Mr. Winton's email within a few minutes, advising that Mr. Moyse and West Face, respectively, would not consent to such a motion. A copy of this email chain is attached as Exhibit "**P**".

35. On December 10, 2015, Catalyst delivered its Notice of Motion to extend the time for filing a notice of motion for leave to appeal in the Divisional Court (the "**December 10 Notice**"). However, Catalyst did not deliver its Motion Record. Indeed, the December 10 Notice explicitly stated that the evidence to be used by Catalyst at the hearing would include the affidavit of Andrew Winton "to be sworn". Shortly after receiving the December 10 Notice, Mr. Milne-Smith emailed Mr. Winton and asked when he planned to deliver his affidavit, given the relatively short time period before the scheduled return date of Catalyst's extension motion on, January 19, 2016. A copy of this email is attached as Exhibit "**Q**".

36. Catalyst finally served Mr. Winton's affidavit in support of its motion for an Order extending time several days ago, on Friday, January 8, 2016. The next day, on January 9, 2016, West Face delivered its productions along with an unsworn affidavit of documents to Catalyst's counsel. The majority of these documents had already been produced to Catalyst in March 2015 as a part of West Face's response to Catalyst's interlocutory motion that was ultimately dismissed by Justice Glustein. I am informed by Mr. Milne-Smith and believe that at a subsequent 9:30 appointment before Mr. Justice Newbould of the Commercial List that occurred on Monday, January 11, 2016 regarding the scheduling of a hearing to approve the Plan of Arrangement pertaining to the sale of WIND Mobile to Shaw, the parties agreed that this has become a matter of urgency, with the result that it would be most expedient to combine Catalyst's motion for an extension of time with its motion for leave to appeal to the Divisional Court.

37. To my knowledge, Catalyst has never taken the position that Justice Glustein's dismissal of its motion for the Imaging Order was final. At no point after West Face delivered its factum on its motion to quash Catalyst's Notice of Appeal on September 11 did Catalyst ever take the position that West Face's position (that Catalyst required leave to appeal from the Imaging Order regardless of whether the appeal of the Contempt Order lay properly to the Court of Appeal) was incorrect.

Prejudice to West Face

38. As alluded to above, in December 2015, West Face and the other Shareholders of WIND Mobile agreed to sell that company to Shaw for a purchase price of $1.6 billion, and to proceed by way of Plan of Arrangement. A copy of the Notice of

Application for approval of the Plan of Arrangement dated December 23, 2015 is attached as Exhibit "**R**". Counsel to West Face, Shaw and Catalyst attended a 9:30 scheduling appointment before Mr. Justice Newbould of the Commercial List on January 4, 2016, Justice Newbould directed that the plan approval hearing be held on January 25, 2016.

39. On January 6, 2016, Rocco DiPucchio, counsel to Catalyst, wrote a "With Prejudice" letter to Mr. Milne-Smith and Mr. Carlson in which he proposed that Catalyst would allow the Plan of Arrangement to proceed without opposition on the condition that West Face "agree to the appointment of an ISS to review the electronic devices of an agreed upon set of custodians at West Face". A copy of Mr. DiPucchio's letter is attached as Exhibit "**S**".

40. In that same letter, counsel for Catalyst also took the position that West Face should place its proceeds from the sale of WIND Mobile into escrow pending a final determination of Catalyst's claim, and that trial of the Moyse action should not occur until after the ISS's report is received. In respect of the latter request at least, Catalyst's position is therefore that West Face should consent to the very relief Justice Glustein rejected and dismissed following the hearing of a fully contested motion in July 2015 and be enjoined from dealing with over $500 million in proceeds until:

(i) the trial of the Moyse action has been heard and determined; and

(ii) all appeal rights concerning the decision of the trial judge in that case have been exhausted.

41. Not surprisingly, West Face immediately rejected Mr. DiPucchio's proposal.

42. The request for appointment of an ISS is, of course, one of the subjects of Catalyst's motion in this Court for an extension of time and for leave to appeal.

43. Catalyst's delay of approximately six months in pursuing its motion for leave to appeal in this Court has caused West Face significant prejudice. If Catalyst is granted leave to extend time and to appeal at this late date, West Face may suffer a significant delay in proceeding with the trial of the Moyse action and obtaining a final resolution of Catalyst's claims on their merits, given Catalyst's position that no trial can occur until: (i) its proposed appeal from the Imaging Order has been heard and finally determined; and (ii) if that appeal is successful, the ISS has imaged, inspected and reported on all of West Face's potentially relevant electronic records. That process could take months to complete. This is particularly problematic given Catalyst's position that in the interim, West Face should be precluded from dispersing to its investors or re-deploying the hundreds of millions of dollars of proceeds that West Face will receive from the disposition of its interest in WIND Mobile.

Prejudice from Inability to Manage Investments

44. As a general matter, any restriction on West Face's ability to manage funds entrusted to it by its investors damages West Face's interests and reputation. West Face acts as a fiduciary to actively manage investors' money. To the extent that investor capital entrusted to West Face must be held in escrow or are otherwise unavailable for distribution or re-investment, West Face is unable to provide the

investment services that its clients expect it to perform for them. As a result, the investors will be directly prejudiced, and West Face may suffer for its failure to prevent this harm to its investors.

45. Specifically, West Face's investors will be deprived of the investment returns that West Face expects to generate by actively managing the assets of its investors and/or deprived of the alternative uses for the WIND Mobile proceeds that investors had intended. It is difficult to predict at this time what investment opportunities may be foregone if West Face is unable to invest over $500 million for a period of several months or more, but the investment opportunities foregone by investors could well be substantial.

46. In addition, investors generally value liquidity, and may well prefer to invest in asset management firms that do not suffer from restrictions on their liquidity. For example, investors may be concerned by liquidity constraints resulting from Catalyst's claims. As an illustration, most sophisticated institutional investors require West Face to complete due diligence questionnaires before investing and often on an ongoing basis. A standard question is whether West Face has been subject to litigation and/or to restrictions on the ability of investors to redeem funds. Delay in resolving this matter expeditiously therefore may be required to be disclosed to future investors and so threatens to create a permanent stain on West Face's reputation going forward.

47. West Face holds its investment in WIND Mobile in two different sets of fund groups: The Long Term Opportunities group of funds (the "**LTOF**") hold approximately 91% of the investment, while the Alternative Credit group of funds (the "**ACF**") hold the

remaining approximately 9%. As the structure and management of these fund groups are different, they will be discussed separately.

Specific Prejudice to Investors in the LTOF

48. The LTOF is what is commonly referred to as a "hedge fund". One of the principal characteristics of a hedge fund, as opposed to a private equity fund, is that investors have significantly more frequent opportunities to exit or "redeem" their investments in a hedge fund. For example, investors in the LTOF are generally permitted to redeem their investments on a quarterly basis. The greater flexibility to exit hedge fund investments is one of their principal attractions to institutional and individual investors. Investors may need to liquidate funds to pay current expenses, make capital expenditures, or invest in other opportunities. In my experience, hedge funds that are unable to meet, or that suspend, redemption requests of their investors suffer irreparable damage to their reputation in the investment community.

49. Like many hedge fund managers, West Face received two kinds of fees in respect of the LTOF: (1) a "management fee" in the range of 2% of assets under management; and (2) an "incentive fee" equal to 20% of net profits achieved in the portfolio in excess of a specified "high water mark".

Prejudice from Inability to Redeem Designated Investment

50. Hedge funds that hold a significant proportion of illiquid investments can encounter difficulties as a result of the potential for a mismatch between the expected investment horizon of their assets, and investor redemption demands. If too many investors choose to redeem their investments at once, for instance, the fund could be

forced to liquidate a long-term investment at an inopportune moment or to liquidate an attractive but more liquid investment, or may even be unable to honour redemptions. To mitigate this risk, the LTOF employs the concept of a "Designated Investment".

51. A Designated Investment is a segregated corpus of assets within the LTOF structure that is used to purchase an illiquid investment, from which redemptions are prohibited until such time as the investment manager determines that there has been a "liquidity event". Each investor in the LTOF designates a percentage of its invested capital that may be allocated, at West Face's discretion, to Designated Investments. Accordingly, West Face used existing liquidity in the LTOF to acquire its interest in WIND Mobile and then classified that interest as a Designated Investment. Only investors in the LTOF at the time the WIND Mobile investment was classified by West Face as a Designated Investment were allocated with exposure to that investment.

52. The result of the Designated Investment is that investors in the LTOF who have redeemed their investments in the LTOF in the period since the Designated Investment was created were not able to redeem their entire investment in the LTOF, and continue to retain their residual interest in the Designated Investment pending a future liquidity event. These investors are being deprived of the opportunity to invest the WIND Mobile sale proceeds that may be effectively frozen pending resolution of Catalyst's claim, or to deploy their capital to other preferred uses.

53. If West Face determines that a liquidity event has occurred with respect to the WIND Mobile Designated Investment upon the closing of that transaction (a decision West Face has not yet made, and cannot make until it knows the precise circumstances

of any litigation at that time), this could create complications in satisfying any judgment if Catalyst's claim against West Face in respect of WIND Mobile were ultimately to be allowed.

54. West Face will also lose fee income to the extent that it is unable to redeem or re-deploy invested capital from the Designated Investment. For invested capital in the Designated Investment, West Face's management fee described above is calculated based on the cost of the investment. Once a liquidity event is declared and the invested capital is released from the Designated Investment, the management fee is then calculated based on the then net asset value of those assets (or sale proceeds). Retaining funds in the Designated Investment because of this litigation therefore deprives West Face of a management fee on the increase (due to the WIND Mobile transaction) in value of invested capital. West Face is also deprived of the opportunity to earn its 20% incentive fee on funds that could otherwise be re-invested. Similarly, the capital invested in the Designated Investment on behalf of investors who remain in the LTOF are deprived of the opportunity to have their invested capital actively managed by West Face.

55. Finally, to the extent that funds cannot be re-invested and are held as cash or in low-yielding investments, it reduces the returns that West Face might otherwise earn for LTOF investors, and reduces the incentive fees that West Face earns based on increases in the net asset value of the LTOF.

Prejudice from Administrative Fees

56. Like many hedge fund managers, West Face employs a third-party administrator to administer the LTOF. The administrator processes investor money, performs necessary accounting tasks in respect of investors' accounts, and assists in net asset value calculations. For these services, the administrator is paid a fee based on the LTOF's net asset value, including the net asset value of any Designated Investments. That net asset value has already been marked up following the announcement of the sale of WIND Mobile to Shaw. Therefore, absent resolution of Catalyst's claim, the administrator will be charging West Face fees based on invested capital in the Designated Investment, even though West Face may not be able to invest that capital.

Prejudice from Currency Hedging Costs

57. Over 90% of capital invested in the LTOF is denominated in U.S. dollars, while the WIND Mobile investment is denominated in Canadian dollars. In order to protect against the risk of the Canadian dollar depreciating, West Face hedges this currency exposure. However, hedging has a cost that has varied over time from 4 to 70 basis points. West Face also has to post collateral for certain hedging transactions.

58. To the extent that West Face cannot redeem or re-deploy the process of sale of WIND Mobile, it will be paying hedging fees, and posting collateral, in respect of invested capital on which neither it nor its investors are likely able to earn a competitive return.

Prejudice to Investors in the ACF

59. Much as with the LTOF, both West Face and investors in the ACF would be prejudiced by an inability to redeem or re-deploy the proceeds from the sale of WIND Mobile, thereby losing the opportunity to earn investment returns on their capital. West Face would also face similar currency hedging costs that would be wasted on uninvested capital as described above.

60. Unlike the LTOF, the ACF is structured similar to a private equity fund and therefore does not have the same liquidity concerns. However, the ACF raises other problems.

Prejudice from Restrictions on Equity Investments

61. The ACF's investment in WIND Mobile involved the acquisition of a portion of WIND Mobile's outstanding debt from its former owner, VimpelCom, along with a smaller slice of equity in that business. Since the ACF is a vehicle principally for debt investments, and has contractual limits on how much equity it can hold, the ACF only acquired approximately 9% of West Face's aggregate equity investment in WIND Mobile. That equity investment, however, represented substantially all of the equity investment permitted for the ACF. A restriction on West Face's ability to re-deploy the proceeds of sale, depending on the circumstances, may therefore limit West Face's ability to acquire any equity in other transactions on behalf of the ACF. As many debt investments also present opportunities to make associated equity investments, this represents a significant limitation on the flexibility of the ACF, in circumstances where no further returns can be earned on the proceeds from the WIND Mobile investment.

Prejudice from Dilution of Investment Returns

62. Similar to the LTOF, for the ACF West Face receives a management fee based on invested capital, and an incentive fee. The incentive fee for the ACF, however, is based on achieving returns above a designated "preferred return" calculated on a compound basis per annum. There is a "waterfall" for returns in the ACF that proceeds in three stages:

(a) First, profits are returned to investors until they have received the preferred return;

(b) Next, profits are split on a designated basis in favour of West Face until West Face has received a specified percentage of profits; and

(c) Finally, remaining profits are divided between West Face and its investors based on the specified percentage of profits to West Face described above.

63. Because of this structure for allocating returns, the longer investors have to wait before receiving proceeds from the WIND Mobile investment, the higher the preferred return threshold that West Face has to meet before being entitled to participate in the investment returns.

64. Moreover, to the extent that West Face is precluded from investing the proceeds of sale from WIND Mobile, West Face's ability to earn a return on invested capital that cannot be re-deployed will be impaired, while its investors will be paying a management fee on invested capital that is likely earning little or no return.

Prejudice from the Limited Deployment Window of the ACF

65. Like many private equity funds, the ACF has a "deployment period" during which committed investor capital is invested, and a "harvest period" during which investments are liquidated and proceeds returned to investors. The deployment period for the ACF expires at the end of December 2016. Once the deployment period ends, West Face is significantly restricted in its ability to call additional capital or make additional investments.

66. If West Face is able to re-invest the proceeds from the sale of WIND Mobile before December 2016, then it can re-deploy (and earn additional incentive and management fees in respect of) those funds. If, however, those funds are restricted because of delays in the hearing and/or appeals of Catalyst's claim, the deployment period will be compressed or may even close, and West Face and its investors will lose out on additional potential investments that could have been made between now and December 2016. The shorter the deployment period during which West Face can re-invest the proceeds from the sale of WIND Mobile interests held in the ACF, the less opportunity there will be to find suitable investments through which to earn returns for West Face's investors, and management and incentive fees for West Face.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario, this 13th day of January, 2016.

A Commissioner, etc.

PHILIP de L. PANET

TAB A

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

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 Party

AMENDED NOTICE OF MOTION

The Plaintiff ("Catalyst") will make a motion to a Judge on March 19, 2015 at 10:00 a.m., or as soon after that time as the motion can be heard at the court house, 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 1E6.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] orally.

THE MOTION IS FOR

(a) If necessary, an Order abridging the time for delivery of this Notice of Motion;

(b) An interim, interlocutory and/or permanent injunction restraining the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted from:

This is Exhibit A *referred to in the affidavit of* Philip de L. Panet *sworn before me, this* 13th *day of* January *20* 16

.....
A COMMISSIONER FOR TAKING AFFIDAVITS

(i) Participating in the management and/or strategic direction of Wind Mobile Corp. and any affiliated or related corporations (collectively, "Wind"); and

(ii) Without limiting the generality of the foregoing, participating in the Spectrum Auction, as that term is defined below;

(c) An Order authorizing an Independent Supervising Solicitor ("ISS") to attend West Face's premises to create forensic images of all electronic devices, including computers and mobile devices of West Face (the "Images") and to prepare a report which shall:

(i) identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and

(ii) in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:

(1) who authored the email;

(2) to whom the email was sent, copied and/or blind copied;

(3) the date and time when the email was sent;

(4) the subject line of the email;

(5) whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);

(6) the contents of the email; and

(7) if the email was deleted, when the email was deleted,

(c.1) A declaration and finding that the Defendant Brandon Moyse ("Moyse") is in contempt of the Order of Justice Firestone dated July 16, 2014;

(c.2) An Order that Moyse be committed to jail for such period as the Court deems just;

(c.3) In addition or in the alternative to paragraph (c.2) above, an Order that Moyse be fined in an amount to be determined by the Court;

(c.4) An Order that Moyse reimburse Catalyst for the full costs of the ISS and forensic expert retained pursuant to a Document Review Protocol executed on December 12, 2014 and any related costs thrown away by Catalyst on account of related legal fees and disbursements, such amounts to be determined and fixed by the Court on a reference;

(d) The costs of this motion on a substantial indemnity basis, plus applicable taxes; and,

(e) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE

The Parties to this Action

(a) Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

(b) West Face is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

(c) The defendant Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014. Moyse was one of only two analysts and had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

(d) On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

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

Moyse and West Face Falsely Assure Catalyst there has been no Wrongdoing

(f) Between May 30 and June 19, 2014, counsel for the parties to this action exchanged correspondence and communicated by telephone. Catalyst's counsel tried, but failed, to get the defendants' counsel to agree to terms which would avoid the need for litigation.

(g) In this exchange of correspondence, counsel for West Face and Moyse claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality. In particular, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is [...] baseless."

(h) As discussed in detail below, this statement is wrong: in March 2014, Tom Dea, a Partner at West Face ("Dea"), expressly asked Moyse to send him samples of his work at Catalyst, and Moyse sent Dea four Catalyst investment analysis memos stamped "Confidential" and "For Internal Discussion Purposes Only".

(i) On June 19, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. Moyse and West refused to preserve the *status quo* while Catalyst sought to enforce restrictive covenants which prevented Moyse from working at West Face prior to December 22, 2014. On June 24, West Face rebuffed Catalyst's efforts to negotiate a resolution, following which Catalyst commenced this action and brought a motion for injunctive relief.

(j) Notably, the defendants insisted on rushing to destroy the status quo even though West Face had no immediate need for Moyse's services: for the first two weeks of Moyse's employment at West Face, he was not assigned any tasks.

The Interim Injunction

(j.1) On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

(k) On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to an order (the "Interim Order"), pursuant to which:

(i) ~~West Face~~The Defendants ~~agreed~~ were ordered to preserve and maintain all records in ~~its~~ their possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to ~~West Face's~~ their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against ~~West Face~~the Defendants;

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

(iii) Moyse ~~consented~~ was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image ~~of his personal computer, iPad and smartphone~~of the data stored on the

Devices; to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

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

(l) The affidavits of documents Moyse swore pursuant to the Interim Order revealed very damning facts which demonstrate that Moyse and West Face casually disregarded Catalyst's proprietary interest in its confidential information.

Moyse Communicated Catalyst's Confidential Information to West Face

(m) As a result of the Defendants' refusal to respect the status quo in June 2014, Catalyst moved with urgency to seek interim relief and prepared its interim relief materials without the benefit of any evidence from the Defendants.

(n) On July 7, 2014, Moyse and Dea swore responding affidavits which confirmed Catalyst's worst fear: Moyse had transferred Catalyst's confidential information to West Face, and West Face distributed that confidential information throughout the firm.

(o) At a meeting with Moyse on March 26, Dea asked Moyse to send him research and writing samples so Dea could assess Moyse's writing and research ability.

(p) In response to this request, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contain Moyse's and other Catalyst

employees' analyses of investment opportunities and were marked "Confidential" and "For Internal Discussion Purposes Only".

(q) Moyse admitted he did not consider these markings to have any meaning, that he knew what he did was wrong, and that he deleted his email to Dea.

(r) Dea also admitted that after he received the Investment Memos, he reviewed them and saw that they were marked confidential. Dea admitted that West Face considered the types of documents Moyse sent him to be confidential and that he would not want Moyse to treat West Face's confidential information in a similar fashion.

(s) Dea admitted that after he reviewed the documents and saw that they were marked "Confidential", he circulated the Investment Memos to his partners and to a vice-president at West Face.

(t) West Face never informed Catalyst that Moyse had given it copies of Catalyst's confidential information. Instead, West Face attached the Investment Memos to its responding motion record and filed them in open court. West Face did not seek Catalyst's permission to do so or otherwise give Catalyst an opportunity to seal the court file prior to the hearing of the motion for interim relief on July 16.

Moyse Reviewed Confidential Information Unrelated to his Work before he Resigned

(u) In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time

period when Catalyst was active in an investment in Stelco. Catalyst and West Face were in direct competition with respect to the Stelco situation. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.

(v) On April 25, 2014, Moyse reviewed dozens of files related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse would review these documents, which he did in an insufficient amount of time to read the material he was accessing. Moyse admitted during cross-examination that he "routinely" reviewed transaction files from Catalyst's old transactions.

(w) At all material times, Moyse had accounts with two Internet-based file-storage services. These services enable users to create a folder on their computer which is synchronized over the Internet so that files stored in the folder can be viewed from any computer with an Internet connection. The services are capable of moving large amounts of data in a relatively brief period of time without leaving a record of the activity on the computer from which it was copied.

(x) In the opinion of Martin Musters, Catalyst's forensic IT expert ("Musters"), Moyse's conduct of reviewing several documents over a relatively brief period of time is consistent with transferring files to an Internet-based file storage account.

Moyse Retained Hundreds of Catalyst Documents After He Left Catalyst

(y) In his first affidavit sworn in response to Catalyst's motion for injunctive relief, Moyse swore that Catalyst had not provided any "actual" evidence that Moyse had transferred information from Catalyst's servers to his personal devices.

(z) However, pursuant to the Interim Order, Moyse provided Catalyst with two affidavits of documents which allegedly set out all of the documents in his power, possession or control that relate to his employment at Catalyst. Those affidavits disclosed over 830 Catalyst documents that remain in his possession. Just by reviewing the document titles alone, Catalyst identified 245 confidential documents that remained in Moyse's possession, power or control following his resignation from Catalyst and commencement of employment at West Face.

(aa) Moyse also admitted that he frequently emailed Catalyst documents to his personal email accounts and that he retained those documents on his personal devices. Moyse could not say with absolute certainty that his most recent search has been exhaustive, and he admitted that he deleted documents between March and May 2014, that he did not inform Catalyst when he resigned that he had its confidential information and that he did not offer to return confidential information to Catalyst.

(bb) Moyse's conduct fits the profile of an employee who took confidential information prior to his resignation from Catalyst.

West Face's Porous Confidential Wall

(cc) Prior to his resignation from Catalyst, Moyse was part of a team working on a significant investment opportunity in the telecommunications industry – the potential acquisition by Catalyst of Wind, one of Canada's few remaining independent mobile telecommunications companies.

(dd) Moyse had access to confidential information pertaining to Catalyst's plans for Wind.

(ee) At some point after it commenced its discussions with Moyse to come work at West Face, West Face also took an interest in Wind.

(ff) In addition, both West Face and Catalyst owned secured debt of Mobilicity, another mobile telecommunications company. Catalyst is Mobilicity's largest secured creditor while West Face owns or owned a much smaller portion of Mobilicity's secured debt.

(gg) In June 2014, after Catalyst's counsel expressed concern to West Face's counsel about the implications of West Face's efforts to hire Moyse on the rival investment firm's pursuit of the Wind opportunity, West Face claimed to have erected a "confidentiality wall" to separate Moyse from its own pursuit of Wind.

(hh) The "wall" erected by West Face was incredibly weak:

(i) it did not apply to all of West Face's employees;

(ii) it applied to Wind, but not to Mobilicity;

(iii) West Face took no steps to obtain acknowledgments from its investment team that a wall had been established;

(iv) No prohibition was imposed to prevent West Face's employees from accessing Moyse's data; and

(v) West Face has refused to state what consequences, if any, an employee would face if he or she did not comply with the confidentiality wall.

West Face Purchased Wind Using Catalyst's Confidential Information

(ii) In August 2014, Catalyst had an exclusive negotiation period to negotiate the purchase of Wind from its then-owners.

(jj) Those negotiations failed and the exclusivity period expired. The negotiations failed on issues relevant to the regulatory regime affecting Wind.

(kk) Within days of negotiations failing with Catalyst, West Face, together with partners in a syndicated investment group, successfully negotiated the purchase of Wind. Notably, the West Face syndicate waived any regulatory concerns that Catalyst continued to have.

(ll) West Face could not have negotiated the deal it did with Wind without access to Catalyst's confidential information, which was provided to it by Moyse.

(mm) Catalyst has amended its claim against West Face to seek a declaration that West Face holds its interest in Wind in trust for Catalyst.

The Interlocutory Injunction and the ISS

(nn) On November 10, 2014, the Court released its decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images of Moyse's personal devices.

(oo) The Court granted the relief sought by Catalyst: Moyse was enjoined from working at West Face prior to December 22, 2014 and an ISS was authorized to review the Images and prepare a report.

(pp) ~~The ISS is in the midst of preparing its report.~~ The ISS process involves a review of the Images using search terms submitted by Catalyst to determine whether the Images contain or contained Catalyst's confidential information;

(qq) The ISS's ~~work is ongoing and its~~ report is not yet final. However, the ISS has reported on an interim basis on the number of "hits" that the search terms requested by Catalyst have generated. Among other things, the following search terms generated an unexplainably large number of "hits" on Moyse's personal computer:

(i) West Face: 5,360;

(ii) Callidus: 132;

(iii) Wind: 26,118;

(iv) Mobilicity: 768;

(v) Turbine (Catalyst's codename for the Wind opportunity): 756;

(vi) Boland (West Face's CEO): 554;

(vii) Dea: 4,013;

(viii) Auction: 6,489;

(ix) Spectrum: 3,852.

(rr) There is no legitimate business reason why these search terms would yield such a large number of hits on Moyse's personal computer. The inference to be drawn from these hits is that Moyse copied Catalyst's confidential information to his personal computer and transferred it to his new employer's at West Face, either before or after he officially commenced employment there in June 2014.

(ss) Hard drives, mobile devices and Internet accounts that could be inspected to determine whether West Face possesses or possessed Confidential Information are beyond the control or possession of Catalyst.

Moyse's Contempt

(ss.2) On February 1, 2015, the ISS delivered a draft report (the "Draft ISS Report") to counsel for Catalyst and Moyse. Pursuant to the document review protocol agreed to and executed by the parties on December 12, 2014 (the "DRP"), Moyse has 10 business days to object to the inclusion of a document in the ISS's report. At the end of this 10-day period, the ISS's report becomes final.

(ss.3) The Draft ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

(ss.5) As set out above, at the interim injunction motion, which commenced at approximately 10:00 a.m. on July 16, 2014, Moyse consented to the Interim Order, which, among other things, ordered him to preserve the data on the Devices and to give the Devices to his counsel so that a forensic expert could create forensic images of the data on the Devices (the "Images").

(ss.6) Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images.

(ss.7) On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

(ss.8) On Sunday, July 20, 2014, at 8:09 p.m., Moyse used the Secure Delete programme to delete files and/or folders from his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer. This folder is created when a user uses the

Secure Delete function to delete files and/or folders in such a manner that the files and/or folders cannot be recovered through forensic analysis.

(ss.9) It is impossible to tell what files and/or folders Moyse deleted on July 20, 2014.

(ss.10) By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse has acted in contempt of Court.

(ss.11) The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

(ss.12) The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme on July 20, 2014, was a breach of the Interim Order.

(ss.13) It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

(ss.14) Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

(ss.15) Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential

Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

(ss.16) As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

The Callidus Report

(tt) Callidus Capital Corporation ("Callidus") is a publicly traded corporation that specializes in innovative and creative financing solutions for companies that are unable to obtain adequate financing from conventional lending sources. Catalyst owns a 60 per cent interest in Callidus.

(uu) In November 2014, shortly after Catalyst successfully argued the interlocutory motion, the share price of Callidus began to drop precipitously without any apparent reason for the rapid decline.

(vv) Catalyst was initially unable to discover the cause of the price drop. However, based on confidential sources, it learned that West Face was "talking down" the stock on the street and had prepared a research report that purported to reveal problems with Callidus's loan book.

(ww) The identity of Callidus's borrowers is, in large part, not public information. If West Face had access to information about Callidus's borrowers, it obtained that information through improper means, likely from Moyse, who had no

involvement with Callidus and yet who had 132 Callidus "hits" on his personal computer.

(xx) Despite repeated requests to West Face, it has refused to disclose its research report on Callidus. West Face's conduct of talking down the stock was directed primarily at attempting to cause harm to Catalyst, a majority shareholder in Callidus.

The Upcoming Spectrum Auction

(yy) In March 2015, Industry Canada is going to auction 30 MHz of AWS-3 spectrum to new entrants to the mobile telecommunications industry, including Wind and Mobilicity, to enable those new entrants to deliver services to more users at faster speeds (the "Spectrum Auction").

(zz) Bidders who intend to participate in the Spectrum Auction must submit a pre-auction financial deposit with their application to participate in the auction by no later than January 30, 2015.

(aaa) Armed with Catalyst's Confidential Information, which it obtained from Moyse, West Face will be able to help Wind compete unfairly against Mobilicity in the Spectrum Auction or otherwise use this information to its advantage in relation to Mobilicity.

Irreparable Harm

(bbb) The damage to Catalyst caused by West Face's conduct is not limited to monetary damages.

(ccc) Absent injunctive relief, Catalyst will suffer irreparable harm.

(ddd) Sections 101 and 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

(eee) Rules 1, 3, 37, 40, ~~and~~ 57 and 60 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. and

(fff) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) The pleadings in this action;

(b) The Reasons for Decision of Justice Lederer dated November 10, 2014;

(b.1) The affidavit of Martin Musters, to be sworn;

(c) The affidavit of James A. Riley, to be sworn; and

(d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

~~January 13, 2015~~
February 6, 2015

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Brandon Moyse

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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Lawyers for the Plaintiff/Moving Party

TAB B

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	TUESDAY, THE 7TH
	)	
MR. JUSTICE GLUSTEIN	)	DAY OF JULY, 2015

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff, was heard on July 2, 2015, at the court house, 393 University Avenue, 8th Floor, Toronto, Ontario, M5G 1E6.

ON READING the three motion records filed by the plaintiff, the two motion records filed by the defendant West Face, two motion records filed by the defendant Brandon Moyse, and the joint motion record of the defendants, the facta of the parties, and the joint book of authorities filed by the parties, and on hearing the submissions of the lawyers for the Parties,

1. THIS COURT ORDERS that the Plaintiff's motion for the relief set out in its Amended Notice of Motion dated February 6, 2015, is hereby dismissed.

This is Exhibit B *referred to in the affidavit of* Philip de L. Panet *sworn before me, this* 13th *day of* January *20* 16

A COMMISSIONER FOR TAKING AFFIDAVITS

2. AND THIS COURT FURTHER ORDERS that if the Parties are unable to agree as to costs, each party may make costs submissions of no more than three pages (not including a costs outline), to be delivered by the defendants within 14 days of this order, with the plaintiff to respond within 14 days from receipt of the defendants' submissions. The defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of the plaintiff's costs submissions.

(Signature of Judge)

C. Chuka
REGISTRAR, SUPERIOR COURT OF JUSTICE
GREFFIER ADJOINT, COUR SUPÉRIEURE DE JUSTICE

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ENTERED AT / INSCRIT A TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

AUG 2 6 2015

AS DOCUMENT NO.:
A TITRE DE DOCUMENT NO.:
PER / PAR:

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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Lawyers for the Plaintiff

TAB C

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 4388
COURT FILE NO.: CV-14-507120
DATE: 20150707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Rocco DiPucchio* and *Andrew Winton*, for the Plaintiff

Matthew Milne-Smith and *Andrew Carlson*, for the Defendant, West Face Capital Inc.

Robert A. Centa, Kristian Borg-Olivier and *Denise Cooney*, for the Defendant, Brandon Moyse

HEARD: July 2, 2015

ENDORSEMENT

Nature of motion and overview

[1] The plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), brings this motion for:

(i) an order that the defendant, West Face Capital Inc. ("West Face") is prohibited from voting its 35% share interest in WIND Mobile ("WIND") pending a determination of the issues raised in this action (the "Voting Injunction"),

(ii) an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face, at the expense of Moyse and West Face, to take place before any examination-for-discovery (the "Imaging Order"), and

(iii) an order (the "Contempt Order") that the defendant, Brandon Moyse ("Moyse"), is in contempt of an interim consent order of Firestone J., dated July 16, 2014 (the "Consent Order").

[2] At the hearing, the parties prepared extensive material. West Face filed a four-volume motion record with (i) a lengthy affidavit with 163 exhibits from Anthony Griffin ("Griffin"), a partner at West Face, (ii) an affidavit from Assar El Shanawany ("El Shanawany"), the

This is Exhibit C referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

Corporate Planning & Control Officer of WIND, and (iii) an affidavit from Harold Burt-Gerrans, a forensic computer expert retained by West Face.

[3] Moyse filed two motion records, including a lengthy affidavit from Moyse and two affidavits from Kevin Lo ("Lo"), a forensic computer expert retained by Moyse.

[4] The defendants also filed a joint motion record with answers to undertakings from cross-examinations, transcripts, and an affidavit from West Face's head of technology.

[5] Catalyst filed three separate motion records, including (i) two extensive affidavits with approximately 40 exhibits from James Riley ("Riley"), the Chief Executive Officer of Catalyst, and (ii) three affidavits from Martin Musters ("Musters"), a computer forensic expert retained by Catalyst.

[6] In total, the parties filed over 3,000 pages of motion material, three factums totalling more than 110 pages, and 66 authorities.

[7] In this endorsement, I address only the key evidence and law which I find are necessary to consider the issues raised by the parties. For the reasons I discuss below, I dismiss the motion for all grounds of relief sought by Catalyst.

The Voting Injunction

a) The failure to provide an undertaking

[8] The Voting Injunction cannot be granted as Catalyst provided no undertaking as to damages.

[9] Rule 40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), provides that:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[10] The failure to provide an undertaking (or request to be relieved) is fatal to an injunction. Such an undertaking in damages "is almost invariably required in commercial cases" (Sharpe J.A., *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, 2014), at paras. 2.470 and 2.500).

[11] The court will dismiss a motion for an injunction if the moving party fails to provide an undertaking under Rule 40.03 (*Mandel v. Morguard Corp.*, [2014] OJ No. 1088 (SCJ), at paras. 20-21; *Air Canada Pilots Association v. Air Canada Acè Aviation Holdings Inc.*, [2007] OJ No. 89 (SCJ), at para. 70, affirmed without separate reasons [2008] OJ No. 2567 (CA)).

[12] West Face raised the lack of an undertaking in its factum, as was appropriate since Catalyst failed to provide the undertaking in its evidence before the court on this injunction.

[13] Catalyst knew and understood the need for an undertaking to obtain an injunction.

[14] At the outset of the hearing, I raised directly with Catalyst's counsel the issue of an undertaking with respect to the injunctive relief sought on this motion.

[15] I advised counsel that Catalyst could consider, prior to argument, whether it was necessary to adjourn the hearing to provide the court with an undertaking. I further advised Catalyst's counsel that if he chose to argue the motion on the basis of the existing evidentiary record, the court could not adjourn the hearing in mid-argument to permit further evidence on the issue. Counsel for Catalyst assured the court that he was prepared to argue the motion on the basis of the evidentiary record and would set out in his oral submissions why the requirement for an undertaking had been satisfied.

[16] During his submissions, when asked to address the issue of the undertaking, Catalyst sought to rely on the undertaking it provided to the court to obtain an interim injunction from Justice Lederer by reasons dated November 10, 2014 (the "Interim Injunction"). Justice Lederer had granted interim relief, by which he, *inter alia*, enjoined Moyse from working for West Face until December 21, 2014 and ordered that an independent supervising solicitor (previously defined as the "ISS") be put into place to review the images of Moyse's personal computer and electronic devices that had been conducted pursuant to the Consent Order (Reasons of Lederer J., at para. 83).

[17] In support of the Interim Injunction, Riley swore an affidavit on June 26, 2014 in which he gave an undertaking to the court that Catalyst "will comply with any order regarding damages the Court may make in the future, if it ultimately appears that the injunction requested by the plaintiff ought not to have been granted" (para. 75 of the June 26, 2014 Riley affidavit).

[18] Justice Lederer relied on the evidence from Riley to find that Catalyst had complied with its requirement under Rule 40.03 to provide an undertaking for damages which might arise if the court ultimately found that the injunction requested by Catalyst ought not to have been granted.

[19] Justice Lederer's reasons made it clear that the undertaking related only to the order he made. He stated that Catalyst gave an undertaking (Reasons of Lederer J., at para. 84):

> that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them. [Emphasis added.]

[20] At the hearing before me, Catalyst submitted that this undertaking "continued" (in effect, could be transferred) to the present Voting Injunction. Catalyst submitted that Riley was not required to provide a separate undertaking for the Voting Injunction since Riley

stated in his affidavit for this motion that "I adopt and re-state the facts set out in those affidavits [filed in support of the Interim Injunction] in this affidavit".

[21] I do not agree that an undertaking for an injunction seeking to prevent employment for a limited time or having documents imaged by an ISS can be "transferred" to an injunction seeking to prevent a 35% shareholder of WIND from exercising voting rights at any time until trial of the action.

[22] First, an undertaking is not a "fact" to be repeated and relied upon in a subsequent affidavit. It is a promise to the court to pay damages arising out of the injunctive relief sought before the court at that time. At no point until this injunction did Catalyst seek an order preventing West Face from exercising its 35% voting interest in WIND.

[23] Second, the damages that could be incurred as a result of the Voting Injunction are exponentially greater than any possible damages that could arise on an order to prevent competition by an analyst (Moyse) who leaves for a competitor. The Interim Injunction, based on the earlier Riley affidavits, protected Catalyst's interests through (i) a review by the ISS of the forensic images of Moyse's computer and electronic devices before discovery, and (ii) orders prohibiting Moyse from competing for six months and using confidential information. Any damage associated with the order sought on the Interim Injunction could pale to the losses West Face could incur as a result of the Voting Injunction if West Face is unable to vote its shares in WIND on all decisions between the present and trial.

[24] Justice Lederer was clear that the undertaking he accepted was based on the relief sought in the specific motion before him, as it was based on the undertaking to pay damages if "it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them" [Emphasis added.] (Reasons of Lederer J., at para. 84).

[25] At the present hearing, Catalyst attempted to rely on the evidence in the current Riley affidavit that it "currently has in excess of $3 billion dollars under management". However, the existence of assets under management is not an undertaking to the court to pay damages for an injunction.

[26] When an undertaking is provided, a responding party has the opportunity to challenge the sufficiency of the undertaking. Regardless of the amount of assets managed or owned by a corporation, the undertaking provided by the moving party depends on its ability to pay the damages which could arise from the injunction. A responding party is entitled to cross-examine to test the sufficiency of the undertaking.

[27] Consequently, there is no undertaking before the court on the present injunction, which is between sophisticated commercial parties with Catalyst seeking a Voting Injunction to enjoin West Face from voting any of its 35% share interest in WIND until trial.

[28] This is not a case of West Face's counsel "laying in the weeds" (as submitted by Catalyst). Catalyst knew the requirements for an injunction, as demonstrated by the earlier injunction sought before Justice Lederer. West Face raised the issue directly in its factum.

Catalyst was advised by the court at the outset that the court was providing it with an opportunity to consider whether it would seek an adjournment to file further evidence, and Catalyst chose not to do so. West Face is not required to create evidence for Catalyst on cross-examination when Catalyst chose not to provide the evidence.

[29] Consequently, Catalyst made a decision to rely on the earlier undertaking with full knowledge that no adjournment mid-hearing could be obtained if the court was not satisfied that there was a proper undertaking.

[30] For these reasons, I dismiss the Voting Injunction on the basis of the failure to provide an undertaking under Rule 40.03.

b) The failure to satisfy the requirements of irreparable harm and balance of convenience

[31] Catalyst's counsel acknowledges that Catalyst has the burden of establishing irreparable harm and that the Voting Injunction cannot be granted if Catalyst does not meet this burden.

[32] The only evidence of harm to Catalyst if the injunction is not granted is Riley's statement in his affidavit that:

> As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

[33] The above evidence does not meet the test of harm that "could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory application", or "harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald Inc. v. Canada*, [1994] SCJ No. 17, at paras. 58-59).

[34] Evidence of irreparable harm must be clear and not speculative (*Trapeze Software Inc. v. Bryant*, [2007] OJ No. 276 (SCJ), at para. 52). It is not enough to show that a moving party is "likely" to suffer irreparable harm; one must establish that he or she "would suffer" irreparable harm (*Burkes v. Canada (Revenue Agency)*, [2010] OJ No. 2877 (SCJ), at para. 18, leave to appeal refused, [2010] OJ No. 5019 (Div. Ct.)).

[35] Riley's assertion is speculative. He does not state that West Face "will" use its voting interest in WIND to harm Catalyst's purported interest. Rather, he states only that West Face "can" do so without explaining how such conduct would arise.

[36] Even if Catalyst has a contingent interest in WIND, Riley admitted during cross-examination that (i) "West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do"; and (ii) West Face "would obviously have an incentive to

maximize the value of its investment in [WIND]" in the same manner as Catalyst claims that it would.

[37] Catalyst submits at paragraph 114 of its factum that West Face could provide capital to WIND (or WIND could seek to raise capital) "on terms to which Catalyst, in West Face's shoes, would not agree". However, there is no evidence to that effect. To the contrary, West Face has been a shareholder and an active part of the management of WIND since September 16, 2014, and Catalyst led no evidence that it is worse off today than it was almost nine months ago.

[38] In essence, Catalyst's position on irreparable harm is that West Face, as a 35% shareholder in WIND, might vote their shares in a manner that decreases the value of the company, and as such, harm Catalyst's "contingent" interest based on Catalyst's claim of constructive trust. However, any claim of constructive trust over property raises a speculative concern that the property may be worth less at trial than at the outset of pleadings. In the present case, there is no evidence to suggest any past or future conduct which will cause irreparable harm, and as such, the injunction must fail.

[39] With respect to the balance of convenience, since Catalyst offers no proper evidence of irreparable harm, it cannot establish that the balance of convenience favours granting the injunction.

[40] Further, West Face filed evidence (in the Griffin and El Shanawany affidavits) that West Face is the single largest investor in WIND, designates two of the ten seats on the board of directors, and plays an important role in WIND's governance, strategic and capital funding direction. An inability for West Face, as the largest WIND shareholder, to vote on issues that affect a significant investment is evidence of the type of harm that cannot be cured in monetary terms, as other shareholders would then have the ability to control the future of WIND without any voting from a 35% shareholder.

[41] For the above reasons relating to Catalyst's failure to provide the undertaking, Catalyst's failure to establish irreparable harm, and given my finding that the balance of convenience is against granting an injunction, I dismiss the motion for a Voting Injunction.

[42] Consequently, I do not address whether there is a serious question to be tried.

The Imaging Order

[43] West Face characterizes the Imaging Order as either an *Anton Piller* order or a Rule 30.06 order. For the purposes of this argument, I make no finding as to whether the higher threshold of an *Anton Piller* order should apply because I agree with West Face that even under the lower "Rule 30.06" threshold as considered in cases where a similar imaging order was sought, the motion must fail.

[44] In the present case, Catalyst proposes to have the ISS conduct a review of West Face's corporate servers and the electronic devices of five West Face representatives and then "prepare a report which shall": (i) "identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information"), and (ii)

provide particulars of who authored or saw any emails which contained or referred to the Confidential Information.

[45] I note that many of the cases relied upon by West Face arise in the context of a request by an adverse party to review the documents sought to be imaged, typically through a forensic expert retained by the moving party. It may be that the discussion in those cases could apply to the Catalyst request for ISS review, since the nature of a review is similarly intrusive, even if not conducted directly by the moving party.

[46] However, it is not necessary to rely on those authorities and I make no finding as to whether the test to permit a moving party to have direct access to the servers of a responding party requires a higher threshold to obtain such relief.

[47] Under Rule 30.06, the principle remains that a party has an obligation under the *Rules* to produce relevant documents, and 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. I agree that the same approach should apply to a request that a responding party image computer servers and electronic devices.

[48] This approach was followed by Justice Stinson in *Brown v. First Contact Software Consultants Inc.*, [2009] OJ No. 3782 (SCJ) ("*Brown*"). Justice Stinson was not faced with a request by a moving party to review the responding party's server, but only with a request for "an order that would require the responding parties to 'image' the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them" (*Brown*, at para. 67). The intrusiveness of such a request would be less than the ISS review proposed by Catalyst.

[49] In *Brown*, Justice Stinson refused to order the plaintiffs (responding parties) to image their hard drives or computers. He held (*Brown*, at para. 67):

> There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

[50] Orders for production of computer hard drives will not be made when a party can explain any delay or errors in producing relevant documents (*Baldwin-Jones Insurance Services (2004) Ltd. (c.o.b. Baldwin Janzen Insurance Brokers) v. Janzen*, [2006] BCJ (S.C.) at paras. 34, 36). Further, the number of "hits" of a term does not demonstrate that a party has failed to produce relevant documents (*Mathieson v. Scotia Capital Inc.*, [2008] OJ No. 3500 (Mast.) at par. 9).

[51] As Morgan J. held in *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] OJ No. 6082 (SCJ) ("*Zenex*"), "it is not sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden'" (*Zenex*, at paras. 13-14).

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

[53] The evidence relied upon by Catalyst at the hearing to demonstrate an effort to thwart discovery obligations was not convincing. Evidence with respect to Callidus Capital Corporation ("Callidus") was produced by West Face once Catalyst put Callidus in issue by alleging misuse of confidential information. West Face disclosed its investment in Arcan voluntarily.

[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.

[55] The error of West Face to recall the March 27, 2014 email arose not in the context of litigation production, but only when West Face received Catalyst's pre-litigation correspondence. The email was immediately produced in the July 7, 2014 responding material, six business days after Catalyst brought its motion for interim relief. West Face's failure to recognize prior to litigation that the March 27, 2014 email had been received and forwarded is not evidence of an intention to hide or delete electronic information.

[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.

[57] For the above reasons, I find 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". Consequently, I dismiss the motion for an Imaging Order.

Contempt Order

[58] For the reasons that follow, I do not find Moyse to be in contempt of the Consent Order.

[59] I summarize the relevant legal principles below:

(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 (*Carey v. Laiken*, 2015 SCC 17 ("*Carey*"), at para. 30);

(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 (*Carey*, at paras. 31-35);

(iii) Any reasonable doubt must be resolved in favour of the person or entity alleged to have breached the order (*Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (CA), at para. 270);

(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" (*Carey*, at para. 36); and

(v) The court retains a discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith (*Carey*, at para. 37).

[60] I review the relevant evidence against the backdrop of these principles.

[61] The impugned contemptuous acts of Moyse are (i) he deleted his personal browsing history immediately prior to turning his personal computer over to the ISS; and (ii) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.

a) The relevant evidence

[62] Moyse's evidence was that when he was ordered to deliver his computer, he was concerned and embarrassed by some of the content on his computer related to adult entertainment sites. Moyse's evidence is that he was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in the lawsuit since he had reasonable explanations for every Catalyst-related document that would be found on the computer and intended to disclose all such documents in his affidavit of documents, as required under the Consent Order.

[63] Moyse's evidence is that he understood and respected his obligations under the Consent Order and was careful in how he maintained his computer following the Consent Order. Moyse's evidence that if Catalyst had sought and obtained an order requiring that he maintain the computer "as is", he would not have used it at all prior to the image being taken.

[64] Moyse's evidence was that he did not have advanced knowledge about computers but was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently-deleted material.

[65] Moyse did some internet searches on how to ensure a complete deletion of his internet browsing history. He came to believe that "cleaning" the computer's registry following the deletion of the internet history would ensure the permanent deletion of the history.

[66] Moyse then purchased the "RegCleanPro" product on July 12, 2014 to delete his internet browser history and four days later purchased the "Advanced System Optimizer" ("ASO") program which contains a suite of programs for personal computer tune-up. One product on the ASO suite is a program called "Secure Delete".

[67] Moyse made no efforts to hide the purchase of these products. The payment receipts and license keys for Moyse's purchases of the two Systweak products were found by the ISS in his electronic personal mail box.

[68] On Sunday, July 20, 2014, the day before Moyse was scheduled to deliver his computer and other devices to counsel, he (i) opened the RegClean Pro and ASO software products on his computer, (ii) looked into how each operated, and (iii) ran the "RegCleanPro" software to clean up the computer registry after he deleted his internet browser history.

b) Deleting personal browsing history

[69] With respect to the first impugned act, there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches.

[70] 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".

[71] 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.

[72] 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.

[73] Catalyst's submission as to the purported contempt is that the court should find, on a standard of beyond reasonable doubt, that Moyse's deletion of his personal browsing history resulted in deletion of any references to his searching his "Dropbox" files, and that such searches would have been relevant as evidence that Moyse was taking confidential information with him prior to departing Catalyst.

[74] However, the evidence does not support a finding beyond a reasonable doubt that there were such files on Moyse's personal computer. It is not enough for Catalyst to speculate

that in the course of deleting his personal browsing history, Moyse may have deleted references to searches of Dropbox files.

[75] The Amended Report of the ISS, dated March 13, 2015, states that Digital Evidence International ("DEI"), the forensic computer expert retained by the ISS, searched Moyse's iPad and found over 1,000 "Catalyst" documents in Moyse's iPad Dropbox. The ISS stated:

> DEI was able to generate a list of documents accessible from this device from the 'Dropbox' iOS application. The iPad contained records for some 1,327 total documents which were recorded by the operating system as accessible to the user at some point in time. Of these documents, a total of 1,017 documents were contained in a folder entitled 'Catalyst'. I have attached as **Appendix 'N'** a copy of the list of files contained within the 'Catalyst' folder, from the data supplied by DEI. The data generated also include a record of the last time that each file was recorded to have been accessed by the user, which is contained within that spreadsheet. I note that there are no records of the documents in the Dropbox being reviewed on any date subsequent to April 16, 2014, and therefore no evidence that the Dropbox files were viewed subsequent to Moyse's departure from Catalyst on the iPad device. [Emphasis in original.]

[76] Catalyst seeks to rely on Moyse's evidence that he accessed Dropbox from time to time, and as such, relevant search history from his computer must have been deleted. However, there was no evidence as to whether Moyse accessed Dropbox through his personal computer or his iPad. Moyse's evidence was that he did not know whether he accessed Dropbox through an "app" (which could have been on his iPad) or by internet (which could also have been through his iPad) (see questions 254-260 of his cross-examination transcript).

[77] Further, Moyse was asked by Catalyst counsel that "if I'm correct that your Dropbox, your history of accessing Dropbox, was retained in your browsing history, you would also have been successful in deleting that, right?" Moyse answered that "I access my Dropbox through a variety of other means" (see questions 294-300 of his cross-examination transcript).

[78] Consequently, there is no evidence, on the standard of beyond reasonable doubt, that Moyse deleted Dropbox information from his personal computer when he deleted his personal browsing history and ran the registry cleaner. Given the over 1000 "Catalyst" files on his iPad Dropbox account, and Moyse's explanation that he may have accessed Dropbox files through an "app", I cannot find (on a standard of beyond reasonable doubt) that Moyse deleted his personal browsing history relevant to Dropbox from his personal computer and as such, I cannot find contempt of court for deleting relevant information from his personal computer.

[79] I note that even if I found that it was beyond reasonable doubt that Moyse deleted relevant Dropbox searches from his personal computer, I would exercise my discretion to decline to making a finding of contempt as such conduct would have occurred as a result of Moyse's "good faith" efforts to comply with the Consent Order while deleting embarrassing personal files which were not relevant to the litigation.

c) Use of the Secure Delete program

[80] Catalyst submits that it is beyond reasonable doubt that Moyse ran the Secure Delete program to delete relevant files from his personal computer. I do not agree that the evidence supports such a conclusion.

[81] First, all of the forensic experts agreed that the presence of a Secure Delete folder on Moyse's system is not evidence that he ran the program.

[82] DEI, on behalf of the ISS, indicated that it could not conclude from the presence of a folder whether the program had been used to delete files. Musters, the forensic expert retained by Catalyst, acknowledged on cross-examination that "the Secure Delete program was launched, but it doesn't yet speak to whether or not files or folders were deleted". Lo, the forensic expert retained by Moyse, gave the same opinion, *i.e.*, that the presence of a Secure Delete folder is not evidence that Moyse ran the program.

[83] Second, Lo's evidence was that he had conducted a complete forensic analysis of Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Moyse's computer. Lo's expert opinion evidence was that if the Secure Delete program had been run on the computer, a log would have been found which maintains records of the files deleted (the "Secure Delete Log"), but no such log exists on Moyse's computer.

[84] Catalyst's expert, Musters, initially gave opinion evidence that it was a "relatively simple" matter to "reset" the Secure Delete Log by using a function called Registry Editor to hide any trace of having run the program. Musters did not append as an exhibit to his affidavit the "publicly available information" on which he relied. Musters maintained his position in cross-examination. However, in an answer to an undertaking, Musters sought to "correct an error in his testimony" in that "the [publicly-available] information includes advice on the removal of the entire ASO program".

[85] Consequently, the evidence is that Moyse could not have easily deleted only the Secure Delete Log with publicly-available information. Instead, the conclusion sought by Catalyst, at a level of beyond reasonable doubt, is that Moyse ran Secure Delete to remove files and then (i) obtained information which explained how to remove the ASO software from his computer, (ii) chose not to use that information to remove all traces of that ASO software, (iii) instead removed only the Secure Delete Log files of the ASO (though Musters did not provide any publicly-available information which would simply instruct Moyes how to do so), (iv) but still left the ASO software, receipts, and emails in place to be easily found by a forensic investigator.

[86] I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO

software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

[87] For the above reasons, I dismiss the Contempt Motion.

Order and costs

[88] Consequently, I dismiss Catalyst's motion in its entirety. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a costs outline), to be delivered by West Face and Moyse within 14 days of this order, with Catalyst to respond within 14 days from receipt of the Defendants' submissions. The Defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of Catalyst's costs submissions.

GLUSTEIN J.

Date: 20150707

TAB D

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 5248
COURT FILE NO.: CV-14-507120
DATE: 20150826

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Rocco DiPucchio* and *Andrew Winton*, for the Plaintiff

Matthew Milne-Smith and *Andrew Carlson*, for the Defendant, West Face Capital Inc.

Robert A. Centa, Kristian Borg-Olivier and *Denise Cooney*, for the Defendant, Brandon Moyse

COSTS ENDORSEMENT

Overview

[1] By endorsement, dated July 7, 2015 (the "Endorsement"), I dismissed (i) Catalyst's[1] motion seeking a Voting Injunction and an Imaging Order against West Face, and (ii) Catalyst's motion seeking a Contempt Order against Moyse.

[2] Pursuant to the Endorsement, all parties delivered written costs submissions, including relevant authorities, which I reviewed.

[3] West Face seeks partial indemnity costs of $175,000, plus $37,347.68 in disbursements (all inclusive of HST). Moyse seeks partial indemnity costs of $110,000, plus $21,602.32 in disbursements (all inclusive of HST). Both defendants seek costs payable by Catalyst within 30 days of this order.

[4] Catalyst submits that only a portion of the defendants' costs should be fixed, and should be made payable in any event of the cause. Catalyst further submits that Moyse's costs

[1] All defined terms are as set out in the Endorsement.

This is Exhibit D referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

should be reduced since it was his conduct in deleting his personal browsing history that led to the motion for the Contempt Order.

[5] Catalyst further submits that the defendants' costs and some of West Face's disbursements are excessive and unreasonable.

[6] I address these issues below.

Analysis

Issue 1: Should only a portion of costs be fixed and made payable in any event of the cause?

[7] Catalyst submits that "most, if not all" of the evidence produced by the defendants in responding to the motion for the Voting Injunction, Imaging Order, and Contempt Motion is relevant to the issues at trial of (i) whether West Face misused Catalyst's confidential information and if so, the appropriate remedy for West Face's misconduct, and (ii) whether Moyse wrongfully retained Catalyst's confidential information following his resignation from Catalyst and whether any of this information was communicated to West Face.

[8] Consequently, Catalyst submits that (i) the portion of the costs which relates to trial evidence should not be ordered by this court as costs on the motion, as the trial judge will need to determine the successful party, and that party will receive its costs of the action; and (ii) the limited portion of the costs related only to the motions (for West Face, "no more than $30,000" and for Moyse, "no more than $20,000") be ordered payable in any event of the cause.

[9] The defendants rely on the general presumption under Rule 57.03(1) that costs of a contested motion are to be fixed by the court and paid within 30 days.

[10] Further, the defendants rely on the decisions of Conway J. in *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2008] OJ 374 (SCJ) ("*Longyear*") and McKinnon J., in *Cana International Distributing Inc. (c.o.b. as Sexy Living) v. Standard Innovation Corp.*, 2011 ONSC 752 (SCJ), in which the courts set out the general principle that costs on an unsuccessful interlocutory injunction should be payable forthwith to the defendants.

[11] In *Longyear*, Conway J. distinguished between injunctions on which the plaintiff was successful (in which case costs would generally not be payable forthwith) and those in which the defendants were successful (in which cases costs would generally be payable forthwith). Conway J. held (*Longyear*, at paras. 7-10):

> **As the defendants point out, there is a distinction between the cases cited by Boart, where the plaintiff had been successful on the interlocutory injunction, and the case where the defendant has successfully resisted the injunction motion, as in the one before me.** The reasoning behind this

distinction is well articulated by Sharpe in *Injunctions and Specific Performance*, 2nd Edition (looseleaf), Toronto, Canada Law Book, 2006, at pp. 2-106:

> Where the defendant successfully resists the plaintiff's motion for an interlocutory injunction, costs may be awarded forthwith ... On the other hand, it would be unusual to award costs of an interlocutory injunction motion to the successful plaintiff prior to trial. As there has been no final determination of the rights of the parties, but rather an order to protect the plaintiff's position pending trial, the preferable course is to reserve the questions of costs to the trial judge.

The rationale for deferring the costs decision does not apply where an injunction is denied. Whether or not this case proceeds to trial, and indeed even if Boart succeeds at trial, it does not follow that Boart was ever entitled to interlocutory relief. This extraordinary remedy is based on additional factors apart from the overall merits of the case. I determined that Boart could not meet the irreparable harm and balance of convenience criteria. I see no reason why Boart's inability to satisfy the injunction test should disentitle the defendants from receiving their costs at this point.

Rule 57.03(1)(a) of the *Rules of Civil Procedure* sets out the normal requirement for costs of a motion, namely that the court fix the costs of the motion and order them to be paid within 30 days, unless the court is satisfied that a different order would be more just.

There is nothing in my mind which makes it more just to depart from the usual rule, nor has Boart provided me with any substantive reasons to do so. The defendants were completely successful on the motion. The trial may or may not proceed. The defendants are entitled to their costs of this motion, as they would be on any other motion brought before trial. Costs should be fixed and payable within 30 days.

[Emphasis added.]

[12] I adopt the above analysis of Conway J. in *Longyear*.

[13] If the court were to defer costs of an injunction related to the factual and legal merits of the action, the unsuccessful defendant would not be entitled to costs reasonably incurred to address those issues even when, as in *Longyear*, the "extraordinary remedy is based on additional factors apart from the overall merits of the case".

[14] By way of example, a plaintiff who seeks an injunction without providing an undertaking or satisfying the requirements of irreparable harm or balance of convenience, still obligates the defendant to review all of the relevant evidence to address the first requirement

of a serious question to be tried. In such a case, the motion for injunctive relief could fail regardless of the merits of the action.

[15] In such circumstances, it is likely that the defendant's costs of preparing responding motion material on the merits would have (in some part) been costs incurred to prepare for trial. If the plaintiff had not brought the injunction, a successful trial defendant would obtain those costs at trial and an unsuccessful defendant would not be entitled to those costs.

[16] However, if the plaintiff chooses to bring an injunction and does not succeed, the unsuccessful defendant at the motion is still required to prepare on the issue of the merits (on the "serious question" test), and there is no certainty that the action will proceed to trial. Even if the action proceeds to trial, the fact that some evidentiary review may later be avoided by counsel (without considering all of the time required for an injunction to set out the evidence and documents in affidavit form) is not a reason to defer that portion of costs to the trial judge. A successful defendant at trial cannot claim twice for the review. An unsuccessful defendant at trial still incurred the costs of evidentiary review in response to the injunction, and ought to be entitled to those costs forthwith regardless of the result at trial.

[17] In the present case, I found that Catalyst had not satisfied the requirements of an undertaking, irreparable harm, or balance of convenience and, as such, was not entitled to injunctive relief. West Face was required to conduct a thorough review of the evidence to address the merits of the action, and those costs were reasonably incurred in response to the motion. West Face is entitled to those costs even if some unidentified portion of those costs related to evidentiary review that might also have been required if a trial takes place.

[18] With respect to the Contempt Motion, I accept the submissions of Moyse that the issue before the court was whether Moyse was in contempt of the Consent Order. The issue before the court at trial will be whether Moyse took confidential information with him when he left Catalyst and whether he passed that information on to West Face. Consequently, I do not accept Catalyst's submission that "[m]ost if not all of the evidence produced by the parties" with respect to the Contempt Motion "will form part of the trial record". Even if some of the evidentiary review will be relevant to trial, Moyse is still entitled to such costs to respond to the motion for the reasons I set out above.

[19] For the above reasons, I do not defer any of the costs (let alone the significant percentage sought by Catalyst) to trial. The defendants are entitled to payment of costs forthwith.

Issue 2: Should Moyse's conduct in deleting his personal browsing history be relevant to costs?

[20] I agree with Catalyst's submission that Moyse's conduct in deleting his personal browsing history is a relevant factor for costs since he "bears some responsibility for the contempt proceeding being brought against him".

[21] Moyse's counsel submits that "the amount Mr. Moyse seeks is significantly less than his actual costs, and less than he would normally be expected to seek in partial indemnity costs" since "[the reduced amount] also reflects Mr. Moyse's recognition that he could have protected his legitimate privacy concerns in ways that would have reduced the likelihood of Catalyst responding in the way that it did".

[22] Consequently, both parties agree that Moyse's conduct in deleting his personal browsing history after the Consent Order is relevant to costs, although Moyse submits that the amount he is seeking for costs reflects this reduction.

[23] Under Rule 57.01(i), the court can consider any other matter relevant to costs. The Contempt Motion would not have been brought if Moyse had not deleted his personal browsing history the day before he was scheduled to deliver his computer under the Consent Order. While I accepted Moyse's submission that such conduct did not constitute contempt of court, I do consider his conduct when I assess costs below.

Issue 3: What are the reasonable costs incurred by the defendants?

[24] All parties rely on the decision of the Court of Appeal in *Boucher v. Public Accountants Council for the Province of Ontario*, 2004 CanLII 14579 (CA) ("*Boucher*"), in which the Court set out the principle that "the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant" (*Boucher*, at para. 24) and that "the expectation of the parties concerning the quantum of a costs award is a relevant factor" (*Boucher*, at para. 38).

[25] All of the parties submitted a costs outline at the hearing, as required under Rule 57.01(6). On a partial indemnity scale (inclusive of taxes and disbursements), (i) Catalyst sought costs of $106,551.17; (ii) Moyse sought costs of $144,204.73; and (iii) West Face sought costs of $290,338.30.

[26] In their written costs submissions, Moyse sought costs of $110,000 on a partial indemnity scale, plus disbursements of $21,602.32 (inclusive of taxes), while West Face sought costs of $175,000 on a partial indemnity scale, plus disbursements of $37,347.68 (inclusive of taxes).

[27] Under Rule 57.01, the court can consider a list of factors (including any other matter relevant to costs). I address the relevant factors below.

[28] **The importance of the issues:** The consequences of the motions for both West Face and Moyse were significant.

[29] With respect to the Voting Injunction, Catalyst sought to prevent West Face from exercising its voting rights in WIND until trial of the action. Further, as initially framed, Catalyst also sought to forbid West Face's participation in the AWS-3 spectrum auction, which Mr. Riley described as a "unique, one-time, extremely valuable opportunity".

[30] Further, Catalyst's initial request for the Imaging Order sought to have the ISS forensically image over 172 West Face devices.

[31] With respect to the Contempt Order, Catalyst sought an order against Moyse (a) declaring that he was in contempt of court, (b) committing him to jail for a period to be determined by the court, and (c) in addition or in the alternative, that he be fined in an amount to be determined by the court.

[32] Given that Catalyst sought to enjoin West Face from voting a significant interest in a major asset, and put Moyse's liberty, reputation and integrity at stake, the defendants had no choice but to vigorously oppose the motions.

[33] **The complexity of the issues:** I do not find that the legal issues in the motion were complex. Catalyst and Moyse relied on settled case law dealing with the law of contempt, and the law relating to injunctive relief is also well-established.

[34] There was complexity in relation to some of the factual issues addressed by the parties. Catalyst accused West Face of using misappropriated confidential information to engage in three transactions (WIND, Callidus, and Arcan). Consequently, West Face was required to review all of the necessary evidentiary record with respect to the hiring of Moyse, its acquisition of WIND, its investment in Arcan, and its Callidus research. Moyse was required to retain a forensic computer expert to address whether Moyse had breached the Consent Order.

[35] **The results of the motion:** Both defendants were fully successful on the motion. Further, I agree with Moyse that Catalyst pursued the Contempt Motion even after its expert had acknowledged that there was no evidence Moyse had run the "Secure Delete" program, and without any evidence that Moyse had deleted Dropbox information from his personal computer.

[36] **The amount an unsuccessful party would reasonably expect to pay/Quantum of costs:** Catalyst raises several issues with respect to the quantum of costs sought by the defendants to submit that the costs sought are not the amount an unsuccessful party would reasonably expect to pay. Catalyst submits: (i) costs were increased as both counsel were newly retained for the motions; (ii) costs were excessive due to duplication, excessive hours, and multiple timekeepers; (iii) costs were dramatically more than the costs incurred in the Interim Injunction; (iv) disbursements of over $27,000 for West Face's information technology expert relate to matters at issue in the trial; and (v) West Face's photocopying expenses of $7,354.35 are almost twice that of Moyse and Catalyst combined.

[37] I agree with the submission of West Face and Moyse that the motion was "high stakes" and, as such, an unsuccessful party would reasonably expect both West Face and Moyse to vigorously oppose the motion and ensure that all of the available evidence and law was before the court.

[38] On the other hand, it was evident from the costs outlines handed to the court at the hearing that much more time was spent by counsel and other timekeepers for West Face (when West Face only had to address the Voting Injunction and Imaging Order) than by counsel for Catalyst, who prepared material for all of the motions.

[39] I accept the submissions of West Face that it had to respond to Catalyst's allegations, which could require significant work to prepare a full response. I also accept that West Face's request for $175,000 in fees (including HST) as compared to the actual partial indemnity fees of approximately $250,000 (including HST) reflects some deduction for some additional time needed as new counsel.

[40] However, the discrepancy between the time charged by counsel and costs attributed to quickly prepare as new counsel are factors in the overall assessment of an amount an unsuccessful party would reasonably expect to pay.

[41] **Relevant case law:** The applicable costs for any motion depend on the facts of the particular case. Nevertheless, I take some guidance from the following cases of costs ordered on a partial indemnity scale, which also involved high-stakes litigation seeking injunctive relief.

[42] In *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.*, [2007] OJ 2137 (SCJ), at para. 15, Cumming J. ordered approximately $81,000 in costs (inclusive of GST and disbursements) for the injunction motion (and a similar amount for a cross-motion).

[43] In Justice Lederer's earlier decision on the Interim Injunction (*Catalyst Capital Group Inc. v. Moyse*, [2015] OJ 1080 (SCJ)), the court ordered costs of the one-day injunction in the cause in the amount of $75,000.

[44] In *Longyear*, Conway J. ordered costs of a one-day injunction motion for the two primary defendants in the amount of $80,000 and $75,000, respectively, inclusive of GST and disbursements.

[45] **Summary:** The litigation on both the injunctive relief (for West Face) and the contempt order (for Moyse) was hard-fought and high stakes. It was reasonable to expect that the responding parties would consider all relevant evidence and ensure that a full record was before the court. Further, the fact review necessary to address the "serious question to be tried" test or whether Moyse was in contempt required some detailed analysis and (in the case of Moyse) assistance from forensic experts.

[46] Nevertheless, the legal issues before the court were not complex. While the volume of material was significant, it is not unusual for a full-day injunction similar to those considered by other courts in the cases cited above. Further, a costs award must take into account that new counsel were retained by both parties for the motions, and that Moyse's conduct in deleting his personal browsing history on the day prior to delivering his computer contributed to the bringing of the Contempt Motion.

[47] I also accept that the photocopying disbursements claimed by West Face are excessive and that much, if not all, of the disbursements of West Face's information technology expert (for collecting and imaging data) relate to issues in the litigation and are not disbursements of the injunction.

[48] Given all of the above factors, I fix costs in favour of West Face in the amount of $90,000 (inclusive of disbursements and taxes) and in favour of Moyse in the amount of $70,000 (inclusive of taxes and disbursements), payable by Catalyst to the defendants respectively within 30 days of this order.

GLUSTEIN J.

Date: 20150826

TAB E

Court of Appeal File No.
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

NOTICE OF APPEAL

THE PLAINTIFF APPEALS to the Court of Appeal from the Order of Justice Glustein dated July 7, 2015, made at Toronto.

THE APPELLANT ASKS that the Order be set aside and an Order be granted as follows:

1. An Order authorizing an Independent Supervising Solicitor ("ISS") to attend the Defendant West Face Capital Inc.'s premises to create forensic images of all electronic devices, including computers and mobile devices of the principals of West Face (the "Images") and to prepare a report which shall:

    a. identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was

This is Exhibit E referred to in the affidavit of Philip de-L Panet sworn before me, this 13th day of January 20 16

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located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and

b. in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:

i. who authored the email;

ii. to whom the email was sent, copied and/or blind copied;

iii. the date and time when the email was sent;

iv. the subject line of the email;

v. whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);

vi. the contents of the email; and

vii. if the email was deleted, when the email was deleted.

2. A declaration and finding that the Defendant Brandon Moyse is in contempt of the Order of Justice Firestone dated July 16, 2014 (the "Interim Order");

3. An Order that the determination of the appropriate sanction for Brandon Moyse's contempt be determined by another Judge of the Superior Court of Justice;

4. An award of costs of the motion below and this appeal; and

5. Such further and other relief as counsel may advise and this Honourable Court deems just.

THE GROUNDS OF APPEAL are as follows:

A. Background to this Action

1. The Appellant ("Catalyst") is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

2. The Respondent West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.

3. The Respondent Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014.

4. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").

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

6. Shortly thereafter, Catalyst commenced this action and brought an urgent motion for injunctive relief seeking, among other things, preservation of documents and enforcement of the Non-Competition Covenant.

B. The Interim Order

7. On June 30, 2014, the parties attended Motion Scheduling Court to schedule the return of Catalyst's motion for interim relief. At this attendance, the Defendants' counsel agreed to preserve the status quo with respect to relevant documents in the Defendants' power, possession or control pending the return of the interim injunction motion on July 16, 2014.

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

(a) The Respondents were ordered 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 Catalyst's action against the Respondents; and

(b) Moyse was ordered to turn over his personal computer and electronic devices (the "Devices") for the creation of a forensic image the data stored on the Devices (the "Images"), to be held in trust by his counsel pending the outcome of the motion for interlocutory relief.

C. Moyse's Contempt of the Interim Order

9. Catalyst's motion for interlocutory relief was heard on October 27, 2014. On November 10, 2014, Justice Lederer of the Superior Court of Justice released his decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images.

10. On February 17, 2015, the ISS delivered a its report (the "ISS Report") to counsel for Catalyst and Moyse.

11. The ISS Report revealed, among other things, that on July 16, 2014, at 8:53 a.m., approximately one hour before the commencement of Catalyst's motion for interim relief, Moyse installed a software programme entitled "Advanced System Optimizer 3". Advanced System Optimizer 3 includes a feature named "Secure Delete", which is said to permit a user to delete and over-write to military-grade security specifications data so that it cannot be recovered by forensic analysis.

12. Between July 16 and July 18, 2014, counsel for the parties exchanged correspondence regarding the retainer of the forensic expert for the purpose of creating the Images. On Friday, July 18, 2014, H&A eDiscovery Inc. ("H&A") was retained to create the Images. The parties agreed that Moyse's Devices would be delivered to H&A on Monday, July 21, 2014.

13. On Sunday, July 20, 2014, at 8:09 p.m., Moyse ran the Secure Delete programme on his personal computer. The date and time of this activity is recorded through the creation of a folder entitled "Secure Delete" on Moyse's computer.

14. In addition, Moyse admits that on July 20, 2014, he deleted his Internet browsing history from his personal computer. Moyse's browsing history would have included information related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

15. As a result of Moyse's conduct, it is impossible to know for sure what information, files and/or folders he deleted on July 20, 2014.

16. By intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse acted in contempt of Court.

17. The destruction of evidence caused by Moyse's breach of the Interim Order has prejudiced Catalyst's ability to obtain a fair trial of its claim on the merits.

18. The Interim Order with which Moyse intentionally did not comply clearly stated what was required of him and in particular Moyse knew that the use of the Secure Delete software programme and deletion of his Internet browsing history on July 20, 2014, was a breach of the Interim Order.

19. It is impossible for Moyse to purge his contempt. The data he deleted can never be recovered.

20. Through his intentional conduct, Moyse has blatantly and intentionally disrespected this Court's Order and has demonstrated a pronounced disdain for the legal system and the courts.

21. Moyse has materially impaired and frustrated the ISS process ordered by Justice Lederer on November 10, 2014. The purpose of Interim Order and the ISS process was to determine through a forensic analysis of the Devices whether, among other things, Moyse had communicated Catalyst's Confidential Information to West Face. By "scrubbing" data from his computer the night before he was to deliver it to H&A, Moyse knowingly rendered the forensic analysis largely useless.

22. As a result of Moyse's wrongful conduct, the only source of evidence of potential communications between Moyse and West Face of Catalyst's Confidential Information now resides on West Face's computers and devices.

D. Appeal of the Contempt Decision

23. The motion judge erred in dismissing the Appellant's motion for a declaration that Moyse acted in contempt of the Interim Order:

(a) The motion judge erred in interpreting the Interim Order to mean that "activities that relate to [the Respondents'] activities since March 27, 2014 was not intended to encompass all of the Respondents' activities, and/or that if this was the intended meaning, then the Interim Order was ambiguous.

(b) The motion judge erred in concluding that there was no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of his Internet searches.

(c) In particular, the motion judge erred in concluding that the Appellant could only speculate that information deleted from Moyse's computer included evidence of Moyse's activities related to his conduct while employed at the Appellant and/or with respect to issues raised in this action.

(d) In addition, the motion judge erred in concluding that, even if Moyse had acted in contempt of the Interim Order, it was appropriate to exercise his discretion to decline to make a finding of contempt. Such discretion is limited to situations

where a finding of contempt would impose an injustice in the circumstances of the case, and is not available in situations where a party's acts in violation of an order make subsequent compliance impossible.

E. Appeal of the ISS Decision

24. The motion judge erred in dismissing the Appellant's motion to create forensic images of the electronic images belonging to the principals of West Face and for the appointment of an ISS to review those images.

25. Justice Lederer had already determined that it was appropriate to authorize an ISS to review the Images of Moyse's devices prior to the discovery process in this Action.

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

27. The creation of forensic images of West Face's devices for review of an ISS prior to the discovery process in this Action is necessary to give effect to the Order of Justice Lederer, from which leave to appeal was unsuccessfully sought by the Respondents.

28. The motion judge erred by failing to consider the need to create the Images of West Face's devices and for an ISS review in order to give effect to the Order of Justice Lederer in this Action.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS: *(State the basis for the appellate court's jurisdiction, including (i) any provision of a statute or regulation establishing jurisdiction, (ii) whether the order appealed from is final or interlocutory, (iii) whether leave to appeal is required*

1. Sections 6(1)(b) and 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C-43;

2. The Order of Justice Glustein dismissing the Plaintiff's contempt motion is final;

3. The Order of Justice Glustein dismissing the Plaintiff's motion for an ISS is an interlocutory order in the same proceeding as the contempt motion, which lies to and is taken to the Court of Appeal; and

4. Leave to appeal is not required.

July 22, 2015

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THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

BRANDON MOYSE et al.
Defendants (Respondents)

Court of Appeal File No.
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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TAB F

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File 23622

This is Exhibit F referred to in the affidavit of Philippe L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

July 24, 2015

VIA EMAIL

Andrew Winton
Lax O'Sullivan Scott Lisus LLP
145 King Street West, Suite 2750
Toronto, ON M5H 1J8

Dear Mr. Winton:

Re: The Catalyst Capital Group Inc. v. Brandon Moyse et al.
Court File No. CV-14-507120

We have received your client's notice of appeal to the Court of Appeal purporting to appeal the Order of Justice Glustein dated July 7, 2015, which dismissed your client's motion to have Mr. Moyse found in contempt of court (the "Order"),.

The notice of appeal states that the Order is final, and that therefore an appeal lies to the Court of Appeal pursuant to s. 6(1)(b) and 6(2) of the *Courts of Justice Act*.

This is not correct in law. The Order is interlocutory, not final: *Simmonds v. Simmonds*, [2013] O.J. No. 4680 (C.A.). I have enclosed a copy of the decision for your reference.

An appeal of the Order only lies to the Divisional Court, with leave, pursuant to s. 19(1)(b) of the *Courts of Justice Act* and rule 62.02 of the *Rules of Civil Procedure*. The Court of Appeal has no jurisdiction to hear the appeal.

If your client withdraws the notice of appeal within five business days, Mr. Moyse will not seek costs against your client. If your client does not do so, we will bring a motion to strike the notice of appeal, and will rely on this letter to seek substantial indemnity costs on success of that motion.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Kris Borg-Olivier

Encl.

c: Matthew Milne-Smith / Andrew Carlson

Case Name:

Simmonds v. Simmonds

Between
Garfield Simmonds, Applicant (Appellant), and
Michelle Simmonds, Respondent (Respondent in Appeal)

[2013] O.J. No. 4680

2013 ONCA 479

117 O.R. (3d) 479

Docket: C56555

Ontario Court of Appeal
Toronto, Ontario

A. Hoy A.C.J.O., K.N. Feldman and J.M. Simmons JJ.A.

Heard: July 5, 2013.
Oral judgment: July 5, 2013.
Released: July 16, 2013.

(6 paras.)

Family law -- Maintenance and support -- Practice and procedure -- Courts -- Jurisdiction -- Contempt -- Orders -- Interim or interlocutory orders -- Appeals and judicial review -- Appeal by husband from dismissal of motion for a finding wife was in contempt for failing to comply with court order dismissed -- Motion judge found wife complied with order that required her to provide disclosure in respect of her income loss claim arising from motor vehicle accident that occurred in 2004 -- Court lacked jurisdiction as motion judge's order was interlocutory and not binding on trial judge.

Appeal From:

On appeal from the order of Justice E. Ria Tzimas of the Superior Court of Justice, dated January 22, 2013.

Counsel:

Peter M. Callahan, for the appellant.

Orlando da Silva Santos, for the respondent.

ENDORSEMENT

The judgment of the Court was delivered by

1 THE COURT (orally):-- The appellant appeals the January 22, 2013 order of the motion judge dismissing his motion for a finding that the respondent was in contempt of court because she had failed to comply with the August 3, 2012 order of Mossip J. requiring her to provide specified disclosure in respect of her income loss claim arising from the motor vehicle accident that occurred in 2004.

2 The motion judge reviewed the materials that had been provided and found that the respondent had complied with the order of Mossip J. and provided all relevant disclosure.

3 The appellant relies on *Pimiskern v. Brophey*, [2013] O.J. No. 505 to argue that an order dismissing a motion for contempt is a final order.

4 The respondent concedes that an order finding contempt is a final order but argues that because the motion judge dismissed the motion for contempt, the motion judge's order is interlocutory and not binding on the trial judge, and that an appeal accordingly does not lie to this court.

5 We agree with the respondent and reject the conclusion reached in *Pimiskern*.

6 This appeal is accordingly dismissed for lack of jurisdiction. Costs are fixed in the amount of $3,500 all inclusive.

A. HOY A.C.J.O.
K.N. FELDMAN J.A.
J.M. SIMMONS J.A.

cp/e/qljel/qlrdp/qlmll/qlpmg/qlhcs

TAB G

DAVIES

This is Exhibit G referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

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dwpv.com

Matthew Milne-Smith
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File No. 250486

July 24, 2015

WITH PREJUDICE

BY E-MAIL

Andrew Winton / Rocco Di Pucchio
Lax O'Sullivan Scott Lisus
145 King St. West, Suite 2750
Toronto, ON M5H 1J8

RE: The Catalyst Capital Group Inc. v. Moyse et. al. (Court File No. CV-14-507120)

Dear Andrew and Rocco:

We have reviewed your client's Notice of Appeal and Appellant's Certificate served July 22, 2015, as well as Mr. Borg-Olivier's letter of today's date and the 2013 *Simmonds v. Simmonds* decision of the Court of Appeal enclosed therein.

First, we note that Catalyst's Notice of Appeal recognizes that Justice Glustein's dismissal of the relief sought against West Face is an interlocutory order, as opposed to a final one, for the purposes of determining appeal routes. Second, we agree with Mr. Borg-Olivier that Justice Glustein's dismissal of Catalyst's motion for contempt against Mr. Moyse is also interlocutory. Therefore, no appeal of Justice Glustein's Order lies to the Court of Appeal, and section 6(2) of the *Courts of Justice Act* has no application to the appeal of the relief sought against West Face. Rather, as noted by Mr. Borg-Olivier, any appeal of the Order lies to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

In light of the foregoing, we agree that the Court of Appeal has no jurisdiction to hear the appeal. If Catalyst withdraws the Notice of Appeal within five business days, West Face will not seek costs against it. If not, West Face will join and/or support Mr. Moyse in the motion to strike the Notice of Appeal, and will seek substantial indemnity costs against Catalyst on success of that motion.

Yours very truly,

DAVIES WARD PHILLIPS & VINEBERG LLP

FOR
Matthew Milne-Smith

MMS/

cc Andrew Carlson, Kris Borg-Olivier, Rob Centa

TAB H

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

This is Exhibit H *referred to in the affidavit of* Philip de L. Panet *sworn before me, this* 13th *day of* January *20*16

A COMMISSIONER FOR TAKING AFFIDAVITS

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Parties)

**MOTION RECORD OF THE MOVING PARTY DEFENDANT (RESPONDENT)
WEST FACE CAPITAL INC.
(MOTION TO QUASH APPEAL)**

September 11, 2015

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Lawyers for the Defendant (Respondent),
Brandon Moyse

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Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Parties)

INDEX

TAB 1

Court of Appeal File No.: C60799
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff (Appellant)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants (Respondents)

NOTICE OF MOTION
(MOTION TO QUASH APPEAL)

The Defendant (Respondent) West Face Capital Inc. will make a motion to a panel of the Court of Appeal on a date and at a time to be fixed by the Registrar, at 130 Queen Street West, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

(a) an Order quashing the Plaintiff's appeal from the Order of Justice Glustein dated July 7, 2015 dismissing the Plaintiff's motion heard July 2, 2015, on the basis that the Court of Appeal lacks jurisdiction to hear the appeal;

(b) the costs of this motion; and

(c) such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

(a) the Plaintiff, The Catalyst Capital Group Inc., brought a motion for three exceptional remedies against the Defendants:

(i) first, an interlocutory injunction prohibiting West Face from voting its 35% share interest in WIND Mobile pending a determination of the issues raised in the action (the "**Voting Injunction**");

(ii) second, an interlocutory Order authorizing an Independent Supervising Solicitor (an "**ISS**") to create and review forensic images of West Face's servers and the electronic devices used by five individuals at West Face, at the expense of Mr. Moyse and West Face, to take place before discovery (the "**Imaging Order**"); and

(i) third, an Order that Mr. Moyse was in contempt of the interim consent Order of Justice Firestone dated July 16, 2014 (the "**Contempt Order**").

(b) Catalyst's motion was heard by Justice Glustein on July 2, 2015;

(c) on July 7, 2015, Justice Glustein released reasons dismissing Catalyst's motion in its entirety;

(d) Catalyst served its Notice of Appeal and Appellant's Certificate on July 22, 2015, purporting to appeal the Order of Justice Glustein to the Court of Appeal, on the basis of sections 6(1)(b) and 6(2) of the *Courts of Justice Act*;

(e) Catalyst's Notice of Appeal recognizes that Justice Glustein's dismissal of the relief sought against West Face was an interlocutory order for the purposes of determining appeal routes;

(f) contrary to Catalyst's Notice of Appeal, Justice Glustein's dismissal of Catalyst's motion for contempt against Mr. Moyse was also interlocutory;

(g) therefore, no appeal of Justice Glustein's Order lies to the Court of Appeal, and section 6(2) of the *Courts of Justice Act* has no application to the appeal of the relief sought against West Face;

(h) rather, any appeal of Justice Glustein's Order lay to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*;

(i) pursuant to the Practice Direction Concerning Civil Appeals in the Court of Appeal, motions to quash appeals are heard by a panel of the Court; and where the basis for the motion to quash is that the Court lacks jurisdiction to hear the appeal, the motion will be scheduled at an early date;

(j) sections 6(1), 6(2), 7(3), 19(1), and 134(3) of the *Courts of Justice Act*, R.S.O. 1990, c C.43;

(k) Rules 37, 61.16 and 62.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194;

(l) the Practice Direction Concerning Civil Appeals in the Court of Appeal; and

(m) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

(n) the Order of Honourable Justice Glustein dated July 7, 2015, and His Honour's reasons for decision; and

(o) such further and other evidence as counsel may advise and this Honourable Court may permit.

August 5, 2015

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THE CATALYST CAPITAL GROUP INC.
Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

NOTICE OF MOTION
(MOTION TO QUASH APPEAL)

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TAB 2

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff (Appellant)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants (Respondents)

AMENDED NOTICE OF MOTION
(MOTION TO QUASH APPEAL)

The Defendant (Respondent) West Face Capital Inc. will make a motion to a panel of the Court of Appeal on a date and at a time to be fixed by the Registrar, at 130 Queen Street West, Toronto.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

(a) an Order quashing the Plaintiff's appeal from the Order of Justice Glustein dated July 7, 2015 dismissing the Plaintiff's motion heard July 2, 2015, on the basis that the Court of Appeal lacks jurisdiction to hear the appeal;

(b) the costs of this motion; and

(c) such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

(a) the Plaintiff, The Catalyst Capital Group Inc., brought a motion for three exceptional remedies against the Defendants:

(i) first, an interlocutory injunction prohibiting West Face from voting its 35% share interest in WIND Mobile pending a determination of the issues raised in the action (the "**Voting Injunction**");

(ii) second, an interlocutory Order authorizing an Independent Supervising Solicitor (an "**ISS**") to create and review forensic images of West Face's servers and the electronic devices used by five individuals at West Face, at the expense of Mr. Moyse and West Face, to take place before discovery (the "**Imaging Order**"); and

(i) third, an Order that Mr. Moyse was in contempt of the interim consent Order of Justice Firestone dated July 16, 2014 (the "**Contempt Order**").

(b) Catalyst's motion was heard by Justice Glustein on July 2, 2015;

(c) on July 7, 2015, Justice Glustein released reasons dismissing Catalyst's motion in its entirety;

(d) Catalyst served its Notice of Appeal and Appellant's Certificate on July 22, 2015, purporting to appeal the Order of Justice Glustein to the Court of Appeal, on the basis of sections 6(1)(b) and 6(2) of the *Courts of Justice Act*;

(e) Catalyst's Notice of Appeal recognizes that Justice Glustein's dismissal of the relief sought against West Face was an interlocutory order for the purposes of determining appeal routes;

(f) contrary to Catalyst's Notice of Appeal, Justice Glustein's dismissal of Catalyst's motion for contempt against Mr. Moyse was also interlocutory;

(g) therefore, no appeal of Justice Glustein's Order lies to the Court of Appeal, and section 6(2) of the *Courts of Justice Act* has no application to the appeal of the relief sought against West Face;

(h) rather, any appeal of Justice Glustein's Order lay to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*;

(h.1) even if Justice Glustein's dismissal of Catalyst's motion for contempt against Mr. Moyse were final, Catalyst was still required to obtain leave to appeal the dismissal of its motion for relief against West Face before relying on section 6(2) of the *Courts of Justice Act*;

(h.2) in the alternative, the Court of Appeal should exercise its discretion under section 6(2) of the Courts of Justice Act to not hear the appeal of the dismissal of the relief sought against West Face;

(i) pursuant to the Practice Direction Concerning Civil Appeals in the Court of Appeal, motions to quash appeals are heard by a panel of the Court; and where the basis for the motion to quash is that the Court lacks jurisdiction to hear the appeal, the motion will be scheduled at an early date;

(j) sections 6(1), 6(2), 7(3), 19(1), and 134(3) of the *Courts of Justice Act*, R.S.O. 1990, c C.43;

(k) Rules 37, 61.16 and 62.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194;

(l) the Practice Direction Concerning Civil Appeals in the Court of Appeal; and

(m) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

~~(n)~~(a) the Order of Honourable Justice Glustein dated July 7, 2015, and His Honour's reasons for decision; and

~~(o)~~(b) such further and other evidence as counsel may advise and this Honourable Court may permit.

~~August 5,~~ September 10, 2015

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Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

AMENDED NOTICE OF MOTION
(MOTION TO QUASH APPEAL)

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THE CATALYST CAPITAL GROUP INC.
Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

MOTION RECORD OF THE MOVING PARTY, WEST FACE CAPITAL INC. (MOTION TO QUASH)

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TAB I

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Parties)

FACTUM OF THE MOVING PARTY DEFENDANT (RESPONDENT) WEST FACE CAPITAL INC. (MOTION TO QUASH APPEAL)

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Lawyers for the Defendant (Respondent), West Face Capital Inc.

This is Exhibit I *referred to in the affidavit of* Philip de L. Panet *sworn before me, this* 13th *day of* January *20* 16

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Brandon Moyse

PART I - OVERVIEW

1. A motion for an interlocutory injunction is by definition interlocutory and not final. To prevent unnecessary appeals from grinding actions to a halt, leave to appeal to the Divisional Court is required. The Plaintiff, however, has tried to leapfrog directly to the Court of Appeal without seeking or obtaining leave. This Court should quash the Plaintiff's Notice of Appeal for want of jurisdiction.

2. Catalyst's Notice of Appeal explicitly concedes that Justice Glustein's dismissal of the relief Catalyst sought against West Face (the "**West Face Order**") is an interlocutory order, not a final one. Catalyst claims jurisdiction in this Court solely by "piggybacking" the West Face appeal on to the appeal of its dismissed contempt motion against Mr. Moyse (the "**Moyse Order**"), which Catalyst claims lies to this Court. As a result, if the Moyse Order is also interlocutory, Catalyst has implicitly conceded that this Court has no jurisdiction over the appeal of the West Face Order.

3. West Face adopts and relies upon the submissions of Mr. Moyse that the Moyse Order is interlocutory. If those submissions are accepted, then West Face's additional submissions need not be considered.

4. Moreover, even if the Moyse Order were final (which is denied), Catalyst's reliance on section 6(2) of the *Courts of Justice Act* is misplaced and the appeal of the West Face Order must be quashed in any event. Section 6(2) only allows appeals of interlocutory orders to be taken to this Court once leave to appeal to the Divisional Court has been granted. Catalyst has neither sought nor obtained leave to appeal.

5. Furthermore, and in the alternative, section 6(2) is discretionary, and this Court should exercise its discretion to not hear the appeal of the West Face Order.

6. In sum, Catalyst's appeal of the West Face Order lies to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*. The purported appeal to this Court should be quashed.

PART II - THE FACTS

7. The Plaintiff, The Catalyst Capital Group Inc., brought a motion in the Superior Court of Justice (Court File No.: CV-14-507120) for three exceptional remedies against the Defendants:[1]

(a) first, an *interlocutory* injunction prohibiting the Defendant West Face Capital Inc. from voting its 35% share interest in WIND Mobile pending a determination of the issues raised in the action (the "**Voting Injunction**");

(b) second, an *interlocutory* order authorizing an Independent Supervising Solicitor (an "**ISS**") to create and review forensic images of West Face's servers and the electronic devices used by five individuals at West Face, at the expense of Mr. Moyse and West Face, to take place before discovery (the "**Imaging Order**"; the West Face Order dismissed Catalyst's motion for the Voting Injunction and the Imaging Order); and

(c) third, an Order that Mr. Moyse was in contempt of the interim consent Order of Justice Firestone dated July 16, 2014 (the "**Contempt Order**").[2]

---

1 See paragraph 1 of the Endorsement of Justice Glustein dated July 7, 2015 (the "**Endorsement**"), Brandon Moyse's Motion Record, Tab 3.

2 In fact, the relief sought by Catalyst against both West Face and Mr. Moyse in its Amended Notice of Motion was even more expansive. Catalyst narrowed its requests for relief to the Orders set out above only in its factum, after extensive affidavit evidence and cross-examination. See Catalyst's Amended Notice of Motion dated February 6, 2015, Brandon Moyse's Motion Record, Tab 5.

8. The Honourable Justice Glustein heard Catalyst's motion on July 2, 2015, and on July 7, 2015 His Honour released reasons dismissing Catalyst's motion in its entirety (the "**Endorsement**").[3]

9. Catalyst served its Notice of Appeal on July 22, 2015,[4] purporting to appeal the West Face Order directly to the Court of Appeal, on the basis of sections 6(1)(b) and 6(2) of the *Courts of Justice Act*.[5] Catalyst is not appealing Justice Glustein's dismissal of the Voting Injunction, but only the Imaging Order. However, Catalyst has never sought leave to appeal the dismissal of the Imaging Order.

10. Subsequently, on August 26, 2015, Justice Glustein released his Costs Endorsement, pursuant to which he ordered Catalyst to pay West Face and Mr. Moyse costs of $90,000 and $70,000, respectively, within 30 days.

PART III - ISSUES AND THE LAW

11. There are three issues on this motion:

(a) first, whether the Moyse Order is interlocutory, in which case the entire appeal must be quashed and the next two questions need not be considered;

(b) second, does this Court lack jurisdiction to hear Catalyst's appeal of the West Face Order[6] pursuant to section 6(2) of the *Courts of Justice Act*;

(c) third, even if this Court could assume jurisdiction to hear the appeal, whether it should exercise its discretion not to do so.

---

3 Endorsement, Brandon Moyse's Motion Record, Tab 3. See also the Order of Justice Glustein dated July 7, 2015 (the "**Order**"), Brandon Moyse's Motion Record, Tab 2.

4 Notice of Appeal of Catalyst dated July 22, 2015 Brandon Moyse's Motion Record, Tab 7.

5 Notice of Appeal of Catalyst, at pp. 8-9, Brandon Moyse's Motion Record, Tab 7.

6 Recognizing in this context that Catalyst purports to appeal only the dismissal of the Imaging Order, not the Voting Injunction.

12. For the reasons set out below, West Face respectfully submits that the answer to these questions is "yes". West Face adopts and relies on Mr. Moyse's submissions on the first issue.

A. This Court Does Not Have Jurisdiction to Hear the Appeal

13. Even if the Moyse Order were interlocutory, this Court does not have jurisdiction to hear Catalyst's appeal of the West Face Order under section 6(2) of the *Courts of Justice Act*. An appeal of the West Face Order only "lies to the Divisional Court" within the meaning of section 6(2) once leave to appeal that Order has been granted, and Catalyst has not been granted leave to appeal the West Face Order.

14. Generally, appeals of interlocutory orders of judges lie to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act*. This section provides:[7]

> **Divisional Court jurisdiction**
>
> 19. (1) An appeal lies to the Divisional Court from,
>
> (b) an interlocutory order of a judge of the Superior Court of Justice, with leave as provided in the rules of court;

15. In order to avoid section 19(1)(b), Catalyst purports to appeal both the Moyse Order and the West Face Order to the Court of Appeal, on the basis of sections 6(1)(b) and 6(2) of the *Courts of Justice Act*. Those sections provide:[8]

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

---

7 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 19(1)(b).
8 *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 6(1)(b) and 6(2).

> (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;
>
> **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.

16. In relying on these provisions, Catalyst explicitly recognized that the West Face Order is an *interlocutory* order for the purposes of determining appeal routes. Indeed, in its Notice of Appeal, Catalyst stated:

> The Order of Justice Glustein dismissing the Plaintiff's motion for an ISS **is an interlocutory order** in the same proceeding as the contempt motion, which lies to and is taken to the Court of Appeal;[9] [emphasis added]

17. For the reasons set out in Mr. Moyse's factum, the appeal of the Moyse Order does not lie to the Court of Appeal. However, even if it did, this Court would still have no jurisdiction under section 6(2) of the *Courts of Justice Act* to hear the appeal of the interlocutory West Face Order, because Catalyst has not obtained leave to appeal.

18. As very recently confirmed by this Court in the 2015 decision of *Waldman v. Thomson Reuters Canada Ltd.*:

---

[9] Notice of Appeal of Catalyst, Brandon Moyse's Motion Record, Tab 7. As an aside, we note that even if Catalyst had not conceded this point, there is no doubt that the West Face Order is interlocutory. Catalyst's motion for the Imaging Order was in the nature of an *Anton Piller* injunction or a premature motion under Rule 30.06 (Justice Glustein made no finding as to whether the onerous test for an *Anton Piller* order applied because he agreed with West Face that even under the lower Rule 30.06 threshold, Catalyst's motion failed: See paragraph 43 of the Endorsement). *Anton Piller* motions and motions under Rule 30.06 are interlocutory. See, for example, *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2001] O.J. No. 477 (Div. Ct.), West Face's Book of Authorities, Tab 8, in which the defendants properly sought leave to appeal to the Divisional Court from a decision granting an *Anton Piller* Order (pursuant to Rule 19(1)(b) of the *Courts of Justice Act*), and *Leduc v. Roman*, [2009] O.J. No. 681 (S.C.J.), West Face's Book of Authorities, Tab 6, in which a master's order dismissing a Rule 30.06 motion was appealed to a single judge of the Superior Court (pursuant to section 17(a) of the *Courts of Justice Act*, which provides that an appeal lies to the Superior Court of Justice from an interlocutory order of a master).

> **An appeal from an interlocutory order only "lies to the Divisional Court" within the meaning of s. 6(2) once leave to appeal that order has been granted**: ... If the motion judge's order refusing to approve the settlement agreement was interlocutory, then this court still would not have jurisdiction to hear the appeal from that order under s. 6(2) of the *CJA* unless and until the appellant obtained leave to appeal to the Divisional Court. Only then could the appellant bring a motion, under s. 6(3) of the *CJA* to transfer that appeal to this court. Section 6(3) of the *CJA* provides that:
>
> > The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2).[10] [emphasis added]

19. In other words, Catalyst was required to first seek and obtain leave to appeal the West Face Order before it could then invoke section 6(2).

20. This Court has applied the foregoing principle repeatedly dating back to the 1993 decision of *Albert v. Spiegel*.[11] As explained in *Albert*, under section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02(1), appeals of interlocutory orders can only be made with leave from a judge of the Superior Court of Justice other than a judge who made the interlocutory order.[12] Section 6(2) of the *Courts of Justice Act* does not give the Court of Appeal the jurisdiction or authority to either grant such leave or otherwise

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10 *Waldman v. Thomson Reuters Canada Ltd.*, [2015] O.J. No. 395 at para. 17 (C.A.) [*Waldman*], West Face's Book of Authorities, Tab 9.

11 See *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.) [*Albert*], West Face's Book of Authorities, Tab 2; *Merling v. Southam Inc.*, [2000] O.J. No. 123 (C.A.), West Face's Book of Authorities, Tab 7; *Cole v. Hamilton (City)*, [2002] O.J. No. 4688 (C.A.), West Face's Book of Authorities, Tab 4; and *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2004] O.J. No. 10 (C.A.) [*Diversitel*], West Face's Book of Authorities, Tab 5. See also *813302 Ontario Ltd. v. 815970 Ontario Inc.*, [1996] O.J. No. 4531 (C.A.), West Face's Book of Authorities, Tab 1.

12 Pursuant to Rule 62.02(1.1), in Toronto, motions for leave to appeal are heard by a judge of the Divisional Court sitting as a judge of the Superior Court of Justice. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 62.02(1) & (1.1).

ignore that essential pre-requisite.[13] In short, this Court cannot grant Catalyst the leave it requires.

21. This Court's decision in *Diversitel Communications Inc. v. Glacier Bay Inc.* is particularly relevant to this motion. In *Diversitel*, the appellant, Glacier Bay, brought a motion for the production of documents by the respondent, Diversitel. Diversitel brought a cross-motion for summary judgment. The motions judge dismissed Glacier Bay's motion for the production of documents and, at the same time, allowed Diversitel's cross-motion (thereby rendering judgment in favour of Diversitel and dismissing Glacier Bay's counterclaim). Glacier Bay then sought to appeal, to the Court of Appeal, both the final order granting judgment against it and dismissing its counterclaim, and the interlocutory order of the motions judge dismissing its motion for the production of documents, without having obtained leave to appeal the interlocutory order. Diversitel brought a motion for an order quashing that part of the appeal which related to the motions judge's refusal to order the production of documents. In allowing Diversitel's motion, this Court stated:

> The decision of the motions judge refusing to order the production of documents is clearly interlocutory and leave to appeal must be obtained from a judge of the Divisional Court pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 even though the appellant has a right of appeal to this court on the judgment and the dismissal of the counter-claim. If the Divisional Court grants leave then the appellant may bring a motion pursuant to s. 6(2) of the *Courts of Justice Act* for an order directing that the productions issue be heard with the appeal related to the judgment in the action and the dismissal of the counter-claim... I would therefore quash that part of the appeal which relates to the productions issue.[14]

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13 *Albert*, *supra* note 11 at para. 5, West Face's Book of Authorities, Tab 2.

14 *Diversitel*, *supra* note 11 at para. 6, West Face's Book of Authorities, Tab 5.

22. The strictness of the rule that leave must have been previously obtained before section 6(2) can apply is intentional and important. If this rule did not exist, a litigant could obtain an unfair advantage by effectively bypassing the important threshold test necessary for obtaining leave to appeal. The rule's importance is evident from *Waldman* itself, in which this Court quashed the appeal despite the fact that both the appellant and the respondent were allied in interest and argued in favour of this Court's jurisdiction.[15]

23. In sum, even if Catalyst could satisfy the first requirement of section 6(2) – that "an appeal in the same proceeding" as the West Face Order "lies to and is taken to the Court of Appeal" (which is denied for the reasons set out above) – Catalyst has not satisfied the second requirement of section 6(2). It must first obtain leave to appeal pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

B. In the Alternative, this Court Should Exercise its Discretion Not to Hear the Appeal

24. Even if this Honourable Court could assume jurisdiction to hear the appeal of the West Face Order on the basis that the order with respect to Mr. Moyse is final, and not interlocutory (which is denied for the reasons set out above), it should exercise its discretion not to do so.

25. In the 2013 decision of *Cavanaugh v. Grenville Christian College*, this Court confirmed that the jurisdiction to combine appeals under section 6(2) of the *Courts of Justice Act* is discretionary, not mandatory. The Court noted that while the purposes of

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15 *Waldman*, *supra* note 10 at paras. 1-3 and 25, West Face's Book of Authorities, Tab 10.

section 6(2) include to promote consistent results, decrease costs, and use judicial resources efficiently, there will be cases when "factors relevant to the administration of justice" override the efficiencies achieved by combing appeals.[16]

26. Indeed, the Court held that *Cavanaugh* was one such case, and refused to hear the appeal of an interlocutory order even though it had jurisdiction to hear the appeal of a final order made in the same proceeding. The Court reasoned that, in the circumstances of that case, there was "little to be gained by joinder", because there was "no risk of inconsistent results and very little overlap in the matters to be addressed on the two appeals".[17]

27. The Court's reasoning in *Cavanaugh* applies to Catalyst's dual appeals of the Moyse Order and the West Face Order. The motion for (and the appeal of) the Moyse Order depends solely on whether Mr. Moyse acted in contempt of the previous interim Order of Justice Firestone by: (i) deleting his personal web browsing history; and (ii) buying and allegedly using "scrubbing" software. As is apparent from Justice Glustein's Endorsement, West Face had no involvement in Mr. Moyse's browsing or scrubbing history.

28. Conversely, the West Face Order turned on whether there was any evidence that West Face attempted to destroy evidence or otherwise evade its discovery obligations. The determination of Catalyst's motion for the West Face Order had nothing to do with whether Mr. Moyse acted in contempt of the previous Order of Justice Firestone.

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16 *Cavanaugh v. Grenville Christian College*, [2013] O.J. No. 1007 at paras. 86-87 (C.A.) [*Cavanaugh*], West Face's Book of Authorities, Tab 3.

17 *Cavanaugh*, *supra* note 16 at para. 88, West Face's Book of Authorities, Tab 3.

29. Catalyst's argument that the two orders are linked is further undermined by its own conduct. When Catalyst initially launched its motion in January 2015, it sought relief against West Face only, and the grounds for such relief (as stated in Catalyst's original Notice of Motion) did not include any allegation of contempt by Mr. Moyse. In other words, Catalyst itself believed that it had grounds to seek the West Face Order independent of any alleged contempt by Mr. Moyse. Catalyst only amended its Notice of Motion in February 2015 to add the allegations of contempt against Mr. Moyse.[18]

30. In short, Catalyst's appeals of the orders sought against the two Respondents are completely distinct. They are based on different facts and different law. There would be little to nothing gained by hearing the two appeals together.

31. On the other hand, scarce judicial resources will be wasted if Catalyst is permitted to circumvent the important step of obtaining leave. Catalyst has not proven: (a) that there is a conflicting decision and that it is desirable that leave to appeal be granted; nor (b) that there is good reason to doubt the correctness of Justice Glustein's decision and that the proposed appeal involves matters of importance that transcend the interests of the parties such that leave to appeal should be granted.[19] Until Catalyst can prove that it can meet this conjunctive test, then by definition Catalyst's motion is not worthy of consideration on appeal.

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18 See Catalyst's Notice of Motion dated January 13, 2015, Brandon Moyse's Motion Record, Tab 4; and Catalyst's Amended Notice of Motion dated February 6, 2015, Brandon Moyse's Motion Record, Tab 5.

19 Rule 62.02(4) provides that leave to appeal "shall not be granted" unless these grounds are met. See *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 62.02(4).

C. Conclusion

32. The Court of Appeal has no jurisdiction to hear the appeal of the West Face Order. Because the Moyse Order and the West Face Order are both interlocutory, any appeal of either or both of them lies to the Divisional Court, with leave, pursuant to section 19(1)(b) of the *Courts of Justice Act* and Rule 62.02 of the *Rules of Civil Procedure*.

PART IV - ORDER REQUESTED

33. West Face respectfully requests that Catalyst's Notice of Appeal be quashed, with costs on a substantial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of September, 2015.

Matthew Milne-Smith
DAVIES WARD PHILLIPS & VINEBERG LLP

Lawyer for the Moving Party Defendant
(Respondent), West Face Capital Inc.

Andrew Carlson
DAVIES WARD PHILLIPS & VINEBERG LLP

Lawyer for the Moving Party Defendant
(Respondent), West Face Capital Inc.

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *813302 Ontario Ltd. v. 815970 Ontario Inc.*, [1996] O.J. No. 4531 (C.A.)
2. *Albert v. Spiegel*, [1993] O.J. No. 1562 (C.A.)
3. *Cavanaugh v. Grenville Christian College*, [2013] O.J. No. 1007 (C.A.)
4. *Cole v. Hamilton (City)*, [2002] O.J. No. 4688 (C.A.)
5. *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2004] O.J. No. 10 (C.A.)
6. *Leduc v. Roman*, [2009] O.J. No. 681 (S.C.J.)
7. *Merling v. Southam Inc.*, [2000] O.J. No. 123 (C.A.)
8. *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2001] O.J. No. 477 (Div. Ct.)
9. *Waldman v. Thomson Reuters Canada Ltd.*, [2015] O.J. No. 395 (C.A.).

TAB B

SCHEDULE "B"
RELEVANT STATUTES

Courts of Justice Act, R.S.O. 1990, Ch. 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. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17).

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. R.S.O. 1990, c. C.43, s. 6 (2); 1996, c. 25, s. 9 (17).

Idem

(3) The Court of Appeal may, on motion, transfer an appeal that has already been commenced in the Divisional Court or the Superior Court of Justice to the Court of Appeal for the purpose of subsection (2). R.S.O. 1990, c. C.43, s. 6 (3); 1996, c. 25, s. 9 (17).

Appeals to Superior Court of Justice

17. An appeal lies to the Superior Court of Justice from,

(a) an interlocutory order of a master or case management master;

(b) a certificate of assessment of costs issued in a proceeding in the Superior Court of Justice, on an issue in respect of which an objection was served under the rules of court. R.S.O. 1990, c. C.43, s. 17; 1996, c. 25, ss. 1 (1), 9 (17).

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. 2006, c. 21, Sched. A, s. 3.

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

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. R.R.O. 1990, Reg. 194, r. 30.06.

MOTION FOR LEAVE TO APPEAL

Leave to Appeal from Interlocutory Order of a Judge

62.02 (1) Leave to appeal to the Divisional Court under clause 19 (1) (b) of the *Courts of Justice Act* shall be obtained from a judge other than the judge who made the interlocutory order. O. Reg. 171/98, s. 23 (1); O. Reg. 170/14, s. 22 (1).

(1.1) If the motion for leave to appeal is properly made in Toronto, the judge shall be a judge of the Divisional Court sitting as a Superior Court of Justice judge. O. Reg. 171/98, s. 23 (1); O. Reg. 292/99, s. 2 (2).

Motion in Writing

(2) The motion for leave to appeal shall be heard in writing, without the attendance of parties or lawyers. O. Reg. 170/14, s. 22 (2).

Notice of Motion

(3) Subrules 61.03.1 (2) and (3) apply, with necessary modifications, to the notice of motion for leave. O. Reg. 170/14, s. 22 (2).

Grounds on Which Leave May Be Granted

(4) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4).

Procedures

(5) Subrules 61.03.1 (4) to (19) (procedure on motion for leave to appeal) apply, with the following and any other necessary modifications, to the motion for leave to appeal:

1. References in the subrules to the Court of Appeal shall be read as references to the Divisional Court.

2. For the purposes of subrule 61.03.1 (6), only one copy of each of the motion record, factum, any transcripts and any book of authorities is required to be filed.

3. For the purposes of subrule 61.03.1 (10), only one copy of each of the factum, any motion record and any book of authorities is required to be filed. O. Reg. 170/14, s. 22 (3).

(6), (6.1), (6.2) REVOKED: O. Reg. 170/14, s. 22 (3).

(6.3) REVOKED: O. Reg. 394/09, s. 30 (3).

Reasons for Granting Leave

(7) The judge granting leave shall give brief reasons in writing. R.R.O. 1990, Reg. 194, r. 62.02 (7).

Subsequent Procedure Where Leave Granted

(8) Where leave is granted, the notice of appeal required by rule 61.04, together with the appellant's certificate respecting evidence required by subrule 61.05 (1), shall be delivered within seven days after the granting of leave, and thereafter Rule 61 applies to the appeal. R.R.O. 1990, Reg. 194, r. 62.02 (8).

THE CATALYST CAPITAL GROUP INC.
Plaintiff and BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

FACTUM OF THE MOVING PARTY, WEST FACE CAPITAL INC. (MOTION TO QUASH)

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith LSUC #44266P
Andrew Carlson LSUC #55850N
Tel: 416.863.0900
Fax: 416.863.0871

Lawyers for the Defendant (Respondent),
West Face Capital Inc.

TAB J

COURT OF APPEAL FOR ONTARIO
OSGOODE HALL
130 QUEEN STREET WEST
TORONTO, ONTARIO M5H 2N5

COUR D'APPEL DE L'ONTARIO
OSGOODE HALL
130, RUE QUEEN OUEST
TORONTO, ONTARIO M5H 2N5

Thursday, September 17, 2015

Mr. Andrew Carlson
Davies Ward Phillips & Vineberg LLP
155 Wellington St. West
40th Floor
Toronto, Ontario
M5V 3J7, Canada

This is Exhibit J referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

Dear Mr. Carlson:

The Catalyst Capital et al. v. Moyse, Brandon et al.
Court of Appeal File Number : M45387 / M45378

The motion has been scheduled for hearing on: Thursday, November 5, 2015, at 10:30 AM.

Having reviewed the issues raised in the motion and counsels' time estimates in those cases in which the court has received estimates, the court has assigned a total of 30 minutes for the argument of the motion, allocated as follows:

Total Moving Party : 20 minutes
Total Respondent(s) : 10 minutes
Total Intervenor(s) :

The day fixed for the hearing of this motion and the time allocation may be varied only on application to the court's List Judge. Applications to the List Judge are ordinarily heard by telephone conference call and may be arranged through the Appeal Scheduling Unit at (416) 327-4615 (civil) or (416) 327-5034 (criminal).
INTERPRETER: If it is anticipated that any or all of these proceedings will be conducted in the French language and that French or English interpretation will be required at the hearing, please contact the Court of Appeal by phone at (416) 3327-5020 and choose option #2 to obtain and complete the Court Interpreter Request Form. Please notify the Appeal Scheduling Unit immediately for criminal matters at (416) 327-5034, for civil matters at (416) 327-1730, or by fax at (416) 327-6256 if the motion has been settled or abandoned so that the court may schedule another appeal in its place.

Alison Warner
Senior Legal Officer
Court of Appeal for Ontario

TO:

Mr. Matthew Milne-Smith
Davies, Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto, Ontario
M5V 3J7, Canada
Counsel for the Appellant

Mr. Andrew Carlson
Davies Ward Phillips & Vineberg LLP
155 Wellington St. West
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Toronto, Ontario
M5V 3J7, Canada
Counsel for the Appellant

TO:

Mr. Chris G. Paliare
Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
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M5V 3H1, Canada
Counsel for the Respondent

Mr. Robert A. Centa
Paliare Roland Rosenberg Rothstein LLP
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Counsel for the Respondent

Mr. Kristian Borg-Oliver
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Mr. Rocco Di Pucchio
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145 King Street West
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Counsel for the Respondent

Mr. Andrew J. Winton
Lax O'Sullivan Scott Lisus LLP
Barristers & Solicitors
Suite 2750
145 King Street West
Toronto, Ontario
M5H 1J8, Canada
Counsel for the Respondent

HR-SCHEM

TAB K

Drover, Lisa

From: Milne-Smith, Matthew
Sent: October 15, 2015 10:39 AM
To: Andrew Winton (awinton@counsel-toronto.com)
Cc: Carlson, Andrew; 'Robert.Centa@paliareroland.com'
Subject: RE: Motion to quash [IWOV-CLIENT.FID45653]

This is Exhibit K referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016.

A COMMISSIONER FOR TAKING AFFIDAVITS

Andrew,

It's now Thursday.

Matt

From: Andrew Winton [mailto:awinton@counsel-toronto.com]
Sent: October 7, 2015 4:18 PM
To: Milne-Smith, Matthew
Cc: 'Robert.Centa@paliareroland.com'; Carlson, Andrew
Subject: RE: Motion to quash [IWOV-CLIENT.FID45653]

Matt,

We inadvertently mis-scheduled the due date for our materials. We'll have them to you by Tuesday.

Regards,

Andrew

Andrew Winton
Lax O'Sullivan Scott Lisus LLP

Direct: (416) 644-5342

From: Milne-Smith, Matthew [mailto:MMilne-Smith@dwpv.com]
Sent: October-07-15 1:00 PM
To: Andrew Winton
Cc: 'Robert.Centa@paliareroland.com'; Carlson, Andrew
Subject: Motion to quash

Andrew, by my reckoning your factum was due yesterday. Can we expect it imminently?

Matt

DAVIES

Matthew Milne-Smith | Bio

155 Wellington Street West
Toronto, ON M5V 3J7

T 416.863.5595
mmilne-smith@dwpv.com

DAVIES WARD PHILLIPS & VINEBERG LLP

TAB L

FORM 37B

Courts of Justice Act

CONFIRMATION OF MOTION

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff (Appellant)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants (Respondents)

CONFIRMATION OF MOTION

I, Matthew Milne-Smith, lawyer for the moving party, West Face Capital Inc., confirm that I have conferred with Andrew Winton, lawyer for the Responding Party The Catalyst Capital Group Inc., and confirm that the motion to be heard on November 5, 2015 will proceed on the following basis:

[ ] for an adjournment on consent to ..... *(date)*

[ ] for a contested adjournment to ..... *(date)*, for the following reason: *(specify who is requesting the adjournment and why, and who is opposing it and why)*

[x] for a consent order

[ ]for a hearing of all the issues

[ ] for a hearing of the following issues only *(specify)*

The presiding judge will be referred to the following materials: West Face`s Motion Record, West Face`s Factum and West Face`s Brief of Authorities

I estimate that the time required for the motion, including costs submissions, will be 5 minutes to settle the terms of the Order.

October 30, 2015

This is Exhibit L *referred to in the affidavit of* Philip de L. Paret *sworn before me, this* 13th *day of* January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

TO LAX O'SULLIVAN SCOTT LISUS LLP
Suite 2750
145 King Street West,
Toronto, ON M5H 1J8

Rocco DiPucchio / Andrew Winton
Tel: 416.598.1744
Fax: 416.598.3730

Lawyers for the Plaintiff (Appellant),
The Catalyst Capital Group Inc.

AND TO: PALIARE ROLAND LLP
35th Floor
155 Wellington Street West
Toronto, ON M5V 3H1

Robert Centa / Kristian Borg-Olivier / Denise Cooney
Tel: 416.646.4300
Fax: 416.646.4301

Lawyers for the Defendant (Respondent),
Brandon Moyse

TAB M

DAVIES

155 Wellington Street West
Toronto ON M5V 3J7
dwpv.com

November 3, 2015

Andrew Carlson
T 416.367.7437
F 416 863 0871
acarlson@dwpv.com

File No. 250486

This is Exhibit M referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

BY E-MAIL

Court of Appeal for Ontario
130 Queen Street West
Toronto, ON M5H 2N5

Attention: Lily Miranda

Dear Ms Miranda:

Court of Appeal File No. C60799

We are counsel to the Defendant (Respondent) West Face Capital Inc. in the above-noted matter. You have requested that we provide a letter confirming the status of the two motions filed in the above-noted matter.

Both West Face and the Defendant (Respondent) Brandon Moyse filed motions to quash the appeal of the Plaintiff (Appellant) The Catalyst Capital Group Inc. from the Order of Justice Glustein dated July 7, 2015. West Face's motion to quash Catalyst's appeal of the relief it had sought against West Face is filed under Motion File No. M45387. Mr. Moyse's motion to quash Catalyst's appeal of the relief it had sought against him is filed under Motion File No. M45378. Both motions are scheduled to be heard on Thursday, November 5, 2015, at 10:30 a.m.

We have conferred with Andrew Winton, counsel to Catalyst, and confirm that West Face's motion to quash will proceed on consent. We estimate that the only time required at the hearing for West Face's motion will be 5 minutes to settle the terms of the Order.

We have conferred with Kris Borg-Olivier, counsel to Mr. Moyse, and confirm that Mr. Moyse's motion to quash will proceed on a contested basis.

Please do not hesitate to contact me if you have any questions.

Yours very truly,

Andrew Carlson

AC/ld

cc Matthew Milne-Smith
Rocco DiPucchio, *Lax O'Sullivan Scott Lisus LLP*
Andrew Winton, *Lax O'Sullivan Scott Lisus LLP*
Robert A. Centa, *Paliare Roland Rosenberg Rothstein LLP*
Kristian Borg-Olivier, *Paliare Roland Rosenberg Rothstein LLP*
Denise Cooney, *Paliare Roland Rosenberg Rothstein LLP*

TAB N

This is Exhibit N referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

Court of Appeal File No.: C60799/M45387
Superior Court File No.: CV-14-507120

COURT OF APPEAL FOR ONTARIO

THE HONOURABLE ~~ASSOCIATE CHIEF~^ JUSTICE HOY	)	THURSDAY THE 5TH
THE HONOURABLE JUSTICE MACFARLAND	)	DAY OF NOVEMBER, 2015
THE HONOURABLE JUSTICE LAUWERS	)	

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents/Moving Party)

ORDER

THIS MOTION by the Defendant (Respondent) West Face Capital Inc. ("**West Face**") for an Order quashing the Plaintiff's appeal from the Order of Justice Glustein dated July 7, 2015 dismissing the Plaintiff's motion heard July 2, 2015, was heard this day at Osgoode Hall, 130 Queen Street West, Toronto, Ontario.

ON READING the Motion Records, Facta, and Books of Authorities filed by "on the consent of" the parties, and on hearing the submissions of counsel for the parties:

1. THIS COURT ORDERS that the appeal bearing Court of Appeal court file number C60799 is hereby dismissed as against West Face.

2. THIS COURT ORDERS that the dismissal of the appeal against West Face is without prejudice to any future motion by the Plaintiff to transfer an appeal from the Order of Justice Glustein dated July 7, 2015, that lies to the Divisional Court, to this Court.

3. THIS COURT ORDERS that the costs of this motion are fixed in the amount of $2,500.00 (inclusive of disbursements and HST) and payable by the Plaintiff to West Face forthwith.

THIS ORDER BEARS INTEREST at the rate of 3% per cent per year commencing on December 4, 2015.

D. MURPHY
REGISTRAR
COURT OF APPEAL FOR ONTARIO

ENTERED AT / INSCRIPT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:

NOV - 6 2015

PER / PAR:

THE CATALYST CAPITAL GROUP INC.
Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court of Appeal File No.: C60799/M45387

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at Toronto

ORDER

DAVIES WARD PHILLIPS & VINEBERG LLP
155 WELLINGTON STREET WEST
TORONTO ON M5V 3J7

Andrew Carlson LSUC 58850N
Email: acarlson@dwpv.com
Tel: 416.367.7437
Fax: 416.863.0871

Lawyers for the Defendant (Respondent)
West Face Capital Inc.

136

TAB O

COURT OF APPEAL FOR ONTARIO

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONCA 784
DATE: 20151117
DOCKET: M45378 M45387 (C60799)

Hoy A.C.J.O., MacFarland, and Lauwers JJ.A.

BETWEEN

The Catalyst Capital Group Inc.

Plaintiff (Appellant/Responding Party)

and

Brandon Moyse and West Face Capital Inc.

Defendants (Respondents/Moving Party)

Rocco Di Pucchio, for the appellant/responding party

Kristian Borg-Olivier and Denise Cooney, for the respondents/moving party Brandon Moyse

Andrew Carlson, for the respondents/moving party West Face Capital Inc.

Heard: November 5, 2015

Motion to quash an appeal from the judgment of Justice B.T. Glustein of the Superior Court of Justice, dated July 7, 2015, with reasons reported at 2015 ONSC 4388.

Lauwers J.A.:

[1] The motion judge dismissed the motion of Catalyst Capital Group Inc. for a declaration that its former employee, Brandon Moyse, is in contempt of the July 16, 2014 order of Firestone J. for failing to preserve certain electronic records relating to Catalyst.

[2] The moving party, Mr. Moyse, seeks to quash Catalyst's appeal on the basis that the judgment appealed from is interlocutory and therefore falls within the jurisdiction of the Divisional Court under s. 19 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. For the reasons set out below, I would quash the appeal.

FACTUAL BACKGROUND

[3] Mr. Moyse is a former employee of Catalyst. He accepted employment with a competitor of Catalyst. Catalyst was concerned that he had or would impart its confidential information to his new employer.

[4] Eventually, on Catalyst's motion, Firestone J. issued an interim consent order for injunctive relief, dated July 16, 2014. The court ordered that "Moyse and [his new employer], and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, that relate to Catalyst." Paragraph 5 of this order provided:

> THIS COURT FURTHER ORDERS that Moyse shall turn over any personal computer and electronic devices owned by him or within his power of control (the "Devices") to his counsel, Grosman, Grosman and Gale LLP, ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Image"), to be conducted by a professional firm as agreed to between the parties.

[5] Catalyst brought a motion for a declaration that Mr. Moyse was in contempt of the consent order.

MOTION JUDGE FOUND NO CONTEMPT

[6] The motion judge's reasons set out a lengthy review of the evidence. He was unable to find "beyond a reasonable doubt" that Catalyst had established that Mr. Moyse was in contempt. His specific findings are relevant to Catalyst's argument on this motion to quash.

[7] With respect to Mr. Moyse's actions in deleting the personal browsing history from his computer, the motion judge found, at para. 69: "there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches."

[8] With respect to Mr. Moyse's conduct in buying and using software to "scrub" files from his personal computer before delivering it, the motion judge stated, at para. 86:

> I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

ANALYSIS

[9] Mr. Moyse argues that an order dismissing a contempt motion is interlocutory for the purpose of an appeal, and therefore lies to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*. He relies on this court's brief endorsement in *Simmonds v. Simmonds,* 2013 ONCA 479, which was an appeal from an order of a motion judge dismissing a motion for a finding of contempt against the respondent's spouse in a family dispute. There, the motion judge found that the respondent had complied with the disclosure order in question. In *Simmonds,* this court accepted the respondent's argument that while an order finding contempt is final, the dismissal of the motion for contempt was interlocutory: the motion judge's finding was not binding on the trial judge. The court rejected the conclusion to the contrary found in *Pimiskern v. Brophey,* [2013] O.J. No. 505 (S.C.).

[10] Catalyst argues that the ruling precedent is this court's decision in *Sabourin and Sun Group of Companies v. Laiken*, 2013 ONCA 530, in which the court heard an appeal from a decision dismissing a contempt motion. That case was about the possible breach of a *Mareva* injunction. I observe that the court did not advert to the interlocutory/final distinction or to the question of jurisdiction at all. The issue appears not to have been argued.

[11] In fairness to the parties, this court's decisions on the final/interlocutory distinction have not been models of clarity. Much ink has been spilled, and court and counsel time wasted in exploring the nuances. But the root principle that all can and do accept was expressed by Middleton J.A in *Hendrickson v. Kallio*, [1932] O.R. 675:

> The interlocutory order from which there is no appeal is an order which does not determine the real matter in dispute between the parties -- the very subject matter of the litigation, but only some matter collateral. It may be final in the sense that it determines the very question raised by the applications, but it is interlocutory if the merits of the case remain to be determined.

[12] This important case is one to which this court frequently returns. See, for example, *Waldman v. Thomson Reuters Canada Ltd.*, 2015 ONCA 53, MacFarland J.A. at para. 22. On the *Hendrickson v. Kallio* test, there can be no doubt that the dismissal of the contempt motion is interlocutory. The merits of the case remain to be determined.

[13] But Catalyst drills deeper and argues that in this case the outcome of the motion is effectively final in a significant dimension. It submits that the important point for the court to keep in mind is that it would not be open to a party who was unsuccessful in a contempt motion to revisit the contempt motion at trial. Counsel argues that the motion judge's decision that Mr. Moyse's conduct did not contravene the order is *res judicata,* and Mr. Moyse's conduct in deleting the

browser history, for example, "can't be re-litigated even in cross-examination." It is therefore final in the sense contemplated by the *Courts of Justice Act*.

[14] I disagree. The motion judge's findings are clear. He simply concluded that Catalyst had not proven, beyond a reasonable doubt, that Mr. Moyse breached Firestone J.'s order. There is nothing in the motion judge's decision that would prevent Catalyst from exploring, in Mr. Moyse's cross-examination at discovery or at trial, what he did with his computer, when he did it, why he did it, who assisted him (if anyone), how he did it and for what purpose or purposes. While the finding that Mr. Moyse was not in contempt may not itself be re-litigated, barring some new revelation, all of the factual issues between the parties may be fully and exhaustively explored at any discovery and at the trial.

[15] In the circumstances of this appeal, the principle in *Simmonds* applies. The order dismissing the contempt motion against Mr. Moyse is interlocutory, and therefore appealable to the Divisional Court, with leave, under s. 19(1)(b) of the *Courts of Justice Act*.

[16] I would quash the appeal without prejudice to Catalyst's right to seek leave to appeal to the Divisional Court. I would award Mr. Moyse costs fixed in the agreed amount of $5,000, all-inclusive.

P. Lauwers JA

I agree Alexandra Hoy ACJO

I agree. Juriansland JA

Released: DL

NOV 17 2015

TAB P

Drover, Lisa

From:	Milne-Smith, Matthew
Sent:	December 3, 2015 8:51 AM
To:	Carlson, Andrew; Denise.Cooney@paliareroland.com; Kris.Borg-Olivier@paliareroland.com; awinton@counsel-toronto.com; 'Robert.Centa@paliareroland.com'
Cc:	rdipucchio@counsel-toronto.com
Subject:	RE: Catalyst motion for leave to appeal [IWOV-CLIENT.FID45653]

West Face takes the same position.

From: Robert.Centa@paliareroland.com [mailto:Robert.Centa@paliareroland.com]
Sent: December 3, 2015 8:49 AM
To: awinton@counsel-toronto.com; Kris.Borg-Olivier@paliareroland.com; Denise.Cooney@paliareroland.com; Milne-Smith, Matthew; Carlson, Andrew
Cc: rdipucchio@counsel-toronto.com
Subject: RE: Catalyst motion for leave to appeal [IWOV-CLIENT.FID45653]

Our client will not consent, particularly since we advised you months ago that you were in the wrong court and you failed to respond to that correspondence, much less deliver a notice of motion seeking leave to appeal to the Divisional Court.

r

Robert A. Centa
Paliare Roland Rosenberg Rothstein LLP
155 Wellington St. West, 35th Floor
Toronto, ON M5V 3H1

+1 416.646.4314 (Direct)
+1 416.646.4301 (Fax)
+1 416.434.3636 (Mobile)

Robert.Centa@paliareroland.com

This is Exhibit P referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

From: Andrew Winton [mailto:awinton@counsel-toronto.com]
Sent: Thursday, December 03, 2015 8:46 AM
To: Robert Centa; Kris Borg-Olivier; Denise Cooney; 'Milne-Smith, Matthew (mmilne-smith@dwpv.com)'; 'Carlson, Andrew (acarlson@dwpv.com)'
Cc: Rocco DiPucchio
Subject: Catalyst motion for leave to appeal [IWOV-CLIENT.FID45653]

Counsel,

The Divisional Court did not accept our notice of motion for leave to appeal. Apparently, the new protocol at the Court where motions seek an extension of time to seek leave is for the extension issue to be argued orally, and only if the extension is granted is the balance of the motion argued in writing.

When the appeals to the Court of Appeal were quashed, we left it as unsettled as to whether the defendants would consent to the extension of time to seek leave to appeal. Can you please let us know if your respective clients will oppose the motion for an extension of time?

If so, please let us know if you are available on any of the following dates the Court has for us to argue the motion:
January 18, 19 or 28
February 16, 17, 18, 22, 23 or 24.

Thanks,

Andrew

Andrew Winton
Direct: (416) 644-5342
awinton@counsel-toronto.com

Lax O'Sullivan Lisus Gottlieb LLP
Suite 2750, 145 King Street West
Toronto ON M5H 1J8 Canada
T 416 598 1744 F 416 598 3730
counsel-toronto.com

TAB Q

Drover, Lisa

From: Milne-Smith, Matthew
Sent: December 10, 2015 10:35 AM
To: rdipucchio@counsel-toronto.com; Andrew Winton (awinton@counsel-toronto.com)
Cc: Denise.Cooney@paliareroland.com; kris.borg-olivier@paliareroland.com; 'Robert.Centa@paliareroland.com'; Carlson, Andrew
Subject: Moyse appeal

Andrew,

I have your notice of motion for an extension of time. When do you plan to deliver your affidavit? Given the relatively short timeline we really need your affidavit ASAP so we can deliver our responding affidavit, schedule any cross-examinations (if necessary) and exchange facta.

I also repeat my request for payment of the outstanding costs awards. There is no stay, the prospects of an appeal are uncertain at best, and there can be no legitimate concerns about re-payment in the remote event of success on appeal. I trust that enforcement proceedings will not be necessary in the circumstances. May I please have your position in that regard by Friday.

Yours very truly,

Matt

This is Exhibit Q *referred to in the affidavit of* Philip de L. Paret *sworn before me, this* 13th *day of* January *20*16

A COMMISSIONER FOR ~~TAKING AFFIDAVITS~~

TAB R

CV-15-11238-00CL

Commercial List Court File No.

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182

AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*

AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

NOTICE OF APPLICATION

TO: THE RESPONDENTS

A LEGAL PROCEEDING HAS BEEN COMMENCED BY THE APPLICANT. The claim made by the Applicant appears on the following pages.

THIS APPLICATION will come on for a hearing before a Judge presiding over the Commercial List at 330 University Avenue, 7th Floor, Toronto on ~~a date to be~~ January 4, 2016 established by the Commercial List Office at ~~10:00 a.m.~~ 9:30am. or as soon after that time as the matter can be heard.

IF YOU WISH TO OPPOSE THIS APPLICATION, to receive notice of any step in the Application, or to be served with any documents in the Application, you or an Ontario lawyer acting for you must forthwith prepare a Notice of Appearance in Form 38A prescribed by the *Rules of Civil Procedure*, serve it on the Applicant's lawyer and file it, with proof of service, in this court office, and you or your lawyer must appear at the hearing.

IF YOU WISH TO PRESENT AFFIDAVIT OR OTHER DOCUMENTARY EVIDENCE TO THE COURT OR TO EXAMINE OR CROSS-EXAMINE WITNESSES ON THE APPLICATION, you or your lawyer must, in addition to serving your Notice of Appearance, serve a copy of the evidence on the Applicant's lawyer and file it, with proof of service, in the court office where the Application is to be heard as soon as possible, but not later than 2:00 p.m. on the day before the hearing.

This is Exhibit R *referred to in the affidavit of* Philippe L. Panet *sworn before me, this* 13th *day of* January *20* 16

A COMMISSIONER FOR TAKING AFFIDAVITS

3287386

IF YOU FAIL TO APPEAR AT THE HEARING, JUDGMENT MAY BE GIVEN IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO OPPOSE THIS APPLICATION BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: December 23, 2015 Issued by: _____

A. Anissimova
Registrar

Address of Court Office:
330 University Avenue
7th Floor
Toronto, ON M5G 1R7

TO: THE HOLDERS OF COMMON SHARES OR OPTIONS OF MID-BOWLINE GROUP CORP. SET OUT IN SCHEDULE "A"

AND TO: The Catalyst Capital Group. Inc.
77 King St. W.
Toronto ON M5K 2A1

APPLICATION

1. The Applicant, Mid-Bowline Group Corp. (the "Corporation"), makes application for:

(a) an order concluding as to the fairness to the shareholders and optionholders of the Corporation of, and approving and implementing, the plan of arrangement (the "Plan of Arrangement") proposed by the Corporation pursuant to section 182 of the *Business Corporations Act* (Ontario), as amended (the "OBCA"), substantially in the form attached as Appendix "A" to this Notice of Application; and

(b) such further and other relief as this Honourable Court deems just.

2. THE GROUNDS for the Application are:

(a) all statutory requirements under the OBCA have been fulfilled;

(b) the proposed Plan of Arrangement is in the best interests of the Corporation, is fair and reasonable to the stakeholders of the Corporation, and is put forward in good faith;

(c) section 182 of the OBCA;

(d) rules 14.05(2) and 38 of the *Rules of Civil Procedure*; and

(e) such further and other grounds as counsel may advise and this Honourable Court may permit.

3. THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Application:

(a) the affidavit of Anthony Griffin and such other affidavits as shall be put before the Court, and the exhibits thereto and other materials referred to therein, to be filed; and

(b) such further and other materials as counsel may advise and this Honourable Court may permit.

December 23, 2015

DAVIES WARD PHILLIPS & VINEBERG LLP
155 Wellington St. W.
Toronto, ON M5V 3J7

Matthew Milne-Smith (LSUC #44266P)
Tel: 416.863.5595
Andrew Carlson (LSUC #58850N)
Tel: 416.367.7437

Fax: 416.863.0871

Lawyers for the Applicant

SCHEDULE "A"

LIST OF SHAREHOLDERS

Globalive Turbine Corp. 1
Globalive Turbine Corp. 2
Globalive Turbine 3 LP
Serruya Private Equity Inc.
Luxembourg Famous Star SARL
Tennenbaum Opportunities Partners V, LP
Tennenbaum Opportunities Fund VI, LLC
Special Value Opportunities Fund, LLC
Special Value Expansion Fund, LLC
Tennenbaum Senior Loan Fund IV-B, LP
Tennenbaum Special Situations Fund IX, LLC
Tennenbaum Special Situations IX-O, LP
Siguler Guff Hearst Opportunities Fund, LP
Maycomb Holdings IV, LLC
WAL Telecom L.P.
64NM Holdings, LP
Robert MacLellan
David Carey
Hamid Akhavan
Peter Rhamey
Alek Krstajic

LIST OF OPTIONHOLDERS

Alek Krstajic
Glen Campbell
Bruce Kirby
Bob Boron
Brian O'Shaughnessy
Ted Flanigan
Tamer Saleh
Atif Ahmad
Nora Brooks
John Lucato
Jennifer Douglas
Dean Price
Asser El Shanawany
Hamid Akhavan
Ed Antecol
Radek Krasny
Frank Bassano
Amor Mohammed
Magued Sorial
Ronny Hanna
Charbel Rizk
Wendy Perego
Mathew Flanigan

Pierre Methe
Paul Bourque
Paul Stevens
Brian Lloyd
Adel Awad
Ashraf Demian
Stephen Kalyta
Mark Elson
Chris Golde
Terry Hubbs
Algis Akstinas
Solomon Chung
Krishna Charan
Mootaz El Sowehy
Mohammed Belmqadem
Tony Marinelli
Mohammad Ahmad
Sharon Xu
Mark Smith
Linda Kowlessar
Sujatha Kumar
Globalive Turbine Corp. 1
Brice Scheschuk
Simon Lockie

APPENDIX A

Plan of Arrangement

FORM OF PLAN OF ARRANGEMENT UNDER SECTION 182 OF THE BUSINESS CORPORATIONS ACT (ONTARIO)

ARTICLE 1
INTERPRETATION

1.1 Definitions.

In this Plan of Arrangement, the following words and terms shall have the meanings hereinafter set forth:

"**Arrangement**" means the arrangement of the Corporation under section 182 of the OBCA on the terms and subject to the conditions set out in this Plan of Arrangement, subject to any amendments or variations thereto made in accordance with the Arrangement Agreement and Section 5.1 hereof or made at the discretion of the Court in the Final Order (with the consent of the Corporation, the Vendors' Representatives and Purchaser, each acting reasonably).

"**Arrangement Agreement**" means the Arrangement Agreement dated effective December 16, 2015 among Guarantor, Purchaser, the Corporation and the Vendors providing for, among other things, the Arrangement, as the same may be amended, supplemented and/or restated from time to time.

"**Arrangement Resolution**" means a special resolution of Shareholders in the form of Exhibit A to the Arrangement Agreement.

"**Articles of Arrangement**" means the articles of arrangement of the Corporation in respect of the Arrangement that are required by the OBCA to be sent to the Director after the Final Order is made, which shall be in form and substance satisfactory to the Corporation, the Vendors' Representatives and Purchaser, each acting reasonably.

"**business day**" means a day, other than a Saturday or Sunday, on which commercial banks in Toronto, Ontario and Calgary, Alberta are open for business.

"**Cash Consideration**" means an amount per Purchased Share equal to the Purchase Price.

"**Certificate**" means the certificate of arrangement giving effect to the Arrangement, issued pursuant to subsection 183(2) of the OBCA after the Articles of Arrangement have been filed.

"**Corporation**" means Mid-Bowline Group Corp., a corporation existing under the OBCA.

"**Court**" means the Superior Court of Justice (Commercial List) in Toronto, Ontario.

"**Director**" means the Director appointed pursuant to section 278 of the OBCA.

"**Effective Date**" means the date of the Certificate.

"**Effective Time**" means 12:01 a.m. (Toronto time) on the Effective Date, or such other time as the Corporation, the Vendors' Representatives and Purchaser may agree to in writing before the Effective Date.

"**Election Deadline**" means 5:00 p.m. (Toronto time) on the business day which is five business days preceding the Effective Date.

"**Election Form**" means the election form delivered to and specified for use by holders of Eligible Option Shares in connection with the Arrangement.

"**Eligible Option Shares**" means Purchased Shares acquired pursuant to the exercise of Replacement Options that were issued in exchange for Management Options and Former Management Options.

"**Exchange Ratio**" means, subject to adjustment (if any) as provided in Section 3.5, the ratio of the Purchase Price to the Market Price.

"**Final Order**" means the order of the Court, in form and substance satisfactory to the Corporation, the Vendors' Representatives and Purchaser, each acting reasonably, approving the Arrangement, as such order may be amended by the Court (with the consent of the Corporation, the Vendors' Representatives and Purchaser, each acting reasonably) at any time prior to the Effective Date or, if appealed, then unless such appeal is withdrawn or denied, as affirmed or as amended (provided that any such amendment is satisfactory to the Corporation, the Vendors' Representatives and Purchaser, each acting reasonably) on appeal.

"**Former Shareholders**" means, at and following the Effective Time, the holders of Purchased Shares immediately prior to the Effective Time.

"**Former Management Options**" means the option commitments to acquire an aggregate of 300,000 shares in the capital of the Corporation at a price of $1.00 per share held by the Former Officers.

"**Former Officers**" means each of Simon Lockie and Brice Scheschuk, being the former Chief Regulatory Officer and Chief Financial Officer, respectively, of WIND Mobile Corp.

"**Globalive Options**" means the options to acquire an aggregate of 10,000,000 shares in the capital of the Corporation at a price of $1.00 per share held by Globalive Turbine Corp. 1.

"**Guarantor**" means Shaw Communications Inc., a corporation existing under the laws of the Province of Alberta.

"**Guarantor Shares**" means the Class B Non-Voting Participating Shares in the capital of Guarantor.

"**Letter of Transmittal**" means the letter of transmittal delivered to and specified for use by Shareholders in connection with the Arrangement in form and substance satisfactory to the Purchaser and the Vendors' Representatives, each acting reasonably; provided, however, that no Letter of Transmittal shall be required in respect of Purchased Shares issued pursuant to subsection 3.1(c).

"**Management Options**" means the options to acquire shares in the capital of the Corporation pursuant to the Option Plan as set out in Schedule B to the Disclosure Letter.

"**Market Price**" means a per share amount equal to the volume weighted average trading price of the Guarantor Shares on the TSX during the last 10 trading days occurring immediately prior to the Effective Date.

"**OBCA**" means the *Business Corporations Act* (Ontario).

"**Option Loan**" means the non-interest bearing loan made by the Purchaser to Globalive Turbine Corp. 1 in connection with the exercise or deemed exercise of the Globalive Options in accordance with this Plan of Arrangement, in an amount equal to the aggregate exercise price in respect of such Options as of the Effective Date.

"**Option Plan**" means the 2015 Stock Option Plan of the Corporation as adopted by the Board of Directors of the Corporation on September 24, 2015, effective as of March 23, 2015, and ratified on December 16, 2015, in the form provided to Purchaser.

"**Options**" means, collectively, the Management Options, the Globalive Options and the Former Management Options.

"**Plan of Arrangement**", "**hereof**", "**herein**", "**hereto**" and like references mean and refer to this plan of arrangement, as the same may be amended, supplemented and/or restated from time to time.

"**Purchase Price**" has the meaning set forth in the Arrangement Agreement, as such amount may be adjusted in accordance with the terms thereof.

"**Purchased Shares**" means the issued and outstanding shares in the capital of the Corporation as of the Effective Time, including any shares issued on the exercise or deemed exercise of Options in accordance with the Arrangement Agreement and this Plan of Arrangement.

"**Purchaser**" means 1503357 Alberta Ltd., a corporation existing under the laws of the Province of Alberta.

"**Replacement Option**" means an option to purchase shares in the capital of the Corporation granted in replacement of a Management Option or Former Management Option on the basis set forth in subsection 3.1(b);

"**Shareholders**" means the holders of Purchased Shares.

"**Share Consideration**" means a number (or fraction) of Guarantor Shares equal to the Exchange Ratio per Purchased Share.

"**Tax Act**" means the *Income Tax Act* (Canada).

"**TSX**" means the Toronto Stock Exchange.

"**Unvested Options**" means all Management Options and Former Management Options that are not Vested Options.

"**Vendors**" means each of the Persons listed on the execution page of the Arrangement Agreement under the heading "Vendors".

"**Vested Options**" means the Management Options and Former Management Options that have vested prior to the Effective Date in accordance with the terms of the Arrangement Agreement.

Words and phrases used herein that are defined in the Arrangement Agreement and not defined herein shall have the same meaning herein as in the Arrangement Agreement. Words and phrases used herein that are defined in the OBCA and not defined herein or in the Arrangement Agreement shall have the same meaning herein as in the OBCA, unless the context otherwise requires.

1.2 Interpretation Not Affected By Headings, etc.

The division of this Plan of Arrangement into Articles, Sections and subsections and the insertion of headings are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Plan of Arrangement.

1.3 Article References

Unless the contrary intention appears, references in this Plan of Arrangement to an Article, Section or subsection by number or letter or both refer to the Article, Section or subsection respectively, bearing that designation in this Plan of Arrangement.

1.4 Number and Gender

In this Plan of Arrangement, unless the contrary intention appears, words importing the singular include the plural and vice versa, and words importing gender shall include all genders.

1.5 Date for Any Action

If the date on which any action is required to be taken hereunder by any of the parties is not a business day in the place where the action is required to be taken, such action shall be required to be taken on the next succeeding day which is a business day in such place.

1.6 Statutory References

Unless otherwise indicated, references in this Plan of Arrangement to any statute includes all regulations made pursuant to such statute and the provisions of any statute or regulation which amends, supplements or supersedes any such statute or regulation.

1.7 Currency

Unless otherwise stated, all references in this Agreement to sums of money are expressed in lawful money of Canada.

ARTICLE 2
ARRANGEMENT AGREEMENT

2.1 Arrangement Agreement

This Plan of Arrangement is made pursuant to, and is subject to the provisions of, the Arrangement Agreement. This Plan of Arrangement shall become effective at, and be binding at and after, the Effective Time on the Corporation, Guarantor, Purchaser, the Vendors and all Persons who were immediately prior to the Effective Time holders or beneficial owners of Purchased Shares or Options.

ARTICLE 3
ARRANGEMENT

3.1 Arrangement

Commencing at the Effective Time, the following events or transactions shall occur and shall be deemed to occur in the following sequence without any further act or formality:

(a) Purchaser will make the Option Loan to Globalive Turbine Corp. 1 and Globalive Turbine Corp. 1 will direct the Purchaser to pay the proceeds of the Option Loan to the Corporation in satisfaction of the exercise price of the Globalive Options in accordance with Section 3.1(c);

(b) each Vested Option outstanding at the Effective Time will be exchanged for a Replacement Option to acquire such number of Purchased Shares that is equal to the fraction obtained when the difference, if positive, between the Purchase Price and the

exercise price of such Option is divided by the Purchase Price; provided, however, that if the difference between the Purchase Price and the exercise price of any such Option produces a negative amount, then such Option shall be terminated and of no further force and effect. All terms and conditions of a Replacement Option shall be the same as the Option for which it was exchanged, except that each Replacement Option shall be exercisable pursuant hereto at a price of $0.00001 per Purchased Share; notwithstanding the foregoing, if it is determined in good faith that the excess of the aggregate fair market value of the shares of the Corporation subject to a Replacement Option immediately after the issuance of the Replacement Option over the aggregate option exercise price for such shares pursuant to the Replacement Option (such excess referred to as the "**In the Money Amount of the Replacement Option**") would otherwise exceed the excess of the aggregate fair market value of the shares of the Corporation subject to such Vested Option immediately before the issuance of the Replacement Option over the aggregate option exercise price for such shares pursuant to the Vested Option, (such excess referred to as the "**In the Money Amount of the Vested Option**"), the previous provisions shall be modified so that the In the Money Amount of the Replacement Option does not exceed the In the Money Amount of the Vested Option, but only to the extent necessary to qualify for the provisions of subsection 7(1.4) of the Tax Act.

(c) each holder of Replacement Options will be deemed to have exercised all such Replacement Options and Globalive Turbine Corp. 1 will be deemed to have exercised the Globalive Options and (i) holders of Replacement Options will pay the exercise price in respect thereof to the Corporation in cash, (ii) the Purchaser will pay the aggregate amount loaned to Globalive Turbine Corp. 1 in Section 3.1(a) above to the Corporation in satisfaction of the exercise price thereof and each holder of Replacement Options and Globalive Turbine Corp. 1 shall be deemed to have received the number of Purchased Shares issuable in respect of each Replacement Option or Globalive Option, as applicable, exercised in accordance with this Section 3.1(c) and (iii) each holder of Options who becomes a holder of Purchased Shares pursuant to this Section 3.1(c) shall be deemed to have executed a Joinder Agreement to the Arrangement Agreement and shall be considered a Vendor thereunder;

(d) (i) each outstanding Purchased Share (other than Eligible Option Shares) shall be transferred by the holder thereof to Purchaser in exchange for the Cash Consideration therefor, provided that Globalive Turbine Corp. 1 will be deemed to have directed Purchaser to retain an amount equal to the amount loaned by Purchaser to it to acquire Purchased Shares on exercise of the Globalive Options pursuant to Section 3.1(a) in repayment of the Option Loan, (ii) the name of such holder shall be removed from the register of holders of Purchased Shares in respect of the Purchased Shares so transferred and (iii) Purchaser shall be recorded as the registered holder of such Purchased Shares so transferred and shall be deemed to be the legal and beneficial owner thereof, free and clear of any Encumbrances;

(e) (i) each outstanding Eligible Option Share shall be disposed of by the holder thereof to Purchaser in accordance with the election or deemed election of such holder pursuant to Section 3.2 in exchange for the Cash Consideration or the Share Consideration therefor, (ii) the name of such holder shall be removed from the register of holders of Purchased Shares in respect of the Eligible Option Shares so transferred and (iii) the name of such holder shall be added to the register of holders of Guarantor Shares in respect of the Share Consideration received by such holder, and Purchaser shall be recorded as the registered holder of such Eligible Option Shares so exchanged and shall be deemed to be the legal and beneficial owner thereof, free and clear of any Encumbrances; notwithstanding the foregoing, if it is determined in good faith that the aggregate fair market value of the Guarantor Shares immediately after the issuance of the Guarantor Shares would otherwise exceed the fair market value of the Purchased Share exchanged

for such Guarantor Shares immediately before the issuance of the Guarantor Shares, the previous provisions shall be modified so that the aggregate fair market value of such Guarantor Shares does not exceed the fair market value of the Purchased Share exchanged for such Guarantor Shares, but only to the extent necessary to qualify for the provisions of subsection 7(1.5) of the Tax Act; and

(f) the Option Plan and all Unvested Options shall be terminated and shall be of no further force or effect.

3.2 Election Regarding Eligible Option Shares

With respect to the exchange of Eligible Option Shares effected pursuant to subsection 3.1(e):

(a) each holder of Eligible Option Shares may elect to receive either:

(i) Cash Consideration in respect of all Eligible Option Shares held by such holder (with a requirement in the Election Form for any holder other than a Former Officer to undertake to apply at least 50% of the net after tax proceeds from such Cash Consideration to acquire Guarantor Shares in the market through a broker designated by Guarantor);

(ii) Cash Consideration in respect of up to 50% of the Eligible Option Shares held by such holder and Share Consideration in respect of the remaining Eligible Option Shares held by such holder; or

(iii) Share Consideration in respect of all Eligible Option Shares held by such holder;

(b) the election provided for in subsection 3.2(a) shall be made by each holder of Eligible Option Shares by delivery to Purchaser, prior to the Election Deadline, of a duly completed Election Form indicating such holder's election; and

(c) any holder of Eligible Option Shares who does not deliver to Purchaser a duly completed Election Form prior to the Election Deadline shall be deemed to have elected to receive the Share Consideration pursuant to clause (iii) of subsection 3.2(a) in respect of such Eligible Option Shares.

3.3 Letters of Transmittal and Election Forms

Any Letter of Transmittal and Election Form, once delivered to Purchaser, shall be irrevocable and may not be withdrawn by a Shareholder.

3.4 No Fractional Guarantor Shares and Rounding of Cash Consideration

(a) In no event shall any fractional Guarantor Shares be issued under this Plan of Arrangement. Where the aggregate number of Guarantor Shares to be issued to a Shareholder as consideration under this Plan of Arrangement would result in a fraction of a Guarantor Share being issuable, the number of Guarantor Shares to be issued to such Shareholder shall be rounded down to the closest whole number and no additional consideration shall be provided to such Shareholder in lieu of the issuance of a fractional Guarantor Share.

(b) If the aggregate cash amount which a Shareholder is entitled to receive under this Plan of Arrangement would otherwise include a fraction of $0.01, then the aggregate cash amount to which such Shareholder shall be entitled to receive shall be rounded down to the nearest whole $0.01.

3.5 Adjustments to Exchange Ratio

The Exchange Ratio shall be adjusted to reflect fully the effect of any stock split, stock dividend (including any dividend or distribution of securities convertible into Guarantor Shares or Purchased Shares, other than stock dividends paid in lieu of ordinary course dividends), consolidation, reorganization, amalgamation, arrangement, recapitalization or other like change with respect to Guarantor Shares or Purchased Shares occurring after the date of the Arrangement Agreement (and not in breach of the terms of the Arrangement Agreement) and prior to the Effective Time.

ARTICLE 4
DELIVERY OF CONSIDERATION

4.1 Delivery of Share Consideration and Cash Consideration

(a) At the Effective Time, upon confirmation by Purchaser that certificates representing all of the Purchased Shares (other than any certificates in respect of Purchased Shares issued pursuant to Section 3.1(c)) have been delivered to the Purchaser together with duly completed Letters of Transmittal in respect thereof, the Purchaser shall (i) pay, or cause to be paid to Davies Ward Phillips & Vineberg LLP, in trust for and on behalf of the Vendors, in cash by way of wire or electronic transfer of immediately available funds to such bank account specified in writing by the Vendors' Representatives (or such other means as may be agreed to by Purchaser and the Vendors' Representatives) an amount equal to the aggregate Cash Consideration payable pursuant to Article 3 less the amount of the Option Loan and (ii) deliver or caused to be delivered to the applicable Vendors certificates (or, at Purchaser's option, evidence of direct registration) representing the number of Guarantor Shares that each Vendor is entitled to receive under the Arrangement.

(b) Subject to Article 10 of the Arrangement Agreement, the Vendors' Representatives shall cause Davies Ward Phillips & Vineberg LLP to release to each Vendor such portion of the aggregate Cash Consideration to which such holder is entitled pursuant to Article 3. For the avoidance of doubt, Globalive Turbine Corp. 1's entitlement to the aggregate Cash Consideration shall be calculated net of the amount of the Option Loan made to Globalive Turbine Corp. 1 in accordance with Section 3.1(a).

4.2 Lost Certificates

In the event any certificate which immediately prior to the Effective Time represented one or more outstanding Purchased Shares that were exchanged pursuant to subsections 3.1(d) or 3.1(e) shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such certificate to be lost, stolen or destroyed, Purchaser will deliver in exchange for such lost, stolen or destroyed certificate, the cash amount or the Guarantor Shares, or any combination thereof, that such Person is entitled to receive pursuant to subsection 3.1(d) or 3.1(e). When authorizing the delivery of such consideration in exchange for any lost, stolen or destroyed certificate, the Person to whom the consideration is being delivered shall, as a condition precedent to the delivery of such consideration, give a bond satisfactory to Guarantor and Purchaser in such sum as Guarantor and Purchaser may direct, or otherwise indemnify Guarantor and Purchaser in a manner satisfactory to Guarantor and Purchaser against any claim that may be made against Guarantor or Purchaser with respect to the certificate alleged to have been lost, stolen or destroyed.

4.3 Withholding Rights

Guarantor and Purchaser shall deduct and withhold from any consideration otherwise payable to any holder of Eligible Option Shares such amounts as Guarantor or Purchaser are required to deduct and withhold with respect to such payment under the Tax Act, the United States *Internal Revenue Code* of

1986 or any provision of provincial, state, local or foreign tax law, in each case as amended. To the extent that amounts are so withheld, such withheld amounts shall be treated for all purposes hereof as having been paid to the holder of the Eligible Option Shares in respect of which such deduction and withholding was made, provided that such withheld amounts are actually remitted to the appropriate taxing authority. The determination of whether an amount is required to be deducted or withheld shall be at the sole discretion of Guarantor and Purchaser.

4.4 No Liens

Any exchange or transfer of securities pursuant to this Plan of Arrangement shall be free and clear of any Encumbrances, adverse claims or other claims of third parties of any kind.

4.5 Paramountcy

From and after the Effective Time: (i) this Plan of Arrangement shall take precedence and priority over any and all Purchased Shares or Options issued prior to the Effective Time; (ii) the rights and obligations of the Former Shareholders and the former holders of Options shall be solely as provided for in this Plan of Arrangement; and (iii) all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein.

ARTICLE 5
AMENDMENTS

5.1 Amendments to Plan of Arrangement

(a) The Corporation, the Vendors' Representatives and Purchaser may amend, modify and/or supplement this Plan of Arrangement at any time and from time to time prior to the Effective Time, provided that each such amendment, modification and/or supplement must: (i) be set out in writing; (ii) be approved by the Corporation, the Vendors' Representatives and Purchaser; and (iii) be filed with the Court.

(b) Any amendment, modification or supplement to this Plan of Arrangement that is directed by the Court shall be effective only if: (i) it is consented to in writing by each of the Corporation, the Vendors' Representatives and Purchaser (in each case, acting reasonably); and (ii) if required by the Court, it is consented to by Shareholders, voting in the manner directed by the Court.

(c) Any amendment, modification or supplement to this Plan of Arrangement may be made following the Effective Date unilaterally by Purchaser, provided that it concerns a matter that is solely of an administrative nature required to better give effect to the administrative implementation of this Plan of Arrangement and is not adverse to the interests of any Former Shareholder or former holders of Options.

ARTICLE 6
FURTHER ASSURANCES

6.1 Further Assurances

Notwithstanding that the transactions and events set out herein shall occur and shall be deemed to occur in the order set out in this Plan of Arrangement without any further act or formality, each of the Parties to the Arrangement Agreement shall make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as

may reasonably be required by either of them in order to further document or evidence any of the transactions or events set out herein.

IN THE MATTER OF the *Business Corporations Act*, R.S.O. 1990, c. B.16, as amended, Section 182
AND IN THE MATTER OF Rule 14.05(2) of the *Rules of Civil Procedure*
AND IN THE MATTER OF a proposed arrangement involving Mid-Bowline Group Corp., its shareholders and optionholders, Shaw Communications Inc., and 1503357 Alberta Ltd.

CV-15-11238-00CL

Commercial List File No.

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

NOTICE OF APPLICATION

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Lax O'Sullivan Lisus Gottlieb

This is Exhibit S referred to in the affidavit of Philip de L. Panet sworn before me, this 13th day of January 2016

A COMMISSIONER FOR TAKING AFFIDAVITS

January 6, 2016

BY EMAIL

WITH PREJUDICE

Matthew Milne-Smith/Andrew Carlson
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Toronto ON
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Michael Schafler
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Toronto Ontario M5K 0A1

Dear Counsel:

Re: Re. Mid-Bowline Group Corp.
Court File No. CV-15-11238-00CL

We write to express our concern at the manner in which your clients are attempting to mis-use the Plan of Arrangement process under the OBCA to determine and release our client's claim against West Face Capital for a constructive trust over West Face's interest in Mid-Bowline Group.

Initially, from our review of the Notice of Application you delivered last week, we understood that the purpose of hearing before Justice Newbould was to determine whether the Court has the jurisdiction to approve a Plan of Arrangement that seeks to release Catalyst's claim.

In light of our discussion on January 4 concerning the evidence Mid-Bowline expects to adduce at the hearing, we now understand that what is intended is a form of mini-trial of our client's claim for breach of confidence in the *Catalyst v. Moyse and West Face* action, notwithstanding the fact that Mid-Bowline and Shaw are not parties to that action, that the Commercial List has no authority to partially determine an action on the regular list and that the action is currently the subject of ongoing procedural motions, including our client's pursuit of the appeal against Justice Glustein's dismissal of the motion to authorize an ISS to review West Face's devices. This is to say nothing of the fact that the parties have not even begun the documentary and oral discovery phase in that proceeding.

It is now apparent to us that the only reason why Mid-Bowline and Shaw are proceeding with this transaction by way of a Plan of Arrangement is to seek to compromise and release Catalyst's claim against West Face. Your clients seek to use

the Plan of Arrangement provisions solely in an attempt to hijack the ongoing proceedings between Catalyst and West Face/Moyse, and in so doing deprive Catalyst of its procedural and discovery rights in pursuing that action.

We do not believe that the Court has the jurisdiction to grant the relief requested pursuant to the provisions of the OBCA. If you are aware of any case in Canada where a Plan of Arrangement has been used in this fashion, we invite you to share it with us at your earliest convenience. We also do not believe the Court has the jurisdiction to hear and determine the "trial" of our client's claim that Mid-Bowline has presently scheduled for the week of January 25, 2016 under the guise of its notice of application to approve the proposed Plan of Arrangement.

To be clear, Catalyst is not interested in holding up a sale of the shares of Wind to Shaw. To that end, it proposes the following compromise to resolve the situation so that the transaction can proceed in a manner that addresses the concerns of Shaw and Mid-Bowline, and removes the need for the four day hearing scheduled to commence in less than three weeks:

- West Face will agree to place the proceeds of the sale of Wind that it receives into escrow pending a final determination of Catalyst's claim;

- Catalyst will agree to amend its statement of claim to remove the claim for a constructive trust over West Face's shares in Wind and to restrict its claim to a tracing of the proceeds of the sale of Wind;

- Following this amendment, the Plan of Arrangement can proceed without objection from Catalyst;

- Catalyst and West Face will agree to the appointment of an ISS to review the electronic devices of an agreed upon set of custodians at West Face, pursuant to a document review protocol to be agreed upon or settled by the Court; and

- Catalyst and West Face will agree on an expedited discovery and trial schedule following receipt of the ISS report, with a goal of completing a trial of Catalyst's tracing claim by July 30, 2016.

We believe this proposed solution represents a fair compromise which protects Catalyst's rights in its existing action, while also acknowledging your client's and Shaw's alleged interest in proceeding with the sale transaction without delay. Under our proposed resolution, there is no need for the Plan of Arrangement to affect Catalyst's claim because Shaw will take the Wind shares free and clear of any ownership claim by Catalyst.

In light of the expedited schedule that West Face has imposed, we intend to bring our concerns and proposed solution to the attention of Justice Newbould at a 9:30 appointment at the earliest opportunity, and to raise the fairness and jurisdiction issues

as threshold matters that must be determined by the Court before it can consider what we now understand to be the true nature of your client's application.

May I please hear from you without delay so that we can, if necessary, schedule a 9:30 appointment with Justice Newbould this week or early next week?

Yours truly,

Rocco DiPucchio

RDP/AJW

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

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West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC. Plaintiff/Moving Party	and	BRANDON MOYSE and WEST FACE CAPITAL INC. Defendants/Responding Parties	Divisional Court File No.: 648/15 Superior Court File No. CV-14-507120

SUPERIOR COURT OF JUSTICE
Proceeding commenced at Toronto

MOTION RECORD OF THE DEFENDANT WEST FACE CAPITAL INC.
RE: MOTION TO EXTEND TIME AND FOR LEAVE TO APPEAL
(Returnable January 21, 2016)

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