Court File No. C60799

ONTARIO
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

FACTUM OF THE PLAINTIFF/APPELLANT, THE CATALYST CAPITAL GROUP INC.

September 21, 2015

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PART I - IDENTITY OF APPELLANT, PRIOR COURT & RESULT

1. This appeal raises important issues concerning the enforcement of preservation orders after the plaintiff had made out a strong *prima facie* case for possession and misuse of its confidential information by the defendants. The question on this appeal is whether a party can disobey a preservation order and destroy evidence without consequence.

2. In the motion below, Justice Glustein (the "Motion Judge") dismissed a contempt motion on the basis that the plaintiff ("Catalyst") had not proven beyond a reasonable doubt that the defendant Brandon Moyse ("Moyse") had breached a preservation order.

3. Catalyst also sought an order providing for the imaging of electronic devices belonging to the defendant West Face Capital Inc. ("West Face") for review by an Independent Supervising Solicitor ("ISS"). This relief was required to ensure Moyse's conduct did not nullify a Court order that authorized an ISS to review a forensic image of Moyse's computer.

4. Catalyst appeals the dismissal of the contempt motion and of the imaging motion. The latter appeal is joined to Catalyst's appeal of the contempt decision pursuant to section 6(2) of the *Courts of Justice Act*.

PART II - OVERVIEW - NATURE OF CASE AND ISSUES

5. On July 16, 2014, Moyse consented to an order that required him, among other things, to preserve documents relevant to his activities since March 27, 2014 and to turn over his personal computer to a forensic IT expert for the purpose of creating an "image" of the computer for potential review by an ISS (the "Interim Order").

6. In breach of the Interim Order, Moyse deleted his web browsing history and ran military-grade deletion software the night before he turned his computer over for imaging. Despite overwhelming evidence that Moyse breached the Interim Order, the Motion Judge concluded that Catalyst did not prove beyond a reasonable doubt that Moyse acted in contempt of court.

7. In November 2014, in a prior motion in this action, Justice Lederer authorized an ISS to review the forensic image of Moyse's computer. At the time, only Moyse knew that he had tampered with the imaging process by deleting potentially relevant information prior to the creation of the image of his computer.

8. Moyse's secret conduct defeated the purpose for the ISS review. In order to remedy this interference with the Court's order, Catalyst sought an order to create images of West Face's devices for review by an ISS (the "Imaging Motion").

9. The Motion Judge dismissed the Imaging Motion. In so doing, Catalyst submits the Motion Judge failed to give proper consideration to the fact that the relief sought was necessary to prevent a prior order of the Court from being rendered meaningless.

10. The issues on appeal are:

(a) whether the Motion Judge erred by finding that the Interim Order was ambiguous if it was intended to encompass Moyse's personal activities;

(b) whether the Motion Judge erred by finding that Moyse's admitted conduct of deleting his web browsing history did not breach the Interim Order;

(c) whether the Motion Judge erred by failing to draw the only reasonable inference of fact available to be drawn from the known facts, namely, that Moyse used the Scrubber to delete documents from his computer;

(d) whether the Motion Judge erred by finding that even if Moyse had breached the Interim Order, he could decline to hold Moyse in contempt of court; and

(e) whether the Motion Judge erred by dismissing the Imaging Motion without giving due consideration of the effect of his decision on Justice Lederer's prior order.

PART III - SUMMARY OF FACTS

A. Background to the Motion Below: The Interlocutory Motion

11. The reasons for decision of Justice Lederer in the motion decided on November 7, 2014, (the "Interlocutory Motion") accurately record the facts relating to that motion, which were also relevant to the motion below. What follows is a summary of Justice Lederer's relevant findings of fact:

(a) Beginning in March 2014, Moyse and Thomas Dea ("Dea"), a partner at West Face, communicated in writing and in person to discuss the possible employment by Moyse at West Face.

(b) By email dated March 27, 2014, Moyse sent Dea four confidential investment memos belonging to Catalyst. Shortly after doing so, Moyse deleted the email message.

(c) West Face did not inform Catalyst that Moyse had sent it Catalyst's confidential information; instead, even though he understood that the memos contained confidential information, Dea circulated the memos to his partners and to Yu-Jia Zhu ("Zhu"), a vice-president at West Face.

(d) By email dated May 24, 2014, while on vacation, Moyse gave notice of his resignation to Catalyst, effective June 22, 2014. Moyse's email made no reference to his having accepted employment with West Face.

(e) Shortly after Catalyst learned that Moyse had resigned to go work for West Face, Catalyst's outside counsel wrote to West Face and to Moyse's counsel to express concerns about Moyse's employment at West Face, and in particular that Moyse was in breach of his non-competition covenant and/or would communicate Catalyst's confidential information to West Face.

(f) In response, West Face's and Moyse's outside counsel took the position that the restrictive covenants were unenforceable and offered assurances that Moyse would comply with his confidentiality obligations to Catalyst. Neither counsel alerted Catalyst's counsel to the fact that Moyse had already communicated confidential information to West Face.

(g) Catalyst's counsel's reply stated that the defendants' replies and assurances did not go far enough in light of the fact that Catalyst and West Face are competitors and Moyse possessed Catalyst's highly sensitive and proprietary information.

(h) Moyse and West Face insisted on proceeding with Moyse's employment at West Face commencing June 23, 2014. Days later, Catalyst commenced this action and brought its motion for urgent interim and interlocutory relief.

(i) Catalyst retained an IT expert to analyze an image of the computer Moyse used while employed at Catalyst. That analysis revealed that:

(i) on March 28, 2014, over an 11-minute period, Moyse accessed a series of files from an "Investors Letters" directory;

(ii) on April 25, 2014, over a 70-minute period, Moyse accessed dozens of files related to the "Stelco" matter out of "personal curiosity";

(iii) on May 13, 2014, over a 20-minute period, Moyse accessed 29 files relating to the Wind Mobile situation;

(j) In his initial affidavit sworn in response to Catalyst's motion, Moyse described Catalyst's concerns about his misuse of confidential information as speculation and innuendo when he knew or should have known it was wrong to do so.

(k) After litigation commenced, West Face disclosed the existence of the March 27 email from Moyse. In cross-examinations, Moyse professed not to understand what makes a memo "confidential".

(l) The Interim Order required Moyse to deliver a sworn affidavit of documents disclosing documents in his power, possession or control relating to Catalyst, prior to the return of the Interlocutory Motion. Moyse's affidavit disclosed over 800 documents, at least 245 of which Catalyst identified as confidential.

(m) Moyse admitted at his cross-examination that he could not say with absolute certainty that his search of his Devices had been exhaustive, and he admitted that between March and May 2014, he deleted documents.[1]

12. What follows is a summary of additional facts relevant to the motion below.

B. Moyse Breached the Interim Order by "Scrubbing" his Computer

1) The ISS Reveals Moyse Purchased and Ran Deletion Software

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

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

(b) The defendants agreed to preserve their records, 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 the action, except as otherwise agreed to by Catalyst;

[1] Judgment of Justice Lederer dated November 10, 2014; Appeal Book & Compendium ("AB"), Tab 6.

(c) Moyse consented to the creation of a forensic image of his personal computer, iPad and smartphone, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(d) 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.[2]

14. The Interim Order was negotiated by the parties' counsel during a recess at the hearing of a contested motion before Justice Firestone. Moyse was present when his counsel negotiated the terms of the Interim Order.[3]

15. On November 10, 2014, Justice Lederer granted Catalyst's motion for an Order authorizing and ISS to analyze the Images created pursuant to the Interim Order.[4]

16. The parties retained Stockwoods LLP to act as the ISS and negotiated a document review protocol (the "Protocol") pursuant to which the ISS was to review the Images.[5]

17. The ISS retained an independent forensic IT expert to assist with its analysis and review of the Images. In its report, the ISS revealed that on the morning of July 16, 2014, Moyse downloaded and installed military-grade deletion software (known colloquially as "scrubbing software" and referred to herein as the "Scrubber") on his personal computer. On July 20, 2014, the night before the Images were created, Moyse ran the Scrubber.

18. The ISS's report stated:

> 44. Third, we located two email messages sent to Moyse's Hotmail account dated Saturday, July 12 and Wednesday, July 16, 2014, which require comment. These emails constitute payment receipts and license keys for a software product. The software product purchased on July 12, 2014 was "RegClean Pro" and it is indicated to include "Special Disk Cleaning Tools". The product purchased on July 16, 2014 was "Advanced System Optimizer 3 [Special Edition]" which is said to include "Free PhotoStudio" and "Special

[2] Order of Justice Firestone dated July 16, 2014; AB, Tab 4, p. 32.
[3] Moyse Cross-Examination, pp. 60-61, qq. 304-313; AB, Tab 11, pp. 202-203.
[4] Order of Justice Lederer, dated November 10, 2014; AB, Tab 5, p. 36.
[5] The Protocol is attached as Exhibit "C" to the affidavit of Martin Musters, sworn February 15, 2015 ("Musters Feb 2015 Affidavit"); AB, Tab 17, pp. 377-81.

Disk Cleaning Tools". According to the promotional website for these products (http://www.systweak.com/aso/), Advanced System Optimizer 3 is software which includes a feature named "Secure Delete", that is said to permit a user to delete, and over-write to military-grade security specifications, data so that it cannot be recovered through forensic analysis.

45. Given the nature and timing of the software installed, I requested that DEI [the ISS's forensic IT expert] take steps to determine whether the product was installed and whether it could be determined if the product had been used to over-write data or files prior to the computer being imaged. DEI advised me that, based on the creation date of the associated folders, RegClean and Advanced System Optimizer 3 were installed on July 16, 2014 at 8:50 and 8:53 a.m. respectively. **The executable files for the Secure Delete feature are contained within the Advanced System Optimizer 3 folder. On July 20, 2014 at 8:09 p.m., a folder entitled "Secure Delete" was created, which suggests that a user of Moyse's computer took steps to make the use of that function available at that point in time.**

46. DEI reported to me that the Secure Delete feature of the software provides several options for over-writing (i.e., "securely deleting") files. By default, the setting is "Fast secure delete" which causes a single pass overwriting process in which data is over-written with random characters. The second option is to use three passes using random characters and the third option is the so-called "military-grade" option which uses seven passes overwriting with random characters.

47. In terms of what may be deleted using this feature, DEI reports that the user may select from any of the following options within the software:

(a) To wipe specific, individual files or folders;

(b) To wipe an entire drive;

(c) To wipe only "free space", i.e. currently unused or unallocated space which may contain fragmentary data from deleted files which have not yet been over-written either through ordinary usage of the computer or through deliberate over-writing.4

[Footnote 4 text: By way of a more detailed explanation, this technique could be used to destroy evidence that might otherwise be recoverable of "deleted files", i.e., files which the user has instructed the operating system to delete. The ordinary "delete" function of common operating systems does not, when employed, actually result in the destruction of the underlying data, but generally remain present in the "unallocated space" of the hard drive. Unallocated space is space that the operating system treats as available to use for the storage/writing of new data or files. Thus, after a period of ordinary use, unallocated space will gradually be populated or filled in with new data, over-writing the old. Until the unallocated space where a "deleted file" is resident is over-written with new data, forensic recovery software can recover the file. The purpose of over-writing software such as Secure Delete, when applied to wipe all "free space" (aka "unallocated space") is to force the over-writing, with random data, of the latent content. Multiple, repetitive over-writing then simply increases the likelihood that forensic recovery tools cannot be used to recover the "deleted" content.]

48. I asked DEI to advise me whether there was evidence that the product had been used in any of these ways. DEI reported that the content of the Moyse computer was not consistent with any use of the Secure Delete function to delete all free space and thereby prevent forensic analysis of the drive as a whole, on the assumption that the product indeed writes with random characters as is claimed in the product literature. Further, it is clear that the

> function was not used to wipe the entire drive, since there were substantial volumes of data produced to us. **DEI cannot determine whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly cannot express any conclusion on that possibility other than to note that it exists.**[6]

19. Upon learning of Moyse's conduct, Catalyst brought a motion to hold Moyse in contempt of court (the "Contempt Motion").

2) Moyse Admits to Deleting his Web Browsing History, Claims He did not Run the Scrubber

20. In response to the ISS report, Moyse admitted (as he had to in the face of the conclusive evidence) that he downloaded the Scrubber, but he claimed that he did not use the Scrubber to delete "relevant" data. Moyse claimed that he only deleted data that he unilaterally determined, without the assistance of counsel, was "irrelevant" and therefore outside the scope of the Interim Order. The "irrelevant" information Moyse deleted included his Internet browsing history.[7]

21. Moyse explained why he deleted his Internet browsing history by putting his state of mind at issue:

> I was also concerned that the irrelevant information on the images [a reference to Moyse's alleged accessing of pornographic websites] would somehow become part of the public record through this litigation. **At this point it was not clear to me what would happen to the images, which would include the irrelevant personal information.**[8]

22. At his cross-examination, Moyse claimed he tried to get information from his lawyers about the ISS process, but they were not sure how the process would unfold. Despite putting his state of mind at issue and admitting to having communicated with his lawyers about this issue, Moyse refused to produce his communications with his counsel.[9]

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[6] Report of the ISS, pp. 41-43, ¶44-48; AB, Tab 16, pp. 352-54.
[7] Affidavit of Brandon Moyse, affirmed April 2, 2015 ("Moyse Affidavit"), ¶38-41; AB, Tab 20, pp. 418-419.
[8] Moyse Affidavit, ¶40; AB, Tab 20, pp. 418-19 [emphasis added].
[9] Cross-Examination of Brandon Moyse held May 11, 2015 ("Moyse 2015 Cross"), p. 70-71, qq. 363-67; AB, Tab 11, pp. 212-13; Moyse Answers to Undertakings, q. 368; AB, Tab 12, p. 239.

23. Moyse claimed he did not run the Scrubber, but he could not explain why a "Secure Delete" folder was created on his computer the night before it was imaged.[10] Moyse claimed that he purchased the Advanced System Optimizer software, which includes the Scrubber, the morning of the Interim Motion because his computer was running slowly and he wanted to "optimize" it.[11]

24. By deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014. The web browsing history included, among other things, his use of personal web-based email services such as "Gmail", evidence of Moyse's use of web-based storage services at issue in this action, and evidence of Moyse's web-searching activity, including, for example, the searches Moyse ran in July 2014 when he was looking for deletion software.[12]

2) Expert Evidence Confirms Moyse Most Likely Ran the Scrubber on July 20, 2014

25. Martin Musters, Catalyst's forensic IT expert ("Musters"), ran independent tests on the operation of the Scrubber. Through his analysis, Musters determined that:

(a) Merely downloading and installing the Scrubber does not lead to the creation of a "Secure Delete" folder on one's computer;

(b) A "Secure Delete" folder is created when a user launches the Scrubber software; and

(c) Although the Scrubber includes a summary log recording a user's deletion activity, it is possible to delete the log to remove evidence that the Scrubber was used to delete documents.[13]

26. The steps required to erase evidence of one's use of the Scrubber are not technically complicated. All the user has to do is use the computer's registry editor software to erase the "registry log" on the computer associated with the Secure Delete software, at which point the summary resets to zero. Information about the registry editor is readily available on the Internet.

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[10] Moyse Affidavit, ¶47; AB, Tab 20, pp. 420-21.
[11] Moyse 2015 Cross, pp. 66-67, qq. 338-345; AB, Tab 11, pp. 208-209.
[12] Cross-Examination of Kevin Lo, pp. 23-26; qq. 95-105; AB, Tab 13, pp. 243-46.
[13] Musters Feb 2015 Affidavit, ¶12; AB, Tab 17, p. 362. Supplementary Affidavit of Martin Musters, sworn April 30, 2015, ¶10-19; AB, Tab 18, pp. 395-401.

3) Moyse's Expert's Inadequate Excuses for Moyse's Conduct

27. Moyse retained Kevin Lo, an IT expert ("Lo"), to respond to Musters' evidence. Lo reviewed a copy of the Image that was provided to him by Moyse's counsel.[14] In his first affidavit, Lo noted, correctly, that the "Secure Delete" folder is created when a user launches the Scrubber, whether or not the user actually uses it to delete data. Lo also noted that he could not find a registry log for Secure Delete on Moyse's computer. Lo relied on the absence of a registry log for Secure Delete to conclude that the Scrubber was not used to delete data from Moyse's computer.[15]

28. In response to this opinion, Musters conducted additional investigations and determined that it is a simple matter to use a computer's registry editor to delete the registry log for the Scrubber. This ability to delete the log for the Scrubber undermined Lo's conclusion, as it demonstrated that the absence of a log did not mean that Moyse did not use the Scrubber.

29. In response to this evidence, Lo affirmed a second affidavit in which he stated that through a review of the metadata for the registry editor on Moyse's computer, Lo could conclude that Moyse never ran the registry editor on his computer. Lo's conclusion was based on the fact that the metadata for the registry editor recorded a "last accessed date" of July 13, 2009, which is the factory default date.[16]

30. Lo's evidence on this point was misleading and is based on facts that he knew were incorrect.

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[14] Moyse has refused to provide a copy of the Image to Catalyst, so it is impossible for Catalyst to verify the accuracy of Lo's information by replicating his analyses.
[15] Affidavit of Kevin Lo, affirmed April 2, 2015, ¶11-20; AB, Tab 21, pp. 432-34.
[16] Supplementary Affidavit of Kevin Lo, affirmed May 12, 2015, ¶6-9; AB, Tab 22, p. 452.

31. As every IT expert knows or ought to know, by default, recent releases of Windows do not update the metadata for the registry editor program to record when the program is run.[17] Thus, the fact that the "last accessed date" for the registry editor on Moyse's computer was recorded as July 13, 2009, was not probative as to whether or not Moyse ran the registry editor.

32. At his cross-examination, Lo's explanation for his mistake was that while he knew that the metadata is not updated, this fact did not occur to him when he swore his affidavit.[18] Despite swearing two affidavits that attempted to support Moyse's position, Lo was unable to point to any evidence that supported his conclusion that Moyse did not use the Scrubber to delete documents.

33. The very nature of this type of software makes it impossible for anyone to know for certain whether it was used, because the data it deletes is deleted forever without a trace, and it is a simple matter of deleting the registry log for the Scrubber to delete the record of its activity.

C. Moyse's Credibility Problems

34. Moyse has engaged in a long-standing course of conduct that demonstrates he is willing to say whatever he feels is necessary to get what he wants. For example:

(a) He admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[19]

(b) He admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have led a due diligence process that he merely participated in with more senior employees at Catalyst;[20]

(c) Moyse justified the "embellishments" on his deal sheet because he wanted a job, and it was not a "sworn" document;

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[17] Second Supplementary Affidavit of Martin Musters, sworn May 13, 2015, ¶5; AB, Tab 19, p. 404.
[18] Cross-Examination of Kevin Lo, held May 14, 2015 ("Lo Cross"), pp. 46-49, qq. 210-223; AB, Tab 13, pp. 247-50.
[19] Cross-Examination of Brandon Moyse, held July 31, 2014 ("Moyse 2014 Cross"), p. 15, qq. 57-62; AB, Tab 10, p. 110.
[20] Moyse 2014 Cross, pp. 17-20, qq. 69-91; AB, Tab 10, p. 111-14.

(d) Moyse now claims that he did not understand all of the terms of his employment agreement with Catalyst, even though he indicated by signing the contract that he had reviewed, understood and accepted the terms of the offer;[21]

(e) Moyse admitted he made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[22]

(f) Moyse admitted that by disclosing a confidential memo to West Face, he knowingly caused Catalyst to breach a non-disclosure agreement;[23]

(g) Moyse admitted he wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device;[24]

(h) Moyse claimed he misrepresented his opinion of his employment at Catalyst in an email to Dea and another partner at West Face;[25]

(i) Moyse admitted that contrary to his affidavit evidence regarding his "limited" role on the Wind Mobile situation, he was in fact part of the Catalyst deal team for the situation and received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement;[26] and

(j) In his first cross-examination, although asked in general terms what matters he worked on at West Face, Moyse omitted reference, even in general terms, to his work on the Arcan investment, which was only disclosed by West Face in response to the motion below.[27]

35. Catalyst's position is that, based on Moyse's prior conduct of misleading the Court, his undisputed credibility problems, his expert's reliance on incorrect evidence, and the undisputed fact that Moyse deleted his web browsing history, the only reasonable inference that the Motion Judge could have drawn from the undisputed evidence in the record is that Moyse used the Scrubber to delete relevant data from his computer.

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[21] Moyse 2014 Cross, pp. 27-28, qq. 126-130; AB, Tab 10, pp. 115-16.
[22] Moyse 2014 Cross, pp. 85-86, qq. 394-396; AB, Tab 10, pp. 144-45.
[23] Moyse 2014 Cross, pp. 96-98, qq. 446-452; AB, Tab 10, pp. 153-55.
[24] Moyse 2014 Cross, pp. 103-106, qq. 473-486; AB, Tab 10, pp. 160-63.
[25] Moyse 2014 Cross, pp. 126-27, qq. 596-602 and pp. 153-54, q. 729; AB, Tab 10, pp. 169-70 and 186-87.
[26] Moyse 2014 Cross, pp. 174-75, qq. 803-809; AB, Tab 10, pp. 194-95.
[27] Moyse 2014 Cross, pp. 171-72, qq. 794-96; AB, Tab 10, pp. 191-92.

D. Moyse worked on a Catalyst-Related Matter During his First Week at West Face

36. In the Interlocutory Motion, Catalyst tried to find out what Moyse worked on while he was employed at West Face, but the defendants refused to disclose this information.[28] In its factum for the Interlocutory Motion, West Face stated that it was not involved in any of the transactions that were the subject of the Catalyst investment memos and had no use for the information contained therein.[29]

37. It turns out that during his first week at West Face, Moyse worked on an analysis of Arcan Resources Ltd. ("Arcan"), one of the companies he analyzed in the Catalyst confidential memos he disclosed to West Face.[30] West Face and Moyse actively hid this relevant evidence from Catalyst and Justice Lederer in the previous motion.

38. West Face has tried to minimize the significance of it conduct, but the fact remains that relevant evidence was only disclosed after Catalyst brought the Imaging Motion, which, if granted, would have demonstrated that West Face had attempted to withhold relevant evidence from the Court at the return of the motion before Justice Lederer.

E. The Unlikely Series of "Coincidences" at West Face

39. Just as Moyse lacks credibility, so does West Face. According to West Face, the following facts are nothing more than an unfortunate series of coincidences, which only came to light as a result of Catalyst's dogged pursuit of the truth in both the prior motions and the current motion:

(a) Moyse sent West Face Catalyst's confidential information as part of his effort to be hired by West Face;

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[28] Moyse Answers to Undertakings, Q. 173; AB, Tab 12, p. 239.
[29] West Face's Factum, dated August 5, 2014, p. 12, ¶39; Exhibit "1" to the Cross-Examination of Anthony Griffin held May 8, 2015 ("Griffin Cross"); AB, Tab 14, p. 264.
[30] Affidavit of Anthony Griffin, sworn March 7, 2015 ("Griffin Affidavit"), ¶52-57; AB, Tab 23, pp. 478-80.

(b) Catalyst's confidential information was circulated to the partners and vice-president;

(c) West Face hired an analyst from the one investment fund manager it was in competition with to purchase Wind Mobile; and

(d) On his second day at West Face, Moyse performed analysis of Arcan, one of the companies that he had worked on at Catalyst for which he sent a confidential memo to West Face in March 2014.

40. The problem with all of these "coincidences" is that they only turn up when Catalyst pursues the truth through its motions.

F. The Motion Judge's Decision

41. The Motion Judge dismissed the Contempt Motion. In particular, he held that:

(a) If the words "activities since March 27, 2014" were intended to encompass non-litigation-related activities, then the Interim Order was ambiguous;

(b) Any activities referred to in the Interim Order would have to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation;

(c) Catalyst did not prove beyond a reasonable doubt that Moyse deleted files relevant to his conduct at Catalyst and/or with respect to issues raised in the litigation;

(d) Even if Catalyst had proved beyond a reasonable doubt that Moyse had deleted relevant files from his personal computer, the Motion Judge would have exercised his discretion to decline to make a finding of contempt as such conduct occurred as a result to make "good faith" efforts to comply with the Interim Order while deleting embarrassing personal files that were not relevant to the litigation; and

(e) Catalyst did not prove beyond a reasonable doubt that Moyse ran the Scrubber.[31]

42. The Motion Judge also dismissed the Imaging Motion. In particular, he held that there was no evidence that West Face failed to comply with its production obligations or that it is evading its discovery obligations.[32]

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[31] Endorsement of Justice Glustein dated July 7, 2015; AB, Tab 3.
[32] *Ibid.*

43. In the motion below, Catalyst also sought injunctive relief. That relief was not granted and Catalyst does not appeal from that decision. It is only appealing the dismissal of the Contempt Motion and of the Imaging Motion.

PART IV - STATEMENT OF ISSUES, LAW & AUTHORITIES

A. The Errors of the Motion Judge

44. The Motion Judge's decision was the product of five errors:

(a) he erred in finding that the words "activities since March 27, 2014" were ambiguous if they were intended to encompass non-litigation-related activities;

(b) he erred in finding that Moyse's admitted conduct of deleting his web browsing history did not breach the Interim Order;

(c) he erred by failing to draw the only reasonable inference to be drawn from Moyse's conduct before the forensic image was made, namely, that Moyse had run the Scrubber to delete documents from his computer;

(d) he erred by concluding that even if Moyse had breached the Interim Order, he could decline to hold Moyse in contempt of court; and

(e) he erred in dismissing the Imaging Motion without considering the need to uphold the integrity of the equitable relief already ordered by Justice Lederer.

B. Standard of Review

45. The question of whether or not a party's conduct amounts to contempt is a question of law that is reviewable on a correctness standard. No deference is owed.[33]

46. Findings of fact, including inferences of fact, should not be reversed unless it can be established that the Motion Judge made a palpable and overriding error. Where the inference-drawing exercise is palpably in error, an appellate court can interfere with the factual conclusion.[34] For example, it is a reviewable error if the Motion Judge failed to draw the only reasonable inference of fact based on the evidence before him.[35]

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[33] *Sabourin and Sun Group of Companies* v. *Laiken*, 2013 ONCA 530 at ¶41 ("*Sabourin*").
[34] *Housen v. Nikolaisen*, 2002 SCC 33 at ¶10 and 23.
[35] *Kamin v. Kawartha Dairy Ltd.*, 2006 CanLII 3259 at ¶8 (ON CA).

47. Discretionary orders are entitled to deference on appeal unless the Motion Judge exercised his discretion unreasonably or acted on a wrong principle.[36]

C. Contempt of Court does not Require Subjective Intent

48. Civil contempt has three elements which must be established beyond a reasonable doubt:

(a) the order alleged to have been 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.[37]

49. An order is not unclear just because it is unduly restrictive.[38] Once having knowledge of the order, a person must obey the order in both letter and spirit with every diligence. They cannot escape a finding of contempt by "finessing" the interpretation of an order.[39]

50. In order to constitute contempt, it is not necessary to prove that the alleged contemnor intended to disobey or flout the order of the Court. All that is required is proof beyond a reasonable doubt of an intentional act or omission that is in fact in breach of a clear order of which the alleged contemnor has notice.[40]

51. Even if a party acts on legal advice, the party can be found in contempt if the conduct violates terms of a court order.[41]

D. The Motion Judge Erred in his Interpretation of the Interim Order

52. Paragraph 4 of the Interim Order provided as follows:

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[36] *Burtch v. Barnes Estate* (2006), 80 OR (3d) 365 at ¶22 (CA).
[37] *Carey v. Laiken*, 2015 SCC 17 at ¶32-35 ["*Carey*"].
[38] *Sabourin*, *supra* at ¶48.
[39] *Ceridian Canada Ltd. v. Azeezodeen*, 2014 ONSC 3801 at ¶32.
[40] *Carey* at ¶38.
[41] *Ibid.* at ¶60-61.

> This Court further orders that Moyse and West Face, 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, **and/or relate to their activities since March 27, 2014,** and/or relate to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst.[42]

53. The Motion Judge held that the phrase "relate to their activities since March 27, 2014" would be ambiguous if it was intended to encompass non-litigation related activities, as "reasonable people could have a different understanding of whether non-work-related activities were to be included". The Motion Judge concluded that the phrase was therefore not intended to include non-work-related activities, and therefore only applied to Moyse's Internet browsing history if Catalyst could prove beyond a reasonable doubt that his browsing history included records of his work-related activities.[43]

54. This interpretation is flawed, as it ignores the plain wording of paragraph 4 in the Interim Order, which, in addition to Moyse's "activities", referred to documents relating to "Catalyst" as a separate category of documents that were ordered preserved. The Motion Judge's interpretation of the Interim Order ignored the explicit inclusion of "and/or" to separate "Catalyst" and "activities", which can only be interpreted to mean that the Interim Order was intended to apply not only to activities related to Catalyst, but also to **any** activities engaged in by Moyse since March 27, 2014.

55. The phrase is not ambiguous. "Activity" means a specific deed, action, or function. The Interim Order was intended to ensure that any evidence of Moyse's deeds, actions or functions since March 27, 2014, if it resided on his personal computer, would be preserved to ensure that evidence of those deeds, actions or functions could be reviewed by the ISS, an independent third party, to determine if Moyse retained Catalyst's confidential information and/or communicated Catalyst's confidential information to any third parties.

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[42] Order of Justice Firestone dated July 16, 2014; AB, Tab 4, p. 32 [emphasis added].
[43] Endorsement of Justice Glustein dated July 7, 2015, ¶71-73; AB, Tab 3, p. 26.

56. The Motion Judge's error lies in the fact that the terms of the Interim Order were broad in nature, in that they required Moyse to preserve evidence of **all** of his activities since March 27, 2014, whether they related to Catalyst or not.

57. The purpose of this broad restriction is evident from the problem Catalyst now faces in its pursuit of the action – Moyse has admittedly deleted his web browsing history from his computer, which makes it impossible to verify whether his web browsing activities were relevant to this action. The only source of evidence as to what was deleted by Moyse is through Moyse himself, which is exactly the situation the parties sought to avoid through an Interim Order that required Moyse to preserve documents relating to **all** of his activities since March 27, 2014, for review by an independent third party.

58. It is no defence to a motion for contempt to argue that the order is improper or should not have been granted. Moyse, through his counsel, consented to the terms of Interim Order on July 16, 2014. Four days later, he deleted his web browsing history. If he was concerned that the phrase "activities since March 27, 2014" was so broad as to include embarrassing personal activities, he should have openly addressed that concern when the parties negotiated the terms of the Interim Order, or by subsequent motion to the Court.

59. It is no defence for Moyse to now argue that the broad terms of the Interim Order were ambiguous. The Motion Judge erred by accepting this argument. The terms of the Interim Order are clear, unambiguous, and required Moyse's full compliance.

F. The Motion Judge Erred In his Conclusion that Moyse's Web Browsing History was not Subject to the Interim Order

60. By intentionally destroying the record of his web browsing activities since March 27, 2014, Moyse put the Court in the position that the Interim Order was intended to avoid – the Motion Judge erroneously concluded that he had to determine whether Catalyst could prove beyond a reasonable doubt that the web browsing history contained records relevant to the action. That was the wrong question, which led to the wrong result on the motion.

61. A computer user's web browsing history records the user's Google searching activities, access to Internet storage services such as Dropbox, and access to Internet email services such as Gmail.[44] The deletion of the web browsing history destroys the record of that activity.[45]

62. Whether or not Moyse admitted to having used Google search, Dropbox or Gmail on his computer, it is beyond dispute that his web browsing history would have recorded whether he accessed those services from his personal computer or not, and on what dates and times. The point of preserving documents and evidence such as Moyse's web browsing history was to provide the ISS with a record of Moyse's web browsing activities as part of his investigation of Moyse's digital records.

63. It is no defence to the contempt motion for Moyse to argue that Catalyst had not proven beyond a reasonable doubt that the record he deleted contained relevant information – the plain wording of the Interim Order applied to any document that evidences his activities since March 27, 2014, and clearly applied to the web browsing history on his personal computer, which Moyse knew was going to be imaged the day after he deleted that history.

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[44] Lo Cross, pp. 23-25, qq. 95-105; AB, Tab 13, pp. 243-45.
[45] Lo Cross, pp. 23-26, qq. 97, 104 and 110; AB, Tab 13, pp. 243-46.

64. By deleting his web browsing history, Moyse put the parties in a position where he was the only person with evidence as to what that history would have revealed. His self-serving evidence on this point should not have been accepted, but in any event, the fact that web browsing history is capable of recording relevant activities is the very reason why it was subject to the Interim Order and should not have been deleted. By doing so, Moyse breached the order and on that basis alone should have been held to acted in contempt of the Interim Order.

G. The Motion Judge Erred by Failing Infer that Moyse had Used the Scrubber

65. It is a reversible error to draw inferences that do not flow logically and reasonably from established facts, because doing so draws the Motion Judge into the impermissible realms of conjecture and speculation.[46]

66. The Motion Judge's conclusion that the evidence does not support a finding beyond a reasonable doubt that Moyse ran the Scrubber was not based on established fact. It was a conclusion based on the failure to draw the only reasonable and logical inference available to be drawn from the established facts.

67. The facts established by the evidence proved, beyond a reasonable doubt, that Moyse:

(a) purchased the Scrubber the morning of the motion for interim relief;
(b) had engaged in Internet searches to research how to permanently delete information from his computer;
(c) deleted his web browsing history the night before his computer was to be imaged;
(d) deleted other damning evidence (his email to Tom Dea sent in March 2014) from his computer when he realized he should not have sent that email; and
(e) launched the Scrubber software the night before his computer was to be imaged.

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[46] *R. v. MacIsaac*, 2015 ONCA 587 at ¶46.

68. From this established evidence, the **only** reasonable inference that the Motion Judge could have drawn is that Moyse used the Scrubber at the same time as he deleted his web browsing history. Instead, the Motion Judge concluded that Moyse launched the Scrubber software but did not use it, which is both unreasonable and illogical.

69. Had the Motion Judge made proper and allowable inferences of fact, instead of illogical and unreasonable inferences, he would have made the only determination available to him from the known facts: that Catalyst had proven beyond a reasonable doubt that Moyse had run the Scrubber to delete documents from his computer, contrary to the terms of the Interim Order and in contempt of court. This is especially so given that Moyse had no credible explanation for the fact that the Scrubber was opened the night before he was required to give his computer to his lawyer for the purpose of creating a forensic image.

H. The Motion Judge Erred in Holding that Moyse was Entitled to an Immediate Discharge

70. The Motion Judge held that even if he had found that Moyse had breached the Interim Order by deleting his web browsing history, he would have exercised his discretion to decline to make a finding of contempt "as such conduct would have occurred as a result of Moyse's 'good faith' efforts to comply with the [Interim Order] while deleting embarrassing personal files which were not relevant to the litigation".[47]

71. In *Carey,* the Supreme Court acknowledged that a judge hearing a contempt motion retains some discretion to decline to make a finding of contempt. However, the examples cited in *Carey* illustrate the scope of this discretion, namely, to avoid an injustice in the circumstances of the case,

[47] Endorsement of Justice Glustein dated July 7, 2014 at ¶79; AB, Tab 3, p. 27.

such as where the alleged contemnor took steps to attempt to comply with the order but was unable to do so.[48]

72. An injustice can occur when the alleged contemnor acts in good faith to take reasonable steps to comply with the order. But "reasonable steps" refer to steps taken in an attempt to comply with a mandatory order or where the defendant did everything possible to comply with the terms of the order.[49] By that measure, Moyse falls short of the standard.

73. The purpose of a contempt order is first and foremost a declaration that a party has acted in defiance of a court order. The rule of law depends on the ability of the courts to enforce their process and maintain their dignity and respect.[50]

74. In the motion below, the Motion Judge erred in holding that he had the discretion in these circumstances to decline to make a finding of contempt. Paragraph 4 of the Interim Order, while positive in its syntax, was prohibitive in nature: Moyse and West Face were ordered to preserve and maintain certain records.

75. One complies with such an order **by not deleting records.** Moyse deleted records that fell within the scope of the Interim Order. When he deleted his web browsing history without **at minimum** consulting first with his counsel or bringing a motion to the Court, Moyse was not exercising diligence or taking reasonable steps to comply with the order; rather, he was taking steps that undermined the spirit and intent of the order.

76. Moyse claimed that his conduct was motivated by his concern regarding the scope of a review of the forensic image of his computer by an ISS. However, after putting his state of mind at

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[48] *Carey, supra* at ¶37.
[49] *Ibid.* See also *TG Industries Ltd. v. Williams*, 2001 NSCA 105 at ¶31.
[50] *Carey, supra*, at ¶30.

issue, he refused to disclose his communications with his counsel that he allegedly engaged in to address this concern.

77. These circumstances do not fall within the limited circumstances where an alleged contemnor can be said to have exercised due diligence in an attempt to comply with a court order. Moyse did no such thing and should not escape liability for the consequences of his actions.

I. The Motion Judge Failed to Consider the Context of the Imaging Motion

78. In the motion below, Catalyst sought to have an ISS review forensic images of West Face's corporate servers and the electronic devices of five West Face representatives for the purpose of preparing a report which would detail whether the Images contain or contained Catalyst's confidential and proprietary information and if so, whether any emails exist in relation to this confidential and proprietary information.

79. The Motion Judge applied Rule 30.06 and determined that Catalyst had not established that West Face had failed to comply with its production obligations or intentionally deleted materials to thwart the discovery process.[51]

80. The Imaging Motion was equitable in nature, and is therefore subject to the discretion of the Court. But that discretion is not wholly unfettered: the Motion Judge was still required to consider all of the relevant principles, including the need for the court to uphold the integrity of its processes and prior court orders.

81. In the unique circumstances of the motion below, where the Court had ordered an ISS review of Moyse's computer, the Imaging Motion should not have been treated as a motion *de*

[51] Endorsement of Justice Glustein dated July 7, 2015 at ¶57; AB, Tab 3, p. 24.

novo; rather, it should have been considered in the context of the relief already ordered by Justice Lederer in the prior motion.

82. While the relief sought in the Imaging Motion was discretionary in nature, the Motion Judge erred by failing to consider the principle of the importance of the relief sought to the need to maintain the dignity and respect for the Court's process. The Imaging Order is required in order to redress the damage to the Court's process caused by Moyse's conduct, while he was an employee of West Face.

83. At the Interlocutory Motion, Moyse's counsel argued that it should be left to Moyse to review and determine what should be produced. Justice Lederer rejected this argument on the basis that this was "another assurance where those made in the past were not sustained."[52] Justice Lederer ordered that an ISS review the forensic images of Moyse's devices and deliver his report before any examinations for discovery are conducted in this action.

84. The ISS process ordered by Justice Lederer was irredeemably tainted by Moyse's conduct of deleting his web browsing history and running the Scrubber before the image of his computer was made. We will never know what was deleted.

85. However, a second source of the same evidence exists – West Face's devices. An ISS review of West Face's devices will remedy the deficiencies of the first ISS process that were caused by West Face's employee (Moyse), and will ensure that Moyse's subversion of the court's process is not left without a remedy.

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[52] Judgment of Justice Lederer dated November 10, 2014 at ¶83; AB, Tab 6, pp. 65-66.

86. The Motion Judge failed to consider the context of the Imaging Motion, and in so doing, erred in his exercise of discretion. In order to preserve the integrity of the court's process, the Motion Judge's decision should be reversed and the Imaging Order Motion be granted.

PART V - ORDER REQUESTED

87. For the reasons stated above, the Motion Judge erred in his decisions on the Contempt Motion and the Imaging Motion. His dismissal of those motions will lead to an injustice that cannot be remedied, and will allow a defendant to avoid answering for intentional conduct that breached a court order to which he consented mere days before.

88. Moyse consented to a preservation order and then deleted relevant documents. The consequences of that conduct should not be that he escapes without a finding of contempt and Catalyst is left without the ISS process that Justice Lederer already found it was entitled to benefit from before oral discoveries.

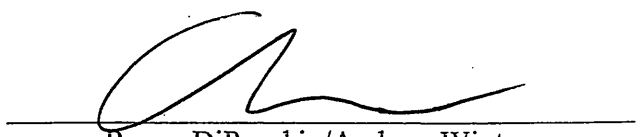
89. Catalyst respectfully requests that the appeal be granted, the Motion Judge's order be overturned and that:

(a) Moyse is held to be in contempt of the Interim Order, with the appropriate sanction to be determined at a subsequent hearing before a judge of the Superior Court of Justice other than the Motion Judge;

(b) Forensic images of the electronic devices belonging to principals of West Face be created for review by an ISS prior to the discovery process in this action; and

(c) Costs be awarded to the Appellant for the motion below and the within appeal on a partial indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of September 2015.



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Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

CERTIFICATE

I estimate that 3 hours will be needed for my oral argument of the appeal, not including reply. An order under 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 20th day of September, 2015.

Andrew Winton

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Sabourin and Sun Group of Companies* v. *Laiken*, 2013 ONCA 530.

2. *Housen v. Nikolaisen*, 2002 SCC 33.

3. *Kamin v. Kawartha Dairy Ltd.*, 2006 CanLII 3259 (ON CA).

4. *Burtch v. Barnes Estate* (2006), 80 OR (3d) 365 (CA).

5. *Carey v. Laiken*, 2015 SCC 17.

6. *Ceridian Canada Ltd. v. Azeezodeen*, 2014 ONSC 3801.

7. *R. v. MacIsaac*, 2015 ONCA 587.

8. *TG Industries Ltd. v. Williams*, 2001 NSCA 105.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

Rule 60.11: Contempt Order

Motion for Contempt Order

60.11(1) A contempt order to enforce an order requiring a person to do an act, other than the payment of money, or to abstain from doing an act, may be obtained only on motion to a judge in the proceeding in which the order to be enforced was made.

(2) The notice of motion shall be served personally on the person against whom a contempt order is sought, and not by an alternative to personal service, unless the court orders otherwise.

(3) An affidavit in support of a motion for a contempt order may contain statements of the deponent's information and belief only with respect to facts that are not contentious, and the source of the information and the fact of the belief shall be specified in the affidavit.

Warrant for Arrest

(4) A judge may issue a warrant (Form 60K) for the arrest of the person against whom a contempt order is sought where the judge is of the opinion that the person's attendance at the hearing is necessary in the interest of justice and it appears that the person is not likely to attend voluntarily.

Content of Order

(5) In disposing of a motion under subrule (1), the judge may make such order as is just, and where a finding of contempt is made, the judge may order that the person in contempt,

(a) be imprisoned for such period and on such terms as are just;

(b) be imprisoned if the person fails to comply with a term of the order;

(c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

(f) comply with any other order that the judge considers necessary,

and may grant leave to issue a writ of sequestration under rule 60.09 against the person's property.

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Appellant

-and-

BRANDON MOYSE et al.
Defendants/Respondents

Court File No: C60799

ONTARIO
COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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