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

FACTUM OF THE RESPONDING PARTY
WEST FACE CAPITAL INC.
(Re: Plaintiff's Motion for Interlocutory Relief returnable June 11, 2015)

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PART I - OVERVIEW

1. This action arises from the hiring of a then 26 year-old analyst, Brandon Moyse, for three and a half weeks in mid-2014. By this motion, the Plaintiff Catalyst seeks three exceptional remedies against the Defendants:

(a) First, an interlocutory injunction restraining "[West Face], its officers, directors, employees, agents, or any persons acting under its direction or on its behalf" from "[p]articipating in the management and/or strategic direction of Wind Mobile Corp. and any affiliated or related corporations" (the "**Management Injunction**").[1]

(b) Second, an interlocutory order authorizing an Independent Supervising Solicitor (an "**ISS**") to create forensic images of all of West Face's over 172 electronic devices, for the stated purpose of determining whether West Face has obtained and misused any confidential information belonging to Catalyst (the "***Anton Piller* Order**").[2]

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[1] Amended Notice of Motion, at para. (b), Catalyst's Motion Record, Tab 1, pp. 1-2. Originally, and as set out in its Amended Notice of Motion, Catalyst also specifically sought injunctive relief regarding the AWS-3 wireless spectrum auction, but that auction concluded successfully for WIND in March and the issue is now moot. In its factum, Catalyst now appears to be narrowing its request to a prohibition on West Face voting its shares in WIND. See Catalyst's Factum, at para. 122(e).

[2] Amended Notice of Motion, at para. (c), Catalyst's Motion Record, Tab 1, p. 2. In its factum, Catalyst now appears to be narrowing its request to West Face's servers and the electronic devices used by five key individuals. See Catalyst's Factum, at para. 122(b).

(c) Third, an order jailing Mr. Moyse for contempt.[3]

2. How such a prosaic hiring engendered such extraordinary prayers for relief is an unfortunate story of misunderstanding breeding mistrust. And admittedly, West Face has hardly endeared itself to Catalyst. West Face hired away one of Catalyst's junior analysts – the Defendant Brandon Moyse. When confronted with an accusation of misappropriating confidential information, West Face overlooked that Mr. Moyse had included writing samples marked "Confidential" as part of his job application, until finding and producing them voluntarily six business days after Catalyst commenced proceedings. West Face successfully acquired WIND Mobile where Catalyst had failed. West Face made a very successful "short sale" investment of Catalyst's subsidiary Callidus.

3. So aggravating have West Face's successes been that Catalyst: has repeatedly threatened defamation proceedings against West Face; has apparently taken steps to publicize the allegations it makes in this motion with the media; and has even complained to the Ontario Securities Commission (without apparent success).

4. While perhaps understandable on an emotional level, on closer examination Catalyst's complaints have no basis in fact or law. There is no evidence that West Face misused any confidential information and no evidence that West Face has destroyed evidence or will otherwise seek to flout the ordinary discovery process. On the contrary, West Face has complied with its legal obligations to Catalyst in this lawsuit and in many cases it has exceeded them. West Face voluntarily implemented an ethical wall precluding Mr. Moyse from any involvement with WIND at West Face. West Face agreed to place Mr. Moyse on indefinite leave and has had no relevant communications with him since mid-July 2014, other than through

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[3] Amended Notice of Motion, at paras. (c.1)-(c.4), Catalyst's Motion Record, Tab 1, p. 3. West Face will not address the motion for a contempt order, as Mr. Moyse has separate representation.

counsel. Moreover, in its responding materials on this motion, West Face did not just answer Catalyst's complaints. It voluntarily disclosed: (a) all email communications involving or concerning Mr. Moyse; (b) its proprietary analysis of Callidus, including its detailed research methods and evidence that formed the basis for that analysis; (c) its investment in Arcan (one of the companies addressed in Mr. Moyse's writing samples); and (d) Mr. Moyse's West Face notebook, redacted only for active investments. West Face even offered to turn over every electronic document accessed by Mr. Moyse during his West Face tenure to the ISS – an offer Catalyst ignored.

5. This Court should deny both proposed injunctions because there is not sufficient evidence to support either of them. The extraordinary remedies sought by Catalyst are not to be granted on mere suspicion, in the hopes of finding actual evidence. Yet that is precisely Catalyst's rationale for the relief it seeks. While the law requires evidence of misusing confidential information, Catalyst's COO Mr. Riley concedes that Catalyst seeks the *Anton Piller* Order because it "will reveal whether [Mr.] Moyse in fact communicated Catalyst's Confidential Information to West Face and what use West Face made of such information".[4] Catalyst relies on a series of allegedly suspicious coincidences, but they amount to little more than what is described above: hiring an analyst, winning a competitive bid for an asset, and successfully executing a short sale. That is just business, as the facts surrounding each "coincidence" reveals.

6. The only potentially confidential information received by West Face was in the four memoranda that Mr. Moyse sent to West Face as writing samples. While unfortunate, the fact is that Catalyst itself never pursued an investment in any of the companies reviewed in those four memos, nor does it allege any loss from the memos' disclosure. Indeed, Catalyst unsealed

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[4] [Emphasis Added]. Riley Affidavit, at para. 91, Catalyst's Motion Record, Tab 3, pp. 82-83.

the Court file containing those memos. West Face ultimately invested in only one of these companies, Arcan, but based on an unexpected business transaction that created a specific investment opportunity six months after Mr. Moyse's Arcan memo had been written. There is no evidence that West Face's investment was based on anything in Mr. Moyse's writing sample.

7. West Face admitted its mistake in overlooking the writing samples during the initial flurry of litigation. As a consequence of that mistake, West Face consented to an interim order enjoining it from employing Mr. Moyse after a mere three and a half weeks. Justice Lederer then enjoined Mr. Moyse from working at West Face until December 2014 (and West Face has since voluntarily and indefinitely extended his period of leave pending this motion). Justice Lederer also ordered a forensic review of Mr. Moyse's electronic devices by an ISS. Catalyst initially sought, but then abandoned, an identical request to the current *Anton Piller* Order. The ISS found only five additional documents on Mr. Moyse's computer beyond the approximately 800 that Mr. Moyse had already disclosed,[5] and no evidence of transmission to West Face.

8. Beyond the writing samples, West Face has not received any Catalyst confidential information, let alone misused it. Specifically, there is no evidence that West Face received any confidential information about the two companies that are at the heart of Catalyst's motion: WIND and Callidus. Catalyst lost the WIND deal to West Face because, during a period in which it enjoyed exclusive negotiating rights, Catalyst demanded a series of regulatory conditions that proved unacceptable to the seller. This all happened after Mr. Moyse's departure from Catalyst and, in fact, after he was placed on indefinite leave from West Face. With respect to Callidus, West Face unearthed the flaws in its business model and financial condition based on entirely public information.

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[5] In addition to the writing samples, Mr. Moyse had initially failed to realize he had not successfully deleted various work files that he had downloaded to work on from home during his time as a Catalyst employee. He disclosed them in his Affidavit of Documents sworn July 22, 2014, and there is no evidence suggesting any such information was ever given to West Face. See Mr. Moyse's Affidavit of Documents sworn July 22, 2014, Catalyst's Motion Record, Tab N, p. 163.

9. However understandable Catalyst's initial suspicions may or may not have been, they have been answered and this motion must be dismissed.

PART II - THE FACTS

A. The Parties

10. The Plaintiff/Moving Party, Catalyst, is an investment firm with over $4 billion in assets under management.[6] Catalyst owns approximately 59.5% of Callidus,[7] and is the largest secured creditor of Mobilicity,[8] a major competitor to WIND Mobile trying to become Canada's fourth national wireless carrier.

11. The Defendant/Responding Party West Face is an investment management firm with over $2 billion in assets under management. West Face is led by its CEO, Greg Boland, along with three other Partners: Peter Fraser, Thomas Dea, and Anthony Griffin.[9] Funds controlled by West Face hold a 35% interest in WIND.[10]

12. The Defendant/Responding Party Brandon Moyse is a (now) 27 year-old former junior employee of Catalyst who worked at West Face as a junior associate from June 23 to July 16, 2014, before West Face voluntarily placed him on indefinite leave due to these proceedings.

B. West Face Did Not Misuse Catalyst Confidential Information to "Scoop" the WIND Deal

i. Introduction

13. West Face acquired its 35% interest in WIND in September 2014 following a highly public sales process run by VimpelCom (WIND's principal equity-holder at the time).

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6 Riley Transcript, q. 587, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 62. But see Riley Affidavit, at para. 3, Catalyst's Motion Record, Tab 3, p. 58.

7 Griffin Affidavit, at para. 100, West Face's Responding Motion Record, Vol. 1, Tab A, p. 38.

8 Amended Notice of Motion, at para. (ff), Catalyst's Motion Record, Tab 1, p. 11.

9 Griffin Affidavit, at paras. 21-22, West Face's Responding Motion Record, Vol. 1, Tab A, p. 9.

10 Griffin Affidavit, at para. 2, West Face's Responding Motion Record, Vol. 1, Tab A, p. 2.

14. Catalyst speculates that West Face may have "scooped" the WIND deal out from under Catalyst based on confidential information relating to Catalyst's own plans for WIND that West Face allegedly acquired from Mr. Moyse.[11] The best evidence that this could not have occurred is that from July 23 to August 18, 2014 – after Mr. Moyse's departure from West Face – Catalyst was engaged in exclusive negotiations with VimpelCom and therefore controlled its own destiny regarding the WIND acquisition. It chose to introduce a series of regulatory conditions after Mr. Moyse's departure from Catalyst and unbeknownst to Mr. Moyse or West Face.[12] VimpelCom was not willing to accept these conditions. In short, Catalyst's secret plans were of no use to Catalyst, and unknown to West Face.

ii. West Face's Pre-Existing Interest in WIND

15. West Face's interest in WIND dates back to at least November 2009, almost five years before Mr. Moyse joined West Face and almost three years before he was employed by Catalyst.[13] This interest was renewed on November 4, 2013, when West Face learned from WIND's then-CEO, Anthony Lacavera, that VimpelCom was interested in selling WIND. Within days West Face delivered an expression of interest. West Face accessed VimpelCom's data room and participated in a management presentation from WIND in December, 2013 – all

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11 See, for example, Riley Affidavit, at paras. 46-47 & 87-88, Catalyst's Motion Record, Tab 3, pp. 70-71 & 82.

12 This is apparent from comparing the three relevant versions of the Draft Share Purchase Agreement: (1) VimpelCom's Original Draft Share Purchase Agreement (which was provided to both Catalyst and West Face, and presumably other interested bidders); (2) Catalyst's May 23, 2014 Draft Share Purchase Agreement (which is the last version of the agreement Mr. Moyse ever saw), Exhibit "E" to the Riley Reply Affidavit, Catalyst's Supplementary Motion Record, Tab 1-E, pp. 47-286; and (3) VimpelCom's August 7, 2014 Draft Share Purchase Agreement, Riley's Undertakings, Advisements, and Refusals Chart, Catalyst's Second Supplementary Motion Record, Tab 16, pp. 391 & 395-526. In Schedule "C" to this factum, West Face has performed a blackline comparison of the relevant regulatory provisions of each of these versions. As apparent from the blackline, Catalyst's May 23, 2014 draft made no material changes to the provisions about regulatory approval. Catalyst's regulatory demands must have arisen after Mr. Moyse left. See also Riley Transcript, qq. 472-504, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 57-59.

13 Griffin Affidavit, at paras. 5 & 29-30, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 3 & 11-12. See also Riley Transcript, qq. 398-405, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 52.

before Mr. Moyse had even reached out to West Face seeking employment.[14] In late April 2014, West Face sent VimpelCom a detailed term sheet.[15]

16. In contrast, Catalyst did not receive a management presentation from WIND until mid-May, 2014.[16]

17. Discussions between VimpelCom and West Face continued throughout the Spring of 2014. By the time Mr. Moyse joined West Face on June 23, 2014, West Face had made significant progress in negotiations.[17] In particular, West Face developed a plan to manage the three essential deal elements that ultimately allowed it to successfully acquire WIND. These three deal elements were:

(a) a deal that could close quickly, with only limited representations and warranties by the vendor;

(b) a purchase price targeting an enterprise value of $300 million; and

(c) a transaction structure that allowed for the full exit of VimpelCom and minimized any risk related to regulatory approval.[18]

18. Significantly, these deal elements had been widely and publicly disclosed by VimpelCom.[19]

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14 Griffin Affidavit, at paras. 31-32, West Face's Responding Motion Record, Vol. 1, Tab A, pp.12-13; and El Shanawany Affidavit, at para. 6, West Face's Responding Motion Record, Vol. 4, Tab B, pp. 1397-1398. Mr. El Shanawany recalled that four individuals from West Face attended this presentation, including West Face Partners Mr. Griffin and Mr. Fraser. El Shanawany Transcript, qq. 38-40, Catalyst's Second Supplementary Motion Record, Tab 11, p. 239.

15 Griffin Affidavit, at paras. 32-34, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 12-13; El Shanawany Affidavit, at para. 10, West Face's Responding Motion Record, Vol. 4, Tab B, pp. 1399.

16 El Shanawany Affidavit, at paras. 10-11, West Face's Responding Motion Record, Vol. 4, Tab B, p. 1399. See also El Shanawany Transcript, qq. 127-131, Catalyst's Second Supplementary Motion Record, Tab 11, p. 245.

17 The details of West Face's negotiations with VimpelCom in the Spring of 2014 are set out in the Griffin Affidavit, at paras. 5-7 & 32-38, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 3-4 & 12-15. See also, generally, the Griffin Reply Affidavit, West Face's Supplementary Responding Motion Record, Tab 1, pp. 1-4, and the Exhibits attached thereto.

18 Griffin Affidavit, at para. 33, West Face's Responding Motion Record, Vol. 1, Tab A, p. 13.

19 See, *inter alia*, the *Globe and Mail* article dated July 31, 2014 attached as Exhibit "5" to the Griffin Affidavit, West Face's Responding Motion Record, Vol. 1, Tab A-5, pp. 146-149; Riley Transcript, qq. 338-365, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 49-50; and El Shanawany Affidavit, at paras. 7-8, 13 & 16, West Face's Responding Motion Record, Vol. 4, Tab B, pp. 1398 & 1400-1401.

iii. Mr. Moyse's Hiring by West Face and the March 27, 2014 Email

19. In the meantime, Mr. Moyse was working at Catalyst as an analyst (a junior position).[20]

20. In January 2014, dissatisfied with his work environment and future prospects at Catalyst,[21] Mr. Moyse contacted West Face looking for a job. One of West Face's Partners, Mr. Dea, met with Mr. Moyse, reviewed his resume, checked his references, and ultimately offered him a position at West Face.[22] Mr. Moyse communicated his resignation to Catalyst on May 24, 2014 while he was on vacation in Southeast Asia, and Catalyst told him to stay home for the balance of his 30 day notice period (which he did).[23]

21. As part of the hiring process, Mr. Dea had asked Mr. Moyse to provide writing samples demonstrating his written communication skills.[24] On March 27, 2014, Mr. Moyse sent an email to Mr. Dea attaching four writing samples that were marked as "Confidential" and "For Internal Discussion Purposes Only". Unfortunately, Mr. Dea then circulated this email internally to his fellow West Face Partners and one other West Face employee who had been involved in prior recruiting efforts, so they could assess Mr. Moyse's written communication skills.[25]

22. Fortunately, the March 27, 2014 email has turned out to be a red herring. Catalyst never pursued an investment in any of the four companies covered in the memos that Catalyst now claims were so important and confidential, and the memos are now between 17 and 31 months

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20 Mr. Moyse's junior role at Catalyst is described in the Moyse Affidavit, at paras. 6-11, Moyse's Responding Motion Record, Tab 1, pp. 2-4.

21 Affidavit of Brandon Moyse sworn July 4, 2014, at paras. 23-29, Exhibit "A" to the Moyse Affidavit, Moyse's Responding Motion Record, Tab 1-A, pp. 27-29.

22 Griffin Affidavit, at para. 39, West Face's Responding Motion Record, Vol. 1, Tab A, p.15.

23 Griffin Affidavit, at para. 42, West Face's Responding Motion Record, Vol. 1, Tab A, p. 16; Moyse Affidavit, at paras. 14-16, Moyse's Responding Motion Record, Tab 1, p. 5. See also Riley Transcript, qq. 242-251, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 44.

24 Griffin Affidavit, at para. 40, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 15-16.

25 Griffin Affidavit, at paras. 48-49, West Face's Responding Motion Record, Vol. 1, Tab A, p. 19.

old.[26] Indeed, in January 2015 Catalyst directed its counsel to unseal the Court file where the March 27, 2014 email was filed.[27]

23. Justice Lederer relied on West Face's failure to disclose the March 27, 2014 email in ordering an ISS process. However, the memos (which were delivered six business days after Catalyst commenced its motion for interim relief[28]) have nothing to do with WIND or Callidus. West Face made no use of these documents other than to evaluate Mr. Moyse's writing skills, and Catalyst has not offered any evidence to the contrary.

24. At the time of Mr. Moyse's departure, Catalyst's interest in WIND remained confidential, and there is no evidence West Face was aware of it. Indeed, in correspondence with West Face, Catalyst would initially refer only to a "telecom file".[29] Catalyst now claims that Mr. Moyse was privy to its regulatory strategy for WIND, but the only alleged sources of Mr. Moyse's confidential information are a PowerPoint presentation to Industry Canada and a Catalyst blackline of VimpelCom's standard form agreement that had been provided to both Catalyst and West Face.[30] The PowerPoint presentation was destroyed shortly after it was given,[31] related to

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26 Griffin Affidavit, Ex. "13", West Face's Responding Motion Record, Vol. 1., Tab A-13, pp. 184, 206, 258 & 282. See also Riley Transcript qq. 272-297, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 46-47.

27 Riley Transcript, qq. 259-262, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 45. See also Griffin Affidavit, at paras. 50 & 129-132, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 20 & 50-52. Coincidentally, a series of articles appeared in the *National Post* and *Globe and Mail* shortly thereafter publicizing Catalyst's allegations against West Face. Catalyst refused to answer questions about its role in instigating this media coverage of its allegations. See Riley's Undertakings, Advisements, and Refusals Chart, Catalyst's Second Supplementary Motion Record, Tab 16, p. 390. See also Riley Transcript, qq. 259-271 & 303, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 45-46 & 47. Copies of these articles are attached as Exhibit "50" to the Griffin Affidavit, West Face's Responding Motion Record, Vol. 2, Tab 50, pp. 809-814.

28 Catalyst commenced its motion on June 26, 2014. West Face delivered its responding materials on July 7, 2014. The interim period included two weekends and a holiday (July 1 "Canada Day"). Riley Affidavit, at para. 27, Catalyst's Motion Record, Tab 3, p. 64.

29 See, for example, Riley Affidavit, Ex. "E", Catalyst's Motion Record, p. 125.

30 Riley Reply Affidavit, at paras. 36-37, Catalyst's Supplementary Motion Record, Tab 1, p. 10. While Mr. Riley also alleges in paragraph 38 of the Riley Reply Affidavit that Mr. Moyse received "dozens" of emails relating to WIND, he admitted during cross-examination that a search had been done of Mr. Moyse's Catalyst emails and that anything relevant would have been produced. Riley Transcript, qq. 305-307, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 47.

31 Riley Transcript, q. 334, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 49. Moyse Transcript, qq. 121-123, Catalyst's Second Supplementary Motion Record, Tab 13, p. 295.

the wireless industry generally and not WIND in particular,[32] and apparently concerned regulatory concessions that Catalyst planned to seek from Industry Canada, which Catalyst only raised with VimpelCom after Mr. Moyse's departure.[33] The Catalyst blackline of VimpelCom's draft agreement from the day before Mr. Moyse's resignation introduced none of Catalyst's novel regulatory plans.[34] In other words, the most Mr. Moyse could have known when he left Catalyst was that it had made no demands for special regulatory concessions from VimpelCom.

iv. West Face's Response to Catalyst's Concerns

25. Catalyst now speculates that West Face hired Mr. Moyse because of his involvement with WIND, but this is contradicted by the evidence. Catalyst first communicated its concern that Mr. Moyse had confidential information regarding a "telecom file" on May 30, 2014.[35] There is no evidence that West Face knew Catalyst was pursuing WIND at the time it hired Mr. Moyse, let alone that Mr. Moyse was involved.

26. West Face took Catalyst's concerns seriously. Given that WIND was a telecom file, West Face implemented a confidentiality wall pursuant to which: (1) Mr. Moyse was forbidden from communicating with anyone at West Face about ongoing WIND negotiations, and vice versa; (2) West Face's IT group implemented technical measures that prevented Mr. Moyse

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32 Moyse Transcript, qq. 121-136, Catalyst's Second Supplementary Motion Record, Tab 13, p. 295. Riley Transcript, qq. 332-333, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 49.

33 Riley Transcript, qq. 390-395, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 52.

34 Griffin Reply Affidavit, at paras. 3-8, West Face's Supplementary Responding Motion Record, Tab 1, pp. 2-4, and the Exhibits attached thereto. See also Riley Transcript, qq. 439-470 & 477-495, in which Catalyst undertook to inform West Face prior to the return of the motion whether it was going to dispute this fact. Catalyst confirmed in answer no. 10 to Riley's Undertakings, Advisements, and Refusals Chart that Catalyst does not dispute the fact that West Face and Catalyst obtained the same Draft Share Purchase Agreement from VimpelCom, Catalyst's Second Supplementary Motion Record, Tab 16, p. 391. See also Riley Transcript, qq. 472-504, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 57-59. See also Schedule "C" to this factum.

35 Affidavit of James Riley sworn June 26, 2014, at para. 37, Exhibit "A" to the Riley Affidavit, Catalyst's Motion Record, Tab 3-A, p. 96.

from accessing WIND-related documents;[36] and (3) the West Face WIND deal team only met in private, behind closed doors, and away from the trading floor area where Mr. Moyse sat.[37]

v. Mr. Moyse Had No Role in WIND Negotiations at West Face

27. Mr. Moyse began working at West Face on June 23, 2014, and approximately three and a half weeks later he was put on indefinite leave (as part of the settlement of Catalyst's motion for interim relief). Mr. Moyse has remained on leave due to these proceedings for almost a year.[38] There is no evidence that the confidentiality wall was ever breached, or that Mr. Moyse ever communicated any Catalyst confidential information related to WIND that he may have had. West Face has disclosed everything Mr. Moyse worked on, none of which related to WIND, Catalyst or Callidus.[39]

vi. Catalyst Fails to Acquire WIND Despite Enjoying an Exclusive Negotiating Period, and the New Syndicate Acquires WIND

28. During Mr. Moyse's brief employment at West Face, West Face was exploring a joint bid for WIND with a potential strategic partner who ultimately backed out of the deal two days after Mr. Moyse stopped working for West Face. In short, West Face was no closer to a WIND transaction when Mr. Moyse left the firm than when he had joined it.[40] In fact, West Face's prospects were dimmer than ever, as on July 23, 2014 (one week after Mr. Moyse went on leave from West Face), West Face learned that VimpelCom had granted another bidder – now

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36 Griffin Affidavit, at para. 43, West Face's Responding Motion Record, Vol. 1, Tab A, p. 17. See also Exhibits "9"-"12" thereto, West Face's Responding Motion Record, Vol. 1, Tabs A-9, p. 172, A-10, p. 173, A-11, p. 174 & A-12, p. 175.

37 Griffin Affidavit, at para. 46, West Face's Responding Motion Record, Vol. 1, Tab A, p. 18.

38 Griffin Affidavit, at para. 58, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 22-23.

39 The details of Mr. Moyse's role, responsibilities, and the work actually performed by him during his brief time at West Face are set out in the Griffin Affidavit, at paras. 58-61 & Appendix "A", West Face's Responding Motion Record, Vol. 1, Tab A, pp. 22-24 & 55-58. See also Griffin Affidavit, Ex. "16", West Face's Responding Motion Record, Vol. 1, Tab A-16, pp. 325-337.

40 Griffin Affidavit, at paras. 68-70, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 26-27.

known to be Catalyst – an exclusive negotiating period to conclude a binding agreement to acquire WIND.[41]

29. Catalyst's exclusive rights meant that VimpelCom was forbidden to, and did not, negotiate with West Face. While West Face delivered a revised proposal, it received no feedback from VimpelCom or its advisors.[42] Catalyst was in the driver's seat and West Face was in the dark.

30. Despite this advantage, Catalyst was not able to conclude a deal with VimpelCom.[43] At some point after Mr. Moyse's departure, Catalyst insisted on a number of regulatory conditions that required Industry Canada approval, which VimpelCom would not accept.[44] The details of why Catalyst failed to close a deal are unknown, as Catalyst has failed to produce its correspondence with VimpelCom other than a few hand-picked documents from the high-water mark of negotiations.[45] However, Catalyst admits that VimpelCom would not accept its regulatory conditions, and that Catalyst would not drop the conditions.[46] Catalyst was not "scooped" by West Face. It failed to reach an agreement with VimpelCom for its own reasons.

31. After Catalyst's exclusive negotiating period expired on August 18, 2014, West Face and its fellow syndicate members moved quickly to get a deal done that would avoid the need for regulatory approval before the full exit of (and payment to) VimpelCom. Mr. Moyse had nothing

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41 Griffin Affidavit, at para. 71, West Face's Responding Motion Record, Vol. 1, Tab A, p. 27. See also El Shanawany Affidavit, at para. 12, West Face's Responding Motion Record, Vol. 4, Tab B, pp. 1399-1400.

42 Griffin Affidavit, at para. 72, West Face's Responding Motion Record, Vol. 1, Tab A, p. 27. See also Riley Transcript, qq. 510-514, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 59.

43 Griffin Affidavit, at para. 73, West Face's Responding Motion Record, Vol. 1, Tab A, p. 28; and El Shanawany Affidavit, at paras. 12-14, West Face's Responding Motion Record, Vol. 4, Tab B, pp. 1399-1400.

44 See, *inter alia*, Riley Transcript, qq. 534-538, 547-548, 568-578, 603-607, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p.62. See also footnotes 12 & 34 above.

45 Riley Transcript, qq. 415-432, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 53-54. See also Exhibits "2" and "3" to the Cross-Examination of James Riley, Joint Supplementary Responding Motion Record of the Defendants, Tab 12, pp.139-140 & Tab 13, pp. 141-142. See also answer no. 9 to Riley's Undertakings, Advisements, and Refusals Chart, Catalyst's Second Supplementary Motion Record, Tab 16, p. 390.

46 Riley Transcript, qq. 574-578, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 62.

to do with the development of this structure, nor how it was implemented.[47] Nor had Catalyst ever pursued such a strategy.[48] West Face's syndicate developed its strategy independently based on its knowledge and analysis of VimpelCom's very public position, communicated to all potential bidders, that it wanted to minimize regulatory risk of approval of a sale. The transaction closed on September 16, 2014.[49]

vii. West Face Did Not Obtain Any Confidential Information Relating to WIND

32. In the face of West Face's uncontroverted evidence that Mr. Moyse played no role in its syndicate's acquisition of WIND, Catalyst vaguely asserts that West Face purchased WIND "by agreeing to waive the regulatory conditions Catalyst had insisted upon."[50] However, as described above, Mr. Moyse had no way to know Catalyst had made those demands. Catalyst only made them some indeterminate time after Mr. Moyse's departure, they were never disclosed to Mr. Moyse, and thus they were never communicated to West Face.[51]

33. In cross-examination, the only confidential strategy regarding WIND to which Mr. Riley could point was a desire to get government pre-approval for any sale.[52] West Face never sought such pre-approval.

34. In any event, Catalyst had its chance and could not make a deal. It cannot blame West Face for making a more attractive offer than Catalyst was willing to make.

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47 Griffin Affidavit, at para. 73, West Face's Responding Motion Record, Vol. 1, Tab A, p. 28.

48 Riley Transcript, qq. 568-578, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 61-62.

49 The details of the New Syndicate's negotiations leading up to closing of the transaction are set out in the Griffin Affidavit, at paras. 75-80, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 29-31. See also El Shanawany Affidavit, at para. 15, West Face's Responding Motion Record, Vol. 4, Tab B, p. 1400.

50 Catalyst's Factum, at para. 44. See also Riley Reply Affidavit, at para. 45, Catalyst's Supplementary Motion Record, Tab 1, p. 12.

51 See footnotes 12, 34 & 44 above.

52 Riley Transcript, qq. 377-388, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 51-52. While Mr. Riley indicated that the "confidential information" known to Mr. Moyse was Catalyst's "attitude towards the government" that it "would be better to have the government on side", Mr. Riley also acknowledged that "You never have pre-approval from the government, in my experience". Riley Transcript, q. 361, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 50.

C. West Face Did Not Misuse Catalyst Confidential Information Relating to Callidus

i. Introduction

35. Catalyst accuses Mr. Moyse of disclosing the identity of Callidus' borrowers to West Face.[53] However, among the limited number of borrowers identified by West Face's research, Catalyst cannot point to a single borrower that was (a) known to Mr. Moyse and (b) not identifiable by the public information set out in West Face's responding motion materials.

ii. West Face's Research Into Callidus Through Public Sources of Information

36. Callidus went public in April 2014 following an initial public offering at $14 per share.[54] After reviewing the IPO marketing materials at the time, West Face did not believe that Callidus' publicly disclosed financial information supported this IPO valuation, and began to follow the company.[55]

37. Callidus quickly climbed in value after the IPO, peaking between August and October 2014 at well over $22 per share, an increase of almost 60% in just four months. This was more than twice book value (based on the assets and liabilities reported in Callidus' public financial statements).[56] While Callidus had disclosed tremendous growth,[57] it provided very limited

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53 Amended Notice of Motion, at para. (ww), Catalyst's Motion Record, Tab 1, pp. 17-18. While Mr. Riley made a more vague allegation in paragraph 84 of the Riley Affidavit that "[Mr.] Moyse had confidential information pertaining to Callidus on his personal computer that he shared with West Face and which West Face used to prepare its research report", he confirmed during cross-examination that the only alleged "Confidential Information" relating to Callidus is the identity of Callidus' borrowers. Riley Transcript, q. 713, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 69. See also Riley Affidavit, at para. 84, Catalyst's Motion Record, Tab 3, p. 81.

54 Griffin Affidavit, at paras. 100 & 104, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 38 & 40.

55 Griffin Affidavit, at paras. 113 & 117-118, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 44 & 46. See also Griffin Transcript, qq. 263-264, 268-276, 421-424, Catalyst's Second Supplementary Motion Record, Tab 2, pp. 24-25 & 34.

56 Griffin Affidavit, at paras. 104-106, 111-118, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 40 & 43-46. As at September 30, 2014, Callidus' share price was approximately $22. As at that date, Callidus' most recently released financial statements reported shareholders' equity of $381 million and 48.69 shares outstanding, resulting in a book value of $7.83 per share. The quoted share price of $21.65 therefore represented a ration between market price and book value, or P/B multiple, of 2.81. See Griffin Affidavit, Ex. "40", West Face's Responding Motion Record, Vol. 2, Tab A-40, pp. 646 & 655. As Mr. Griffin put it during his cross-examination: "We thought at the IPO valuation [that the multiples] the company was coming out at …. were favourable/aggressive, and as the stock price increased from the IPO point, it became more glaring." Griffin Transcript, q. 422, Catalyst's Second Supplementary Motion Record, Tab 2, pp. 24-25 & 34.

57 Griffin Affidavit, at paras. 107-112, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 41-44.

information about the actual composition of its loan portfolio.[58] West Face was therefore skeptical that Callidus' shares warranted such a high valuation.[59] In mid-October 2014, three months after Mr. Moyse's departure from West Face, West Face decided to begin short selling shares of Callidus.

38. Catalyst expresses incredulity that West Face would short Callidus without having done detailed research on the composition of its loan book. However, at the same time, Catalyst has been touting the attractiveness of investing in Callidus to public investors without providing any detail about the Callidus loan book.[60] Catalyst's position that West Face must have known the identity of Callidus' borrowers from Mr. Moyse before shorting the stock also contradicts Catalyst's position that its borrowers are all performing on their loans, and there is no weakness in the company.[61]

39. If the loans are all sound, as Catalyst insists, why would West Face need to know loan details before shorting the stock? In assessing Catalyst's allegations about what information West Face must have had to make a short sale, it is worth noting the lack of investment experience of Catalyst's lone affiant on this point, Mr. Riley. Mr. Riley is a respected lawyer and now plays a managerial role at Catalyst, but has no qualifications or meaningful experience as an investment manager.[62]

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58 Griffin Affidavit, at paras. 114-116, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 44-45. See also Griffin Transcript, qq. 321-322, Catalyst's Second Supplementary Motion Record, Tab 2, p. 28.

59 Griffin Affidavit, at paras. 106, 111-113 & 117-118, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 40, 43-44 & 46.

60 As explained by Mr. Griffin during his cross-examination, whether detailed research is conducted prior to making a decision to take a short position "really depends on the case". Mr. Griffin explained: "Well, if it is an event-oriented situation where we [West Face] are trying to capture a particular pricing environment for a security, high or low – in the case obviously of a short, high; in the case of a long position, low – one of the facets of the fund we manage in terms of our strategy is that we are an event-oriented fund, and so we often have to quickly respond to pricing discrepancies in the market that are created on either side….". See Griffin Transcript, qq. 212-213, Catalyst's Second Supplementary Motion Record, Tab 2, p. 20.

61 Riley Transcript, qq. 676-678, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 67.

62 Mr. Riley admitted during cross-examination that his background is in law, and not in investment. In fact, Mr. Riley only joined Catalyst in 2011 (he had been a banking and insolvency lawyer for several decades prior to

40. After deciding to take its initial short position in Callidus in mid-October, West Face pursued more detailed research into Callidus in order to determine whether to increase or reduce its short position.[63] As West Face learned more and more about the (concerning) composition of Callidus' loan book, it continued to increase its short position in Callidus' stock through to December 2014.[64]

41. West Face's research was based entirely on public sources of information. Some of these were as simple as Google and Bloomberg. Others included searches of government records, public websites, and promotional materials.[65]

42. In the result, West Face was able to identify a total of 40 of Callidus' borrowers, 14 of which West Face understood to be outstanding as of March 9, 2015, and nine of which West Face believed matched nine of the 19 total loans described in general terms by Callidus in its IPO prospectus.[66] West Face has never had a complete picture of Callidus' loan portfolio at any point in time, which is inconsistent with Mr. Moyse having disclosed the loan book to West Face.

43. In any event, there is no evidence that Mr. Moyse knew about, let alone disclosed to West Face, the identity of any of Callidus' borrowers.[67] Indeed, both Mr. Moyse and Mr. Riley

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that). See Riley Transcript, qq. 189-191, 202, & 213, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 41-42 By contrast, Mr. Griffin has almost 20 years of experience in the financial industry, and regularly monitor and research potential investments for the funds that he manages. Griffin Affidavit, paras. 21-23, West Face's Responding Motion Record, Vol. 1, Tab A, p. 9. See, generally, Griffin Transcript, qq. 16-24 and 232-259, Catalyst's Second Supplementary Motion Record, Tab 2, pp. 8 & 21-24. In addition to Mr. Riley's general lack of investment experience, he often had trouble recalling fairly basic information about Callidus's loan book. For example, Mr. Riley asserts that Callidus had only two loans whose value was at risk, yet he could not recall which loans those were. He also did not know the interest rate on Callidus' approximately $50 million loan to Arthon, nor whether Callidus's 2014 year-end financial statements (released March 31, 2014) had met analysts' predictions. See, *inter alia*, Riley Transcript, qq. 621-624, 792-800, 958 & 1036, Joint Supplementary Responding Motion Record, Tab 10, pp. 64, 72-73, 82 & 85.

63 Griffin Affidavit, at para. 118, West Face's Responding Motion Record, Vol. 1, Tab A, p. 46.

64 Griffin Transcript, qq. 279, 286, 384, 725-727, Catalyst's Second Supplementary Motion Record, Tab 2, pp. 25, 26, 32 & 55.

65 Griffin Affidavit, at paras. 121-128 & Appendices "B" & "C", West Face's Responding Motion Record, Vol. 1, Tab A, pp. 47-50, 59-93.

66 Griffin Affidavit, at para. 124, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 48-49.

67 Mr.

agreed that Mr. Moyse had no access to the Callidus file system,[68] and no involvement with its operations.[69]

44. Catalyst's original allegation in its Amended Notice of Motion was that West Face had obtained non-public information about Callidus from Mr. Moyse. In its responding materials, West Face attached as exhibits the public sources of every piece of information regarding Callidus borrowers that it was ultimately able to identify – thereby proving that this information is public, as was grudgingly conceded by Mr. Riley during his cross-examination.[70]

45. Finally with respect to Callidus, Catalyst complains that West Face should have disclosed its research earlier, and that it was engaged in a market manipulation scheme. Neither is true; but more important, neither is relevant in a motion about alleged misuse of confidential information. Catalyst made no allegation concerning Callidus until it commenced this motion in January 2015. Its requests for West Face's research were made in the context of defamation threats by Catalyst.[71] West Face had no obligation to disclose its proprietary

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68 Moyse Affidavit, at para. 53, Moyse's Responding Motion Record, Tab 1, p. 16. Riley Transcript, qq. 651-652, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 66.

69 Riley Affidavit, at para. 56, Catalyst's Motion Record, Tab 3, p. 73.

70 Riley Transcript, qq. 662-672, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 66. In addition to Mr. Riley's general admission that West Face's information about Callidus was public, Mr. Riley gave a more specific admission in a similar exchange regarding West Face's summary in the Callidus Report about Callidus' loan to Arthon Industries. Mr. Riley was asked: "Do you see any non-public information on that page?" (in reference to p. 769 of West Face's Responding Motion Record, Vol. 2, Tab 46, p. 769). His answer: "No, but I see a failure to have a complete disclosure of what was on the public record at the time". Riley Transcript, qq. 857-865, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 77 Mr. Riley later criticized Mr. Griffin for relying solely on public information contained in Arthon's Monitor's reports. See Riley Transcript, qq. 911-923, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 79-80.

71 Catalyst's repeated demands for West Face's Callidus Report in advance of commencing defamation litigation, and West Face's responses to these demands, are reflected in Exhibits "W", "X", "Y", "Z", "AA", "BB", "CC", "DD", and "EE" to the Riley Affidavit, Catalyst's Motion Record, Tabs W, pp. 298-299, X, pp. 300-301, Y, pp. 302-304, Z, pp. 305-306, AA, pp. 307-308, BB, pp. 309-311, CC, pp. 312-313, DD, pp. 314-316 & EE, pp.317-318.

research until it became relevant in pending litigation, at which point Catalyst complained that West Face disclosed too much.[72]

46. Nor is there any evidence that West Face disclosed its research to any third party, other than a one-page list of Callidus' publicly-identified borrowers sent to an independent market research company called Veritas. Tellingly, Catalyst refuses to disclose with whom West Face supposedly shared its Callidus research.[73] The fact is, West Face manipulated nothing. It sold high, and then bought low as other investors came to appreciate the overvaluation that West Face had identified in its research. Catalyst has raised its market manipulation allegations with the OSC,[74] which to date has, appropriately, apparently done nothing. Any market manipulation allegations should rest with the OSC, and are not relevant to the issues before this Court.

D. The ISS Found No Evidence on Mr. Moyse's Electronic Devices that he had Provided Any Catalyst Confidential Information to West Face

47. On November 10, 2014, the Court granted Catalyst's first interlocutory injunction enjoining Mr. Moyse from disclosing any confidential information of Catalyst, or competing with Catalyst until December 22, 2014, and directing the ISS to review the images of Mr. Moyse's personal electronic devices.[75]

48. Following the decision, the parties negotiated and agreed to a protocol (the "**ISS Protocol**") pursuant to which the ISS reviewed forensic images of Mr. Moyse's personal electronic devices. The ISS Protocol contemplated that a draft report would be prepared by the ISS, for comment by Mr. Moyse. Catalyst commenced the present motion before even

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72 The email correspondence between Catalyst's and West Face's counsel regarding Catalyst's various objections to West Face's inclusion of the Callidus Report and the research supporting it is attached as Exhibit "D" to the Riley Reply Affidavit, Catalyst's Supplementary Motion Record, Tab 1-D, pp. 41-46.

73 Riley Transcript, qq. 1238-1241, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 95. See also answer no. 32 to Riley's Undertakings, Advisements, and Refusals Chart, Catalyst's Second Supplementary Motion Record, Tab 16, p. 394.

74 Riley Transcript, qq. 1219-1222, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 94.

75 Griffin Affidavit, at para. 81, West Face's Responding Motion Record, Vol. 1, Tab A, p. 31.

receiving a draft of the report, based on the number of "hits" resulting from the initial very general search terms Catalyst had put forward.[76]

49. In any event, the final ISS report was issued on February 17, 2015 (the "**ISS Report**"). Consistent with all of the above, the ISS found no evidence that Mr. Moyse had provided any of Catalyst's confidential information to West Face.[77] In fact, the ISS found only five Catalyst documents beyond the approximately 800 that Mr. Moyse had already disclosed in his Affidavit of Documents. The supposedly anomalous "hit" count on which Catalyst relied to initiate this motion was the product of generic search terms and duplication in computer file storage. Catalyst now attacks the ISS Report because Mr. Moyse clumsily deleted his Internet browser history to avoid the ISS seeing his personally embarrassing but irrelevant Internet usage. However, there is no evidence that Mr. Moyse is a sophisticated computer user who could have deleted files and emails without a trace.[78] Indeed, he left obvious indicators of his Internet history deletions.

E. West Face Has Already Made Full Disclosure of its Relevant Documents

50. At the time West Face delivered its responding motion materials to Catalyst in March 2015, West Face provided Catalyst with all non-privileged, non-confidential emails found on West Face's servers that were sent to or from (including by way of "cc" and "bcc") Mr. Moyse's West Face email address or his personal email addresses.[79] None of these emails indicate that Mr. Moyse disclosed any Catalyst confidential information to West Face.

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[76] Griffin Affidavit, at paras. 82-86, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 32-33.

[77] Griffin Affidavit, at para. 87, West Face's Responding Motion Record, Vol. 1, Tab A, p. 33. A copy of the ISS Report is attached as Exhibit "26" to the Griffin Affidavit, West Face's Responding Motion Record, Vol. 2, Tab A-26, pp. 411-457.

[78] See, for example, Burt-Gerrans Transcript, qq. 253-359, Catalyst's Second Supplementary Motion Record, Tab 9, p. 219.

[79] The manner in which these emails were collected is described in the Burt-Gerrans Affidavit, at paras. 12-14, West Face's Responding Motion Record, Vol. 4, Tab C, p. 1408. Some of the emails were redacted for reasons of privilege, and for reasons of confidentiality, but only to the extent the redacted content is not

51. At the same time, West Face also offered to produce to the ISS all documents on West Face's servers that could reasonably be identified as having been created, modified, or accessed by Mr. Moyse.

52. While these two combined offers would have provided Catalyst with substantially all of West Face's documentary evidence relevant to Catalyst's claim, Catalyst never responded to this offer. Instead, it continued to pursue the highly invasive and onerous *Anton Piller* Order for the ISS to image all of the over 172 electronic devices owned by West Face, which Catalyst strenuously maintains is its competitor. The ISS Report for Mr. Moyse's three personal electronic devices took months. One can only imagine the time and expense for all of West Face's devices.

PART III - THE LAW AND ARGUMENT

A. The Management Injunction

i. Introduction

53. The Management Injunction initially sought by Catalyst would have prevented West Face from participating in the management of an asset that its syndicate paid $300 million to acquire, and tens of millions since to operate, with no apparent benefit to Catalyst. Catalyst has now, without explanation, narrowed this to a request that West Face not be permitted to vote its shares. Catalyst seeks this still extraordinary relief without any evidence of misuse of confidential information relating to WIND, and in the face of extensive evidence from West Face that there was no such misuse.

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relevant to the matters in issue. See also Exhibit "1" to the Cross-Examination of James Riley, Joint Supplementary Responding Motion Record of the Defendants, Tab 11, pp.137-138.

54. It is important to bear in mind that any "pre-trial injunction is a remedy of extraordinary character, which places a high onus on the plaintiff seeking the relief."[80] Catalyst has failed to meet this high onus. Catalyst has not satisfied any of the three criteria established by the *RJR-MacDonald* test – (i) it has not demonstrated a "serious issue to be tried" (let alone a "strong *prima facie* case"); (ii) it has not proven that it will suffer "irreparable harm" if the order is refused; and (iii) it has not established that the "balance of convenience" supports granting the requested relief.

55. In addition to Catalyst's failure to satisfy the *RJR-MacDonald* test, the Management Injunction is impermissibly broad and overreaching, and insufficiently connected to the (alleged) interests that it purports to protect. Finally, Catalyst has not given any undertaking as to damages. Both of these flaws are also fatal in their own rights.

ii. Catalyst Has Not Established a Serious Issue to be Tried

56. The first branch of the *RJR-MacDonald* test requires the moving party to demonstrate "a serious issue to be tried" or, in some cases, "a strong *prima facie* case".[81] Catalyst cannot satisfy the first branch of the *RJR-MacDonald* test regardless of which standard is applied.[82]

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80 *Airport Limousine Drivers Assn. v. Greater Toronto Airports Authority*, [2005] O.J. No. 3509 at para. 85 (S.C.J.) [*Airport Limousine*], Joint Book of Authorities, Tab 27. See also *Kanda Tsushin Kogyo Co. v. Coveley*, [1997] O.J. No. 56 at para. 4 (Div. Ct.), Joint Book of Authorities, Tab 28.

81 The "strong *prima facie* case" test requires the moving party to show that its claim is almost certain to succeed. This test applies in various circumstances, including those in which the requested injunction is mandatory in nature. See, *inter alia*, *Benayoune & Associates FZE v. Kanata Chemical Technologies Inc.*, [2014] O.J. No. 4808 para. 40 (S.C.J.), Joint Book of Authorities, Tab 29; and *Sobeys Capital Inc. v. Sentinel (Sherbourne) Land Corp.*, [2014] O.J. No. 5998 at paras. 18-21 (S.C.J.), Joint Book of Authorities, Tab 30.

82 Given the extremely broad, invasive, and mandatory nature of the Management Injunction, West Face submits that, technically speaking, Catalyst should be required to meet the "strong *prima facie* case" test. While Catalyst frames the Management Injunction as a prohibitive order restraining West Face from voting its shares, the Management Injunction is more accurately viewed as a mandatory order that re-shapes WIND's shareholder governance and upends the *status quo*. Indeed, in order to comply with the order, WIND's shareholders may well be required to re-negotiate their contractual obligations under the existing shareholders' agreement. While the distinction between a prohibitive and mandatory order is not always clear, removing West Face from participating in WIND's management and/or strategic direction will not preserve the *status quo* or even return WIND's management to what it was prior to West Face's alleged misuse of confidential information. Rather, the effect of the order will be to create a whole new set of circumstances and relationships until the completion of trial. That said, Catalyst fails to meet the first criterion of the *RJR-MacDonald* test regardless of which threshold is applied, rendering this point moot.

57. Catalyst's underlying claim against West Face is for breach of confidence. The elements of such a claim are that: (i) the defendant has received genuinely confidential information; (ii) in circumstances imposing an obligation of confidence; and (iii) the information has been misused by the defendant (that is, used in an unauthorized manner) to the detriment of the plaintiff.[83]

58. If Catalyst cannot establish (at least) a "serious issue to be tried" with respect to each of these criteria, the injunction cannot be granted.[84]

59. For example, in *Trapeze Software Inc. v. Bryans*, Justice Newbould denied an interlocutory injunction where the moving party had no evidence that the defendant had misused confidential information. Mere speculation was not enough:

> 53. I am not persuaded that that assertion [of misuse] is anything more than speculation….
>
> 62. In my view an injunction ought not to be granted without an evidentiary base that it is likely that a [breach of confidence] will occur without an injunction being granted. There is no basis for the granting of such an injunction.[85]

60. Similarly, in *Pandi v. Fieldofwebs.Com Ltd.*, Justice Low refused to grant an interlocutory injunction in circumstances where the moving party was unable to put forward any "direct evidence" that the defendants had misused the confidential information in question. Justice Low held that it was insufficient for the moving party to argue that the defendants "must have"

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83 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] S.C.J. No. 83 at paras. 54-55 (per Sopinka J.) and at paras. 129 & 135 (per LaForest J.), Joint Book of Authorities, Tab 31.

84 See, *inter alia*, *Maudore Minerals Ltd. v. Harbour Foundation*, [2012] O.J. No. 3548 at paras. 87-88 (S.C.J.) [*Maudore Minerals*], Joint Book of Authorities, Tab 32; and *United Technologies Corp. v. Platform Computing Corp*, [1998] O.J. No. 883 at paras. 49-50 (Gen. Div.) [*United Techonologies*], varied on other grounds, [1999] O.J. No. 4490 (C.A.), Joint Book of Authorities, Tab 33.

85 *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 at paras. 53 & 62 (S.C.J.) [*Trapeze Software*], Joint Book of Authorities, Tab 34.

misused the information based on the existence of (allegedly) "compelling circumstantial evidence."[86] Catalyst's reliance on circumstantial "coincidences" is simply not sufficient.

61. Perhaps the most obvious reason that Catalyst has not presented a serious issue to be tried is the explicit contradiction embodied in the two forms of relief sought in the current motion. On the one hand, Catalyst asserts that it is entitled to the Management Injunction because West Face acquired its interest in WIND by allegedly misusing confidential information obtained from Mr. Moyse. On the other hand, Catalyst requires the *Anton Piller* Order because it admittedly cannot otherwise determine whether West Face even possesses (let alone misused) any such "Confidential Information". Catalyst's second prayer for relief disentitles it to the first.

62. In any event, as set out above, West Face has put forward cogent evidence that: (i) it had a pre-existing interest in WIND; (ii) Mr. Moyse's hiring had nothing to do with WIND; (iii) West Face responded reasonably to Catalyst's confidentiality concerns by implementing a confidentiality wall; (iv) Mr. Moyse did not work on anything related to WIND during his three and a half weeks at West Face; (v) Catalyst failed to execute a deal for WIND during its period of exclusivity because of regulatory demands that it had not even made by the time Mr. Moyse left Catalyst; (vi) West Face won the bidding by removing regulatory conditions on which Catalyst insisted; and (vii) the ISS found no evidence of any transmission of confidential information to West Face, including concerning WIND.

63. In sum, West Face has answered Catalyst's allegations and suspicions. There is no "serious issue to be tried", and certainly no "strong *prima facie* case", justifying the imposition by this Court of the invasive Management Injunction.

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[86] *Pandi v. Fieldofwebs.Com Ltd.*, [2007] O.J. No. 2739 at paras. 16, 25, 26 & 30 (S.C.J.), Joint Book of Authorities, Tab 35. See also *Maudore Minerals*, at paras. 89-91, Joint Book of Authorities, Tab 32; and *United Technologies*, at paras. 33, 41, 46-48 & 56, Joint Book of Authorities, Tab 33; and *JTT Electronics Ltd. v. Farmer*, [2014] B.C.J. No. 3145 at paras. 30, 31 & 37 (Sup. Ct.), Joint Book of Authorities, Tab 36.

iii. Catalyst has Failed to Demonstrate Irreparable Harm if an Injunction Is Not Granted

64. Catalyst is equally unable to demonstrate that it will suffer "irreparable harm" should the injunction not be granted. As was explained by the Supreme Court:

> [43] Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused…
>
> [58] At this stage the only issue to be decided is whether a refusal to grant relief **could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application**.
>
> [59] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured…. [87] [Emphasis added]

65. Evidence of irreparable harm must be clear and not speculative.[88] It is not sufficient for a moving party to rely on bald statements, generic assertions, or unproven allegations that irreparable harm will be suffered if the requested interlocutory relief is not granted.[89]

66. In the face of this onus, the only "evidence" of harm that Catalyst could put forward was Mr. Riley's bald assertion that "West Face can use its voting interest in [WIND] to harm Catalyst's [contingent] long-term interest".[90] This does not meet the test, for multiple reasons.

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87 *RJR-MacDonald Inc. v. Canada*, [1994] S.C.J. No. 17 at paras. 43, 58 & 59, Joint Book of Authorities, Tab 8. See also *FCI Fisker Cargo Inc. v. ABX Logistics Corp.*, [2001] O.J. No. 68 at para. 8 (S.C.J.), Joint Book of Authorities, Tab 37.

88 See, *inter alia, Optilinx Systems Inc. v. Fiberco Solutions Inc.*, [2014] O.J. No. 5708 at paras. 10-12 & 37-39 (S.C.J.) [*Optilinx*], Joint Book of Authorities, Tab 38; *Airport Limousine*, at paras. 132 & 135, Joint Book of Authorities, Tab 27; and *Trapeze Software*, at paras. 52-53 & 62, Joint Book of Authorities, Tab 34.

89 *Burkes v. Canada*, [2010] O.J. No. 2877 at paras. 18 & 21 (S.C.J.), leave to appeal refused, [2010] O.J. No. 5019 at para. 6 (Div. Ct.), Joint Book of Authorities, Tab 39; *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663 at para. 36 (S.C.J.), Joint Book of Authorities, Tab 40; and *Airport Limousine*, at para. 135, Joint Book of Authorities, Tab 27.

90 Riley Affidavit, at para. 90, Catalyst's Motion Record, Tab 3, p. 26. It appears Catalyst's initial purported concern was that, armed with Catalyst's confidential information, West Face would be able to help WIND compete unfairly against WIND's competitor Mobilicity (a debtor of Catalyst) in the AWS-3 auction. See Amended Notice of Motion, at para. (aaa), Catalyst's Motion Record, Tab 1, p. 18. Catalyst appears to have changed tracks following Mobilicity's decision to not participate in the AWS-3 auction. As set out in the Griffin Affidavit, WIND was the only bidder for spectrum set aside for new entrants in Ontario, Alberta, and British Columbia, and was able to obtain the AWS-3 spectrum for the reserve price set by Industry Canada. As such, Catalyst's alleged concern that its confidential information would lead to unfair competition has been shown to be groundless, since there was no competition between WIND and Mobilicity (or any other

67. First, Mr. Riley's assertion is completely speculative – and even he does not go so far as to allege that West Face "will" use its voting interest in WIND to harm Catalyst's interest in WIND, he merely asserts that it "can" without explaining how.

68. Second, not only is Mr. Riley's assertion speculative, it is illogical. Even assuming that Catalyst has a contingent interest in WIND (which is denied), the parties' interests would be aligned. As noted by Mr. Griffin, "West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do".[91] Mr. Riley admitted during cross-examination that 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.[92] There is no evidence that West Face would raise capital on terms not acceptable to Catalyst, as is belatedly alleged at paragraph 114 of Catalyst's factum.[93] Indeed, West Face has been a shareholder and an active part of the management and/or strategic direction of WIND since September 16, 2014, and Catalyst can point to no evidence that it is somehow worse off today than it was almost nine months ago.

69. Third, and as touched on above, in cases involving allegations of breach of confidence, irreparable harm will not be established by a moving party if the most that can be shown is that there is or was a "potential breach of confidentiality."[94]

70. As a final point, it is well-established that delay on the part of the moving party is a factor that the Court will consider in determining whether the moving party has satisfied the

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bidder). See Griffin Affidavit, at paras. 88-93, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 34-36.

91 Griffin Affidavit, at para. 99, West Face's Responding Motion Record, Vol. 1, Tab A, p. 38.

92 Riley Transcript, qq. 1261-1263, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, p. 96.

93 It is noteworthy that while Catalyst has only a contingent, tenuous claim to WIND, it has a very real interest as the largest secured creditor of WIND's competitor Mobilicity.

94 *Canadian Transit Co. v. Girdhar*, [2001] O.J. No. 3273 at paras. 23, 24 & 30-31 (S.C.J.), affirmed [2002] O.J. No. 2933 at para. 17 (Div. Ct.), Joint Book of Authorities, Tab 41.

requirement to show irreparable harm. If the moving party is, in fact, suffering such harm, then it should move (or rather, would have moved) for injunctive relief expeditiously.[95]

71. Catalyst initially obtained a motion date for March 19, 2015, with motion materials due February 16. It served its materials late, in the evening of February 18. West Face served its responding materials on March 9 in accordance with the original scheduling order. Catalyst then did nothing to move the matter forward. Catalyst's demand for a supplemental ISS report pushed back Mr. Moyse's evidence until April 6, and still Catalyst did nothing. A motions scheduling court appearance was finally initiated by West Face, which directed service of Catalyst's factum by May 29. The factum was served late, on the evening of June 1. Catalyst's lack of urgency and even timeliness regarding deadlines and timetables, quite apart from the prejudice to West Face, is inconsistent with claims of irreparable harm.

iv. The Balance of Convenience Favours West Face

72. Even if Catalyst could satisfy the first two criteria for granting an interlocutory injunction, as between the interests of West Face and Catalyst, the balance of convenience favours West Face.

73. In this case, Catalyst offers only Mr. Riley's bald allegations of harm to Catalyst's alleged contingent interest, while Mr. Riley himself acknowledged that the parties' interests are aligned with respect to WIND. On the other hand, West Face will suffer very real prejudice if West Face is excluded from voting its shares of WIND. West Face is the largest single investor in WIND, designates two of the ten seats on its board of directors, and plays an important role in WIND's governance, strategic and capital funding direction.[96] If precluded from voting its shares, West

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95 See, *inter alia*, *Thompson v. BFI Canada Inc.*, [2014] O.J. No. 3179 at paras. 70-76 (S.C.J.), Joint Book of Authorities, Tab 42; *Bell Canada v. Rogers Communications Inc.*, [2010] O.J. No. 2229 at paras. 9, 21-29 (S.C.J.), Joint Book of Authorities, Tab 43; and *Hearing Clinic (Niagara Falls) Inc. v. Ellesmere Hearing Centre Ltd. (c.o.b. Canada Hearing Centre)*, [2008] O.J. No. 5271 at paras. 22-23 (S.C.J.), Joint Book of Authorities, Tab 44.

96 Griffin Affidavit, at paras. 94-99, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 36-38.

Face risks dilution of its interest if the shareholders are called upon to make additional investments in the company and West Face cannot participate by vote. It would also suffer from the harm to its reputation caused by being excluding from voting its shares in such a significant investment.[97]

74. The prejudice, however, does not stop with West Face. The Court must also consider whether the injunction would prejudice the rights of third parties not before the Court. Indeed, the rights and interests of innocent third parties can play a conclusive role in determining the balance of convenience.[98]

75. For example, in one ruling – bearing a very strong resemblance to the current dispute – the Manitoba Queen's Bench refused to grant an interlocutory injunction sought by CanWest, which would have required that the defendant, Morton, be excluded from the management of Global. The impact that this order would have had on Global meant that the balance of convenience weighed against granting the interlocutory relief. Just as in the current proceeding, the Court recognized that granting the injunction would hurt both the third-party corporation and the moving party itself (in its capacity as a shareholder of the corporation).[99]

76. The Management Injunction which Catalyst seeks will provide no benefit to Catalyst's claimed contingent interest in WIND. The uncontested evidence of both West Face and WIND, however, is that it would harm WIND by depriving it of West Face's guidance and support.

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97 See, generally, Griffin Affidavit at paras. 2, 17, West Face's Responding Motion Record, Vol. 1, Tab A, pp. 2 & 7 and Griffin Transcript, qq. 714-722, Catalyst's Second Supplementary Motion Record, Tab 2, pp. 54-55.

98 *Rogers Communications Inc. v. Shaw Communications Inc.*, [2009] O.J. No. 3842 at para. 76 (S.C.J.), Joint Book of Authorities, Tab 45. See also *Maudore Minerals*, at para. 79, Joint Book of Authorities, Tab 32; and *Optilinx*, at para. 13, Joint Book of Authorities, Tab 38. When a dispute involves the ownership, management or control of a corporation, courts will consider the impact the injunction will have on management of the enterprise and on its ongoing business. See, for example, *Robert Moore Pharmacy Ltd. v. Shoppers Drug Mart Inc.*, [2012] O.J. No. 6172 at para. 36 (S.C.J. [Comm. List]), Joint Book of Authorities, Tab 46. See also *Mandel v. Morguard Corp.*, [2014] O.J. No. 1088 at para. 25 (S.C.J.) [*Mandel*], Joint Book of Authorities, Tab 47.

99 *Morton v. Asper*, [1988] M.J. No. 424 at pp. 15-16 (Q.B.), Joint Book of Authorities, Tab 48.

Injunctive relief that hurts everyone, and helps no one but West Face's and WIND's competitors, should not be granted.

77. Finally, the terms of an injunction should be crafted as narrowly as possible and certainly no wider than what is strictly required to protect the plaintiff's rights.[100] As confirmed by Justice Strathy (as he was then) in *Jobsearch Canada Inc. v. Matrix Search Group Ltd.*, a party alleging misuse of confidential information should typically limit itself to enjoining further misuse of the confidential information, and returning it to the moving party. In that case, Justice Strathy confirmed that it was both unnecessary and inappropriate for the moving party to seek broader and more intrusive orders.[101]

78. Similarly, in *Maudore Minerals Ltd. v. Harbour Foundation*, Justice Perell refused to enjoin a shareholders' meeting based on allegations that the majority shareholders had misused confidential corporate information. No link had been shown to exist between (i) the alleged misuse of confidential information; and (ii) the conduct of the upcoming meeting which the moving party sought to enjoin.[102]

79. Catalyst's motion suffers from these same flaws. It does not seek an injunction precluding West Face from using its confidential information, perhaps because it cannot point to West Face holding any such information. Catalyst claims that its "Confidential Information" may have been misused by West Face to acquire WIND, but there is no link between that claim and enjoining West Face's participation in WIND. There is no evidence of any imminent and demonstrable mismanagement of WIND in this case. Catalyst's remedy, if any, lies at trial.

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100 Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf ed. (Toronto: Canada Law Book, 2014) at paras. 1.390-1.400, [*Sharpe*], Joint Book of Authorities, Tab 66.

101 *Jobsearch Canada Inc. v. Matrix Search Group Ltd.*, [2008] O.J. No. 2556 at paras. 15-20 (S.C.J.), Joint Book of Authorities, Tab 49.

102 *Maudore Minerals*, at paras. 94-96, Joint Book of Authorities, Tab 32. Justice Perrell stated: "Assuming that confidential information was misused, it was misused for the purpose of [the majority shareholders] exercising a right that they had to engage in a proxy fight. In [the majority shareholders] now engaging in that proxy fight, there is no evidence connecting their dissent proxy circular with the confidential information".

v. Catalyst Has Provided No Undertaking as to Damages

80. As a condition of obtaining an injunction, the party seeking it must provide an undertaking as to damages unless the Court orders otherwise. Catalyst has not provided the required undertaking or requested to be relieved (nor is there any reason why it should be relieved) from providing an undertaking. This is a fatal flaw, and Catalyst's motion for the Management Injunction should be dismissed for this reason alone.[103]

B. The *Anton Piller* Order

81. The second extraordinary order sought by Catalyst is the *Anton Piller* Order. As noted above, if this order is made, it will require West Face to permit the ISS to forensically image over 172 different electronic devices, including all of West Face's desktops, laptops, servers, and both company-owned and employee-owned phones and tablets.[104]

82. There is no factual foundation for this overbroad and intrusive fishing expedition before discovery has even occurred. The motion amounts to either an *Anton Piller* order on notice, or a premature Rule 30.06 motion, and Catalyst cannot meet the test for either. The proper course is to proceed to documentary and oral discovery.

i. Catalyst Cannot Meet the Test for an *Anton Piller* Order

83. The prerequisites to an *Anton Piller* order – or "civil search warrant" – were articulated by the Supreme Court of Canada in the seminal case of *Celanese Canada Inc. v. Murray Demolition Corp*.:

> [1] …The only justification for such an extraordinary remedy is that the plaintiff has a strong *prima facie* case and can demonstrate that on the facts, absent such an order, there is a

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103 See, *inter alia*, *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 40.03; *Sharpe*, at paras. 2.470 & 2.500, Joint Book of Authorities, Tab 66; *Mandel*, at paras. 20-21, Joint Book of Authorities, Tab 47; and *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.*, [2007] O.J. No. 89 at para. 70 (S.C.J.), affirmed without separate reasons, [2008] O.J. No. 2567 (C.A.), Joint Book of Authorities, Tab 50.

104 Griffin Affidavit, at para. 133, West Face's Responding Motion Record, Vol. 1, Tab A, p. 52.

> **real possibility relevant evidence will be destroyed or otherwise made to disappear**.
>
> ….
>
> [35] There are four essential conditions for the making of an *Anton Piller* order. **First**, the plaintiff must demonstrate a strong *prima facie* case. **Second**, the damage to the plaintiff of the defendant's alleged misconduct, potential or actual, **must be very serious**. **Third**, there must be **convincing evidence** that the defendant has in its possession incriminating documents or things, and **fourthly** it must be shown that there is **a real possibility that the defendant may destroy such material** before the discovery process can do its work.[105] [Emphases added]

84. West Face acknowledges that most *Anton Piller* orders are sought *ex parte*. However, some *Anton Piller* orders have been sought on notice and the same test applies.[106] Catalyst must satisfy the four-part *Anton Piller* test set out above, but cannot do so:

(a) First, as discussed above in the context of the Management Injunction, Catalyst falls far short of demonstrating a strong *prima facie* case;

(b) Second, Catalyst has not proven (and has not even seriously attempted to prove) that the damage it will suffer is "very serious" if documentary production is made in the ordinary course;

(c) Third, Catalyst has failed to provide "convincing evidence that [West Face] has in its possession incriminating documents or things". In fact, Catalyst admitted that it brought this motion to determine whether West Face has any evidence in its possession, not to obtain evidence it knows to exist; and

(d) Fourth, Catalyst has not demonstrated a "real possibility" that West Face will destroy evidence. The fact that Catalyst made no real effort to move the motion forward with any urgency following the delivery of West Face's responding materials demonstrates that Catalyst has no genuine concern that West Face will destroy documents. This point is discussed in more detail below in the context of Rule 30.06.

ii. A Rule 30.06 Order is Premature and Inappropriate

85. Even if one, generously, were to apply the test under Rule 30.06 instead of the *Anton Piller* test, Catalyst cannot meet the test. There is no evidence of non-disclosure.

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105 *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] S.C.J. No. 35 at paras. 1 & 35, Joint Book of Authorities, Tab 51.

106 See, for example, *TSI International Group Inc. v. Formosa*, [2015] O.J. No. 816 at paras. 1-3, 5 & 102-114 (S.C.J.), Joint Book of Authorities, Tab 52. See also *KOS Oilfield Transportation Ltd. v. Mitchell*, [2010] A.J. No. 1049 at paras. 50-51 (C.A.) [*KOS Oilfield*], Joint Book of Authorities, Tab 53.

86. One of the foundational principles of Ontario civil procedural law is that the obligation to identify and produce all relevant (non-privileged) documents lies on the party in possession of such documents.[107]

87. Within this regime, Rule 30.06 provides a remedy for any party who can prove that the opposing party's documentary disclosure has been incomplete, including, under paragraph (c), a mandatory order for production:

> 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…, the court may,…
>
> (c) order the disclosure or production for inspection of the document, or a part of the document, if it is not privileged.[108]

88. Orders made under Rule 30.06 are rare. Courts have recognized that they are "very intrusive"[109], that "a hard drive is not ordinarily subject to production,"[110] and that there exists "no entitlement as of right" to a forensic investigation.[111] On the contrary, it is only in "an exceptional case",[112] or "in exceptional circumstances", that a Court should "order production of the hard drive for examination."[113] An order under Rule 30.06(c) is therefore extraordinary relief – akin to an *Anton Piller* order[114] – constituting an exception to the Court's general unwillingness to expose a litigant's private materials to compulsory review by an opponent.

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107 See, *inter alia*, *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] O.J. No. 6082 at para. 8 (S.C.J.) [*Zenex*], Joint Book of Authorities, Tab 54; *Merpaw v. Hyde*, [2015] O.J. No. 800 at paras. 14-15 (S.C.J.) [*Merpaw*], Joint Book of Authorities, Tab 55; and *Innovative Health Group Inc. v. Calgary Health Region*, [2008] A.J. No. 615 at paras. 30-38 (C.A.) [*Innovative Health Group*], Joint Book of Authorities, Tab 56. See also *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 30.

108 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 30.06.

109 *Nicolardi v. Daley*, [2002] O.J. No. 595 at paras. 31-32 (S.C.J.) [*Nicolardi*], Joint Book of Authorities, Tab 57.

110 *Innovative Health Group* at para. 3, Joint Book of Authorities, Tab 56.

111 *Rossi v. Vaughan*, [2010] O.J. No. 203 at para. 12 (S.C.J.) [*Rossi*], Joint Book of Authorities, Tab 58.

112 *Innovative Health Group* at para. 33, Joint Book of Authorities, Tab 56.

113 *Merpaw* at para. 26 (S.C.J.), Joint Book of Authorities, Tab 55.

114 As noted by the British Columbia court, in considering the B.C. equivalent of Rule 30: "The foregoing should not be taken to say that hard drives should never be ordered to be produced so that a party may have access to electronic documents. But different rules and principles govern those situations, such as those

89. The Rule 30.06 test was set out in the recent 2015 case of *Merpaw v. Hyde*, where Justice Leroy noted that "[t]here must be some evidence of non-disclosure [by the producing party] before production will be ordered… A motion under Rule 30.06 requires evidence of omission, as opposed to speculation that potentially relevant undisclosed documents exist."[115] Justice Leroy made it clear that there is a rigorous burden on the moving party: "Only in exceptional circumstances such as when there is convincing evidence that a party is intentionally deleting relevant and material information will the Court order production of the hard drive for examination."[116]

(a) A Motion Under Rule 30.06 Is Premature

90. As a preliminary matter, Catalyst's motion is premature for at least two reasons. First, all of the relevant non-privileged documents that Catalyst seeks can and will be produced by West Face through the ordinary discovery process. Catalyst has offered no basis to doubt this. Indeed, West Face turned over the only potentially confidential Catalyst information in its possession (the March 27, 2014 email) six business days after this action was commenced; disclosed its investment in Arcan voluntarily; disclosed its Callidus research once Catalyst put it in issue; and turned over all emails relating to Mr. Moyse. West Face even offered to turn over its own confidential information created, accessed or modified by Mr. Moyse, but this offer was ignored by Catalyst.

91. Second, Catalyst will be free to bring a Rule 30.06 motion after the parties have exchanged Affidavits of Documents should it have a compelling reason, at that time, to believe

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pertaining to the requirements of obtaining an *Anton Piller* order". See *Desgagne v. Yuen*, [2006] B.C.J. No. 1418 at para. 21 (Sup. Ct.), Joint Book of Authorities, Tab 59.

115 *Merpaw* at paras. 15 & 17, Joint Book of Authorities, Tab 55. See also *Rossi* at paras. 10 & 12, Joint Book of Authorities, Tab 58.

116 *Merpaw* at para. 26, Joint Book of Authorities, Tab 55. See also *Rossi* at para. 10, Joint Book of Authorities, Tab 58; *Frangione v. Vandongen*, [2010] O.J. No. 2337 at para. 14 (S.C.J.), Joint Book of Authorities, Tab 60; *Nicolardi* at paras. 32 & 33, Joint Book of Authorities, Tab 57; and *Innovative Health Group*, at para. 39, Joint Book of Authorities, Tab 56. The Court noted that the evidence must "establis[h] that a party is intentionally deleting relevant and material information or otherwise deliberately thwarting the discovery process" at para. 3.

that West Face has made incomplete disclosure. Catalyst no doubt finds this option unattractive because it is not aware of any confidential information held by West Face and so has no basis for such a motion. Bringing the motion now inflicts significant cost and expense on West Face, as it is forced to prove a negative.

92. Ironically, had Catalyst not initiated the present motion almost five months ago,[117] West Face could have been focusing its efforts on its Affidavit of Documents, and Catalyst would likely already have received the documents to which it claims to want access through a cumbersome ISS process.

(b) There is No Evidence of Destruction of Evidence By West Face.

93. A clear theme throughout the case law is that a party seeking extraordinary relief under Rule 30.06(c) must present more to the Court than mere speculation that the other side has failed to disclose relevant documents. As was recently explained by Justice Morgan in *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*:

> [13] …I…am cognizant of the fact that "[a] motion under Rule 30.06 requires evidence, as opposed to mere speculation, that potentially relevant undisclosed documents exist."
>
> [14] …The Plaintiff cannot be permitted to take over the Defendant's search of its own computer system, and to make a 'mirror copy' of the Defendant's hard drive, on mere speculation that there might be more than has been produced to date. [118]

94. In what could be a direct response to Catalyst's position on this motion, Justice Morgan noted that "it is <u>not</u> sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden'."[119]

95. The stringent evidentiary onus put on the moving party reflects our Courts' longstanding distaste for fishing expeditions. Under Ontario law "[t]here is no right to rummage through an

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117 Catalyst's initial Notice of Motion was dated January 13, 2015.
118 *Zenex* at paras. 13 & 14, <u>Joint Book of Authorities</u>, Tab 54.
119 *Zenex* at para. 14, <u>Joint Book of Authorities</u>, Tab 54. [Emphasis added].

opponent's filing cabinets (or in this case, computers) to see if there is anything interesting."[120] As has also been noted, it "would be no more than a fishing expedition" if a party were granted the right to explore an opponent's electronic files based on nothing more than a vague allegation that undisclosed documents exist.[121]

96. For example, in the *Fuller Western Rubber* case, a motions court (following evidence that a single document had been deleted by the defendant) granted an interlocutory order imposing a full computer forensic investigation of the defendant's electronic devices. The Alberta Court of Appeal vacated this order on the grounds that: (i) no allegations had been made that any other documents were at risk of destruction; (ii) the order constituted an improper "fishing expedition"; and (iii) the standard discovery process should have been permitted to unfold in the usual fashion:

> [19] …The contempt application was based entirely on the efforts to delete the HSE Manual. No allegation was made of *the destruction of any other document*, nor is there **any evidence of any other destruction. Embarking on an expensive fishing expedition** at this stage of the litigation is **unwarranted**. Should **the discovery process** produce evidence of other problems, further applications for relief can be brought. [Emphasis added]
>
> [20] …[T]he remedy of a forensic audit of the computers is deleted.[122]

97. The same point was recently made by Justice Stinson of this Court in *Brown v. First Contact Software*. In refusing a request for "ancillary relief"[123] – in the form of "an order that would require the responding parties to 'image' the hard drives or their computers, in order to

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120 *Rossi v. Vaughan*, [2010] O.J. No. 203 at para. 11, Joint Book of Authorities, Tab 58.

121 *Nicolardi* at para. 33, Joint Book of Authorities, Tab 57.

122 *Fuller Western Rubber Linings Ltd. v. Spence Corrosion Services Ltd.*, [2012] A.J. No. 442 at paras. 19-20 (C.A.), Joint Book of Authorities, Tab 61. See also *KOS Oilfield*, at para. 51, Joint Book of Authorities, Tab 53.

123 The requested order was "ancillary" because Stinson J. had already refused the moving party's principal request for an interlocutory injunction prohibiting breach of confidence and of fiduciary duty.

preserve an electronic copy of all visible and invisible data contained on them"[124] – Stinson J. noted that:

> [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.[125] [Emphasis added]

98. Finally, in *Plaza Consulting Inc. v. Grieve*, the moving party sought an order allowing "computer experts [to] conduct a forensic review to ensure that no confidential information belonging to the [moving party] remains on [the defendants' equipment]."[126] Justice Morgan refused to grant the order because: (i) it was a speculative fishing expedition (*i.e.,* the "invasive" relief required "stronger evidence" of misuse or failure to disclose than was presented), and (ii) the moving party's concerns could be "addressed in the discovery process":

> [42] The [moving party] points to no specific information that it suspects is on the particular equipment in issue. It also makes no specific allegation that information on these devices is actually being used on an ongoing basis. …
>
> [43] T]he Plaintiff cannot now demand access to the Defendants' equipment without providing some evidence that this equipment actually still contains the Plaintiff's materials. A compelled forensic analysis of another party's computer equipment is an invasive order that would require stronger evidence of misuse or failure to disclose than is contained in the present motion record.
>
> [44] In the event that there is some doubt about any remaining information or documentation in the possession of the Defendants, those issues can be addressed in the discovery process. Indeed, if any forensic review is necessary in respect of any computer

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124 Interestingly, a preservation order – which is far less invasive than a true evidence-gathering order – was refused on the grounds that there was no proof it was required.

125 *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 at para. 67 (S.C.J.), Joint Book of Authorities, Tab 62. See also *Mathieson v. Scotia Capital Inc.*, [2008] O.J. No. 3500 at paras. 5-6 & 9-10 (S.C.J.), Joint Book of Authorities, Tab 63.

126 The computer equipment had previously been used by the defendants while they were employed by the moving party.

> equipment, that can be raised during discovery. There is no reason for an order of any kind at this stage in the proceedings.[127]

99. The foregoing analyses apply to Catalyst's current demand for the *Anton Piller* Order.[128] Catalyst has offered no evidence that West Face has (let alone will, in the future) attempt to thwart the ordinary-course discovery process and evade its discovery obligations. Past destruction of evidence was not sufficient in *Fuller Western Rubber*. In this case, the most Catalyst can allege against West Face is that production came later than it would have liked. That is not the test. Whatever destruction Mr. Moyse may or may not have done, it is no basis for an extraordinary remedy against West Face.

100. Against this large body of caselaw, Catalyst has cited one case, *GDL Solutions Inc. v. Walker*, in which Justice Brown appears to have accepted (without explanation) that the standard *RJR-MacDonald* test applied to the granting of an interlocutory forensic imaging order. The ruling contains nothing more than a brief, conclusory analysis granting the forensic imaging order, and so it is difficult to glean why Justice Brown felt that this was the proper test.[129] Given the lack of principled reasoning as to why the *RJR-MacDonald* test would apply, the failure to address the contrary caselaw, and the extremely brief reasons as to how that test was met, West Face submits that this decision cannot be relied on as authority for the *Anton Piller* Order. In any event, even if the *RJR-MacDonald* test were applied, Catalyst cannot meet it on the evidence. There is no evidence that West Face has destroyed or not preserved relevant records.

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127 *Plaza Consulting Inc. v. Grieve*, [2013] O.J. No. 3769 at paras. 42-44 (S.C.J.), Joint Book of Authorities, Tab 64.

128 See, *inter alia, KOS Oilfield Transportation Ltd. v. Mitchell*, [2010] A.J. No. 1049 at para. 52 (C.A.), Joint Book of Authorities, Tab 53, in which the Court stated: "In this case, much if not all of the information sought by KOS can be obtained through the ordinary discovery process. Even at this stage, it appears that this is an appropriate case for case management and an expedited process. We anticipate that plaintiff's counsel will seek any necessary directions in that regard".

129 In fact, Justice Brown also appears to have applied the wrong test with respect to irreparable harm. Her Honour indicated that the defendants' conduct gave rise "to the probability of irreparable harm". The probability of irreparable harm is not sufficient to meet the second criterion of the *RJR-MacDonald* test – rather, the moving party must demonstrate that it will suffer irreparable harm. See *GDL Solutions Inc. v. Walker*, [2012] O.J. No. 3768 at para. 93 (S.C.J.), Joint Book of Authorities, Tab 7.

101. Unable to meet the legal test, Catalyst argues that West Face cannot be trusted because it has developed a "consistent" habit of non-disclosure. In that regard, Mr. Riley alleges in paragraph 85 of his Affidavit: "…first they deny that documents exist, or they admit documents exist but deny wrongdoing, and then they insist that Catalyst bring a motion or otherwise commence litigation to protect its interests".[130] The sum total of Mr. Riley's evidence supporting this alleged course of conduct by West Face in failing to produce relevant documents relates to only two documents, both of which West Face produced in an entirely appropriate and unprompted manner when they became relevant in the action. Those two documents are:

(a) the March 27, 2014 email; and

(b) the Callidus Report.

102. With respect to the March 27, 2014 email, apparently Catalyst faults West Face for not proactively producing this email immediately upon receipt of Catalyst's pre-litigation correspondence alleging that Mr. Moyse had breached his confidentiality obligations. West Face included the March 27, 2014 email in its July 7, 2014 responding motion record. These were, of course, the very first materials that West Face filed in this proceeding, and they were filed only six business days after Catalyst commenced its motion for interim relief on June 26, 2014.[131]

103. Even if West Face could be faulted for not producing a copy of the March 27, 2014 email in advance of its first opportunity to do so in the litigation, it is clear that the test under Rule 30.06 is not satisfied merely because a party subject to the disclosure obligation produces documents late. As explained by Justice Morgan: "[T]here must be *evidence stronger* than a

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130 Riley Affidavit, at para. 85, Catalyst's Motion Record, Tab 3, p. 81. It is difficult to understand how Mr. Riley could fault West Face for denying wrongdoing in the face of Catalyst's allegations.

131 Riley Affidavit, at para. 27, Catalyst's Motion Record, Tab 3, p. 64. The interim period included two weekends and a holiday (July 1 "Canada Day").

corrected error for a court to order that the Plaintiff actually take control of the search through the Defendant's computer hard drive."[132]

104. Similarly, with respect to the Callidus Report, Catalyst somehow criticizes West Face (whom it considers a competitor) for not immediately capitulating to Catalyst's counsel's demands, in the context of a (baseless) defamation allegation unrelated to this proceeding, to produce West Face's proprietary research report. As set out in the correspondence between the parties' counsel, West Face did not produce the Callidus Report because West Face had no obligation to assist Callidus in its stated desire to sue West Face for defamation.[133] Mr. Riley readily admitted during his cross-examination that prior to the allegations made in Catalyst's January 13, 2015 Notice of Motion, Callidus was not the subject matter of this, or any, proceeding involving West Face.[134]

105. Once Catalyst put Callidus in issue in this proceeding by alleging misuse of confidential information, West Face included a copy of the Callidus Report in its responding motion materials (though ironically, Catalyst then objected to the filing of these materials upon seeing that they were entirely based on public information, not stolen confidential information).[135]

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132 *Zenex* at para. 11, Joint Book of Authorities, Tab 54. See also *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, [2006] B.C.J. No. 753 at para. 34 (Sup. Ct.), Joint Book of Authorities, Tab 65. In that case, the plaintiff sought to forensically examine the defendant's hard-drive on the basis that the defendant had omitted to disclose the existence of an email, and in fact had sworn an affidavit that no such email existed. The defendant explained that he had forgotten about the email at the time he swore his affidavit. Justice Humphries dismissed the plaintiff's motion, noting that while the circumstances in which the email came before the Court were "unfortunate", the defendant had explained the omission (namely, that he had forgotten about the existence of the email), and the plaintiff had not "put forth any evidence to suggest there are other avenues that must be explored to ensure there are no other similar lapses".

133 Catalyst's repeated demands for West Face's Callidus Report in advance of commencing defamation litigation, and West Face's responses to these demands, are reflected in Exhibits "W", "X", "Y", "Z", "AA", "BB", "CC", "DD", and "EE" to the Riley Affidavit, Catalyst's Motion Record, Tabs W, pp. 298-299, X, pp. 300-301, Y, pp. 302-304, Z, pp. 305-306, AA, pp. 307-308, BB, pp. 309-311, CC, pp. 312-313, DD, pp. 314-316 & EE, pp.317-318.

134 Riley Transcript, qq. 632-649, Joint Supplementary Responding Motion Record of the Defendants, Tab 10, pp. 65-66.

135 The email correspondence between Catalyst's and West Face's counsel regarding Catalyst's various objections to West Face's inclusion of the Callidus Report and the research supporting it is attached as Exhibit "D" to the Riley Reply Affidavit, Catalyst's Supplementary Motion Record, Tab 1-D, pp. 41-46. Catalyst first alleged that this evidence – which it now bitterly complains should have been produced earlier

106. In short, there is no basis for the drastic and extraordinary Order sought by Catalyst. West Face has not withheld relevant documents; on the contrary, so far in this proceeding, West Face has gone above-and-beyond the call of duty to produce to Catalyst – prior to discovery – documents relevant to the allegations Catalyst has made:

(a) West Face filed a four volume responding motion record attaching 163 exhibits relevant to Catalyst's allegations regarding WIND, the AWS-3 auction (since abandoned), and Callidus;

(b) West Face produced a copy of the notebook Mr. Moyse used during his three and a half weeks at West Face, showing what Mr. Moyse worked on redacted only for a few confidential items where West Face was still pursuing an active opportunity;

(c) together with its responding motion materials, West Face produced to Catalyst copies of all non-privileged, non-confidential emails sent to or from Mr. Moyse's West Fact email account or known personal email accounts, which were on West Face's servers;

(d) West Face also offered to produce to the ISS all of the documents on West Face's servers that it identified as having been created, accessed or modified by Mr. Moyse. Catalyst rejected this offer without explanation; and

(e) West Face produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Mr. Griffin on May 8, 2015.

107. Catalyst has no evidence that West Face will destroy evidence or evade its discovery obligations. Granting the motion, however, would be extremely invasive and onerous to West Face, which Catalyst has consistently maintained is a competitor.

PART IV - ORDER REQUESTED

108. West Face respectfully requests that Catalyst's motion be dismissed with costs on a substantial indemnity basis from the date of the ISS Report (or, in the alternative, from the date West Face delivered its responding motion materials), at which point Catalyst knew or ought to have known that this motion was meritless.

– was irrelevant, and threatened a motion to strike. West Face agreed to defer filing its materials so such a motion could be brought. It never was. Catalyst then complained the material was inaccurate, but refused to say how.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 8th day of June, 2015.

Matthew Milne-Smith
Andrew Carlson
Davies Ward Phillips & Vineberg LLP

Lawyer for the Defendant, West Face Capital Inc.

SCHEDULE A
LIST OF AUTHORITIES

1. *Air Canada Pilots Assn. v. Air Canada Ace Aviation Holdings Inc.*, [2007] O.J. No. 89 (S.C.J.), affirmed without separate reasons, [2008] O.J. No. 2567 (C.A.)
2. *Airport Limousine Drivers Assn. v. Greater Toronto Airports Authority*, [2005] O.J. No. 3509 (S.C.J.)
3. *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663 (S.C.J.)
4. *Baldwin Janzen Insurance Services (2004) Ltd. v. Janzen*, [2006] B.C.J. No. 753 (Sup. Ct.)
5. *Bell Canada v. Rogers Communications Inc.*, [2010] O.J. No. 2229 (S.C.J.)
6. *Benayoune & Associates FZE v. Kanata Chemical Technologies Inc.*, [2014] O.J. No. 4808 (S.C.J.)
7. *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3782 (S.C.J.)
8. *Burkes v. Canada*, [2010] O.J. No. 2877 (S.C.J.), leave to appeal refused [2010] O.J. No. 5019 (Div. Ct.)
9. *Canadian Transit Co. v. Girdhar*, [2001] O.J. No. 3273 (S.C.J.), affirmed [2002] O.J. No. 2933 (Div. Ct.)
10. *Celanese Canada Inc. v. Murray Demolition Corp.*, [2006] S.C.J. No. 35
11. *Desgagne v. Yuen*, [2006] B.C.J. No. 1418 (Sup. Ct.)
12. *FCI Fisker Cargo Inc. v. ABX Logistics Corp.*, [2001] O.J. No. 68 (S.C.J.)
13. *Frangione v. Vandongen*, [2010] O.J. No. 2337 (S.C.J.)
14. *Fuller Western Rubber Linings Ltd. v. Spence Corrosion Services Ltd.*, [2012] A.J. No. 442 (C.A.)
15. *GDL Solutions Inc. v. Walker*, [2012] O.J. No. 3768 (S.C.J.)
16. *Hearing Clinic (Niagara Falls) Inc. v. Ellesmere Hearing Centre Ltd. (c.o.b. Canada Hearing Centre)*, [2008] O.J. No. 5271 (S.C.J.)
17. *Innovative Health Group Inc. v. Calgary Health Region*, [2008] A.J. No. 615 (C.A.)
18. *Jobsearch Canada Inc. v. Matrix Search Group Ltd.*, [2008] O.J. No. 2556 (S.C.J.)
19. *JTT Electronics Ltd. v. Farmer*, [2014] B.C.J. No. 3145 (Sup. Ct.)
20. *Kanda Tsushin Kogyo Co. v. Coveley*, [1997] O.J. No. 56 (Div. Ct.)
21. *KOS Oilfield Transportation Ltd. v. Mitchell*, [2010] A.J. No. 1049 (C.A.)
22. *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] S.C.J. No. 83
23. *Mandel v. Morguard Corp.*, [2014] O.J. No. 1088 (S.C.J.)
24. *Mathieson v. Scotia Capital Inc.*, [2008] O.J. No. 3500 (S.C.J.)
25. *Maudore Minerals Ltd. v. Harbour Foundation*, [2012] O.J. No. 3548 (S.C.J.)
26. *Merpaw v. Hyde*, [2015] O.J. No. 800 (S.C.J.)
27. *Morton v. Asper*, [1988] M.J. No. 424 (Q.B.)

28. *Nicolardi v. Daley*, [2002] O.J. No. 595 (S.C.J.)

29. *Optilinx Systems Inc. v. Fiberco Solutions Inc.*, [2014] O.J. No. 5708 (S.C.J.)

30. *Pandi v. Fieldofwebs.Com Ltd.*, [2007] O.J. No. 2739 (S.C.J.)

31. *Plaza Consulting Inc. v. Grieve*, [2013] O.J. No. 3769 (S.C.J.)

32. *RJR-MacDonald Inc. v. Canada*, [1994] S.C.J. No. 17

33. *Robert Moore Pharmacy Ltd. v. Shoppers Drug Mart Inc.*, [2012] O.J. No. 6172 (S.C.J.) [Comm. List])

34. *Rogers Communications Inc. v. Shaw Communications Inc.*, [2009] O.J. No. 3842 (S.C.J.)

35. *Rossi v. Vaughan*, [2010] O.J. No. 203 (S.C.J.)

36. Sharpe, Robert J., *Injunctions and Specific Performance*, loose-leaf ed. (Toronto: Canada Law Book, 2014)

37. *Sobeys Capital Inc. v. Sentinel (Sherbourne) Land Corp.*, [2014] O.J. No. 5998 (S.C.J.)

38. *Thompson v. BFI Canada Inc.*, [2014] O.J. No. 3179 (S.C.J.)

39. *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 (S.C.J.)

40. *TSI International Group Inc. v. Formosa*, [2015] O.J. No. 816 (S.C.J.)

41. *United Technologies Corp. v. Platform Computing Corp*, [1998] O.J. No. 883 (Gen. Div.) varied on other grounds, [1999] O.J. No. 4490 (C.A.)

42. *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] O.J. No. 6082 (S.C.J.)

SCHEDULE B
RELEVANT STATUTES

RULE 30 DISCOVERY OF DOCUMENTS

INTERPRETATION

30.01 (1) In rules 30.02 to 30.11,

(a) "document" includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and data and information in electronic form; and

(b) a document shall be deemed to be in a party's power if that party is entitled to obtain the original document or a copy of it and the party seeking it is not so entitled. R.R.O. 1990, Reg. 194, r. 30.01 (1); O. Reg. 427/01, s. 12; O. Reg. 132/04, s. 6.

(2) In subrule 30.02 (4),

(a) a corporation is a subsidiary of another corporation where it is controlled directly or indirectly by the other corporation; and

(b) a corporation is affiliated with another corporation where,

(i) one corporation is the subsidiary of the other,

(ii) both corporations are subsidiaries of the same corporation, or

(iii) both corporations are controlled directly or indirectly by the same person or persons. R.R.O. 1990, Reg. 194, r. 30.01 (2).

SCOPE OF DOCUMENTARY DISCOVERY

Disclosure

30.02 (1) Every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party to the action shall be disclosed as provided in rules 30.03 to 30.10, whether or not privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (1); O. Reg. 438/08, s. 26.

Production for Inspection

(2) Every document relevant to any matter in issue in an action that is in the possession, control or power of a party to the action shall be produced for inspection if requested, as provided in rules 30.03 to 30.10, unless privilege is claimed in respect of the document. R.R.O. 1990, Reg. 194, r. 30.02 (2); O. Reg. 438/08, s. 26.

Insurance Policy

(3) A party shall disclose and, if requested, produce for inspection any insurance policy under which an insurer may be liable,

(a) to satisfy all or part of a judgment in the action; or

(b) to indemnify or reimburse a party for money paid in satisfaction of all or part of the judgment,

but no information concerning the insurance policy is admissible in evidence unless it is relevant to an issue in the action. R.R.O. 1990, Reg. 194, r. 30.02 (3).

Subsidiary and Affiliated Corporations and Corporations Controlled by Party

(4) The court may order a party to disclose all relevant documents in the possession, control or power of the party's subsidiary or affiliated corporation or of a corporation controlled directly or indirectly by the party and to produce for inspection all such documents that are not privileged. R.R.O. 1990, Reg. 194, r. 30.02 (4).

AFFIDAVIT OF DOCUMENTS

Party to Serve Affidavit

30.03 (1) A party to an action shall serve on every other party an affidavit of documents (Form 30A or 30B) disclosing to the full extent of the party's knowledge, information and belief all documents relevant to any matter in issue in the action that are or have been in the party's possession, control or power. O. Reg. 438/08, s. 27 (1).

Contents

(2) The affidavit shall list and describe, in separate schedules, all documents relevant to any matter in issue in the action,

(a) that are in the party's possession, control or power and that the party does not object to producing;

(b) that are or were in the party's possession, control or power and for which the party claims privilege, and the grounds for the claim; and

(c) that were formerly in the party's possession, control or power, but are no longer in the party's possession, control or power, whether or not privilege is claimed for them, together with a statement of when and how the party lost possession or control of or power over them and their present location. R.R.O. 1990, Reg. 194, r. 30.03 (2); O. Reg. 438/08, s. 27 (2).

(3) The affidavit shall also contain a statement that the party has never had in the party's possession, control or power any document relevant to any matter in issue in the action other than those listed in the affidavit. R.R.O. 1990, Reg. 194, r. 30.03 (3); O. Reg. 438/08, s. 27 (3).

Lawyer's Certificate

(4) Where the party is represented by a lawyer, the lawyer shall certify on the affidavit that he or she has explained to the deponent,

(a) the necessity of making full disclosure of all documents relevant to any matter in issue in the action; and

(b) what kinds of documents are likely to be relevant to the allegations made in the pleadings. O. Reg. 653/00, s. 3; O. Reg. 438/08, s. 27 (4).

Affidavit not to be Filed

(5) An affidavit of documents shall not be filed unless it is relevant to an issue on a pending motion or at trial. R.R.O. 1990, Reg. 194, r. 30.03 (5).

INSPECTION OF DOCUMENTS

Request to Inspect

30.04 (1) A party who serves on another party a request to inspect documents (Form 30C) is entitled to inspect any document that is not privileged and that is referred to in the other party's affidavit of documents as being in that party's possession, control or power. R.R.O. 1990, Reg. 194, r. 30.04 (1).

(2) A request to inspect documents may also be used to obtain the inspection of any document in another party's possession, control or power that is referred to in the originating process, pleadings or an affidavit served by the other party. R.R.O. 1990, Reg. 194, r. 30.04 (2).

(3) A party on whom a request to inspect documents is served shall forthwith inform the party making the request of a date within five days after the service of the request to inspect documents and of a time between 9:30 a.m. and 4:30 p.m. when the documents may be inspected at the office of the lawyer of the party served, or at some other convenient place, and shall at the time and place named make the documents available for inspection. R.R.O. 1990, Reg. 194, r. 30.04 (3); O. Reg. 575/07, s. 1.

Documents to be Taken to Examination and Trial

(4) Unless the parties agree otherwise, all documents listed in a party's affidavit of documents that are not privileged and all documents previously produced for inspection by the party shall, without notice, summons or order, be taken to and produced at,

(a) the examination for discovery of the party or of a person on behalf or in place of or in addition to the party; and

(b) the trial of the action. R.R.O. 1990, Reg. 194, r. 30.04 (4).

Court may Order Production

(5) The court may at any time order production for inspection of documents that are not privileged and that are in the possession, control or power of a party. R.R.O. 1990, Reg. 194, r. 30.04 (5).

Court may Inspect to Determine Claim of Privilege

(6) Where privilege is claimed for a document, the court may inspect the document to determine the validity of the claim. R.R.O. 1990, Reg. 194, r. 30.04 (6).

Copying of Documents

(7) Where a document is produced for inspection, the party inspecting the document is entitled to make a copy of it at the party's own expense, if it can be reproduced, unless the person having possession or control of or power over the document agrees to make a copy, in which

case the person shall be reimbursed for the cost of making the copy. R.R.O. 1990, Reg. 194, r. 30.04 (7).

Divided Disclosure or Production

(8) Where a document may become relevant only after the determination of an issue in the action and disclosure or production for inspection of the document before the issue is determined would seriously prejudice a party, the court on the party's motion may grant leave to withhold disclosure or production until after the issue has been determined. R.R.O. 1990, Reg. 194, r. 30.04 (8).

DISCLOSURE OR PRODUCTION NOT ADMISSION OF RELEVANCE

30.05 The disclosure or production of a document for inspection shall not be taken as an admission of its relevance or admissibility. R.R.O. 1990, Reg. 194, r. 30.05.

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.

DOCUMENTS OR ERRORS SUBSEQUENTLY DISCOVERED

30.07 Where a party, after serving an affidavit of documents,

(a) comes into possession or control of or obtains power over a document that relates to a matter in issue in the action and that is not privileged; or

(b) discovers that the affidavit is inaccurate or incomplete,

the party shall forthwith serve a supplementary affidavit specifying the extent to which the affidavit of documents requires modification and disclosing any additional documents. R.R.O. 1990, Reg. 194, r. 30.07.

EFFECT OF FAILURE TO DISCLOSE OR PRODUCE FOR INSPECTION

Failure to Disclose or Produce Document

30.08 (1) Where a party fails to disclose a document in an affidavit of documents or a supplementary affidavit, or fails to produce a document for inspection in compliance with these rules, an order of the court or an undertaking,

(a) if the document is favourable to the party's case, the party may not use the document at the trial, except with leave of the trial judge; or

(b) if the document is not favourable to the party's case, the court may make such order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (1); O. Reg. 504/00, s. 3.

Failure to Serve Affidavit or Produce Document

(2) Where a party fails to serve an affidavit of documents or produce a document for inspection in compliance with these rules or fails to comply with an order of the court under rules 30.02 to 30.11, the court may,

(a) revoke or suspend the party's right, if any, to initiate or continue an examination for discovery;

(b) dismiss the action, if the party is a plaintiff, or strike out the statement of defence, if the party is a defendant; and

(c) make such other order as is just. R.R.O. 1990, Reg. 194, r. 30.08 (2).

PRIVILEGED DOCUMENT NOT TO BE USED WITHOUT LEAVE

30.09 Where a party has claimed privilege in respect of a document and does not abandon the claim by giving notice in writing and providing a copy of the document or producing it for inspection at least 90 days before the commencement of the trial, the party may not use the document at the trial, except to impeach the testimony of a witness or with leave of the trial judge. R.R.O. 1990, Reg. 194, r. 30.09; O. Reg. 19/03, s. 7.

PRODUCTION FROM NON-PARTIES WITH LEAVE

Order for Inspection

30.10 (1) The court may, on motion by a party, order production for inspection of a document that is in the possession, control or power of a person not a party and is not privileged where the court is satisfied that,

(a) the document is relevant to a material issue in the action; and

(b) it would be unfair to require the moving party to proceed to trial without having discovery of the document. R.R.O. 1990, Reg. 194, r. 30.10 (1).

Notice of Motion

(2) A motion for an order under subrule (1) shall be made on notice,

(a) to every other party; and

(b) to the person not a party, served personally or by an alternative to personal service under rule 16.03. R.R.O. 1990, Reg. 194, r. 30.10 (2).

Court may Inspect Document

(3) Where privilege is claimed for a document referred to in subrule (1), or where the court is uncertain of the relevance of or necessity for discovery of the document, the court may inspect the document to determine the issue. R.R.O. 1990, Reg. 194, r. 30.10 (3).

Preparation of Certified Copy

(4) The court may give directions respecting the preparation of a certified copy of a document referred to in subrule (1) and the certified copy may be used for all purposes in place of the original. R.R.O. 1990, Reg. 194, r. 30.10 (4).

Cost of Producing Document

(5) The moving party is responsible for the reasonable cost incurred or to be incurred by the person not a party to produce a document referred to in subrule (1), unless the court orders otherwise. O. Reg. 260/05, s. 5.

DOCUMENT DEPOSITED FOR SAFE KEEPING

30.11 The court may order that a relevant document be deposited for safe keeping with the registrar and thereafter the document shall not be inspected by any person except with leave of the court. R.R.O. 1990, Reg. 194, r. 30.11.

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

UNDERTAKING

40.03 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. R.R.O. 1990, Reg. 194, r. 40.03.

SCHEDULE C
REGULATORY PROVISIONS IN THE RELEVANT DRAFT SHARE PURCHASE AGREEMENTS

VimpelCom's Original Draft Share Purchase Agreement	**Catalyst's May 23, 2014 Draft Share Purchase Agreement** (blacklined against VimpelCom's Original Draft Share Purchase Agreement)	**VimpelCom's August 7, 2014 Draft Share Purchase Agreement** (blacklined against Catalyst's May 23, 2014 Draft Share Purchase Agreement)
6.3 Regulatory and Third Party Approvals (a) The Purchaser shall, as promptly as practicable (i) give all notices to, make all filings and applications with, obtain all consents and approvals of and take any action in respect of, any Persons and Governmental Authorities that are required of the Purchaser to consummate the transactions contemplated by this Agreement; and (ii) provide such other information and communications to such Governmental Authorities or other Persons as such Governmental Authorities or other Persons may reasonably request in connection therewith. The Purchaser shall provide prompt notification to the Seller when any such consent, approval, action, filing or notice referred to in clause (i) above is obtained, taken, made or given, as applicable, and shall advise the Seller of any communications (and, unless precluded by Law, provide copies of any such communications that are in writing to the Seller and its outside counsel) with any	**6.3 Regulatory and Third Party Notifications and Approvals** (a) The Purchaser shall, as promptly as practicable: (i) give all notices to, make all filings and applications with, obtain all consents and approvals of and take any action in respect of, any Persons and Governmental Authorities that are required of the Purchaser to consummate the transactions contemplated by this Agreement; and (ii) provide such other information and communications to such Governmental Authorities or other Persons as such Governmental Authorities or other Persons may reasonably request in connection therewith. The Purchaser shall provide prompt notification to the Seller when any such consent, approval, action, filing or notice referred to in clause (i) above is obtained, taken, made or given, as applicable, and shall advise the Seller of any communications (and, ~~unless precluded by Law~~subject to Section 6.3(d), provide copies of any such communications that are in writing to the	**6.3 Regulatory and Third Party Notifications and Approvals** (a) The Purchaser shall~~, as promptly as~~ promptly, but in no event later than the date that is ten Business Days after the signing of this Agreement by all Parties hereto, or soon thereafter as is reasonably practicable: (i) give all notices to, make all filings and applications with, obtain all consents and approvals of and take any action in respect of, any Persons and Governmental Authorities that are required of the Purchaser to consummate the transactions contemplated by this Agreement; and (ii) provide such other information and communications to such Governmental Authorities or other Persons as such Governmental Authorities or other Persons may reasonably request in connection therewith. The Purchaser shall provide prompt notification to the Seller when any such consent, approval, action, filing or notice referred to in clause (i) above is obtained, taken, made or given, as applicable, and shall advise the Seller

Governmental Authority or other Person regarding any of the transactions contemplated by this Agreement. (b) The Purchaser shall cooperate and assist the Seller in giving any notices to third parties and obtaining consents from third parties as are required to consummate the Transaction as set forth in Schedule 3.2(e), provided that the Seller shall not have any obligation to expend any monies in connection with the obtaining of such third party consents or oblige the Seller to give any guarantee or other consideration of any nature in connection therewith. (c) Without limiting the generality of the foregoing, the Purchaser shall consult and cooperate with the Seller in connection with all notices, filings, applications, analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of the Purchaser in connection with obtaining all consents and approvals from any Governmental Authorities necessary to consummate the transactions contemplated hereby. The Purchaser will not make any notification, filing, application or other submission in relation to the transactions contemplated hereby without first providing the Seller with a copy of such notification, filing, application or other submission in draft form (subject	Seller and its outside counsel) with any Governmental Authority or other Person regarding any of the transactions contemplated by this Agreement. The Seller shall cooperate and assist the Purchaser to the extent necessary in giving any notices to, filings and applications, and obtaining consents and approvals to any Governmental Authorities that that Purchaser shall make to consummate the Transaction. (b) The Purchaser shall cooperate and assist the Seller in giving any notices to third parties and obtaining consents from third parties as are required to consummate the Transaction as set forth in Schedule 3.2(e), provided that the Seller shall not have any obligation to expend any monies in connection with the obtaining of such third party consents or oblige the Seller to give any guarantee or other consideration of any nature in connection therewith. (c) Without limiting the generality of the foregoing, the Purchaser shall consult and cooperate with the Seller in connection with all notices, filings, applications, analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of the Purchaser in connection with obtaining all consents and approvals from any Governmental Authorities necessary to	of any communications (and, subject to Section 6.3(d), provide copies of any such communications that are in writing to the Seller and its outside counsel) with any Governmental Authority or other Person regarding any of the transactions contemplated by this Agreement. The Seller shall cooperate and assist the Purchaser to the extent necessary in giving any notices to, filings and applications, and obtaining consents and approvals to any Governmental Authorities that ~~that~~the Purchaser shall make to consummate the Transaction. (b) The Purchaser shall cooperate and assist the Seller in giving any notices to third parties and obtaining consents from third parties as are required to consummate the Transaction as set forth in Schedule 3.2(~~e~~i), provided that the Seller shall not have any obligation to expend any monies in connection with the obtaining of such third party consents or oblige the Seller to give any guarantee or other consideration of any nature in connection therewith. (c) Without limiting the generality of the foregoing, the Purchaser shall consult and cooperate with the Seller in connection with all notices, filings, applications, analyses, appearances, presentations, memoranda, briefs, arguments, opinions and proposals made or submitted by or on behalf of the

to reasonable redactions or limiting the sharing of such draft, or parts thereof, to an outside-counsel-only basis where appropriate) and giving the Seller a reasonable opportunity to consider its content before it is filed with the relevant Governmental Authority, and the Purchaser shall consider and take account of all reasonable comments timely made in this respect. The Purchaser shall promptly notify the Seller of any substantive communications from or with any Governmental Authority with respect to the transactions contemplated by this Agreement and will use its reasonable best efforts to ensure, to the extent permitted by Law, that the Seller, or its outside counsel where appropriate, are involved in any substantive communications or invited to attend meetings with, or other appearances before, any Governmental Authority with respect to the transactions contemplated by this Agreement. (d) Subject to Section 6.4, the obligations of the Purchaser under this Section 6.3 shall include committing to any and all undertakings, divestitures, licenses or hold separate or similar arrangements with respect to its assets or the assets of the Globalive Entities and committing to any undertakings or other arrangements relating to conduct of its business or the business of the Globalive Entities as a condition to obtaining any and all	consummate the transactions contemplated hereby. ~~The~~Subject to Section 6.3(d), the Purchaser will not make any notification, filing, application or other submission in relation to the transactions contemplated hereby without first providing the Seller with a copy of such notification, filing, application or other submission in draft form~~ (subject to reasonable redactions or limiting the sharing of such draft, or parts thereof, to an outside-counsel-only basis where appropriate)~~ and giving the Seller a reasonable opportunity to consider its content before it is filed with the relevant Governmental Authority, and the Purchaser shall consider and take account of all reasonable comments timely made in this respect. ~~The~~Subject to Section 6.3(d), the Purchaser shall promptly notify the Seller of any substantive communications from or with any Governmental Authority with respect to the transactions contemplated by this Agreement and will use its reasonable best efforts to ensure, to the extent permitted by Law, that the Seller, or its outside counsel where appropriate, are involved in any substantive communications or invited to attend meetings with, or other appearances before, any Governmental Authority with respect to the transactions contemplated by this Agreement. (d) ~~Subject to Section 6.4, the obligations of the Purchaser under this~~	Purchaser in connection with obtaining all consents and approvals from any Governmental Authorities necessary to consummate the transactions contemplated hereby. Subject to Section 6.3(d), the Purchaser will not make any notification, filing, application or other submission in relation to the transactions contemplated hereby without first providing the Seller with a copy of such notification, filing, application or other submission in draft form and giving the Seller a reasonable opportunity to consider its content before it is filed with the relevant Governmental Authority, and the Purchaser shall consider and take account of all reasonable comments timely made in this respect. Subject to Section 6.3(d), the Purchaser shall promptly notify the Seller of any substantive communications from or with any Governmental Authority with respect to the transactions contemplated by this Agreement and will use its reasonable best efforts to ensure, to the extent permitted by Law, that the Seller, or its outside counsel where appropriate, are involved in any substantive communications or invited to attend meetings with, or other appearances before, any Governmental Authority with respect to the transactions contemplated by this Agreement. (d) Subject to Section 6.4, the Purchaser shall not knowingly take or

approvals or clearances from any Governmental Authority or Person necessary to consummate the transactions contemplated hereby, including taking any and all actions necessary in order to ensure the receipt of the necessary consents, approvals, clearances or forbearances, or the termination, waiver or expirations of the necessary waiting periods, under applicable Law. In addition, subject to Section 6.4, the Purchaser shall not knowingly take or cause to be taken any action which would be expected to prevent or delay the obtaining of any consent or approval required hereunder, including entering into any timing or other agreements with any Governmental Authority without the express written consent of the Seller, for the consummation of the transactions contemplated hereby. No action taken under this Section 6.3 shall entitle the Purchaser to any reduction to the Purchaser Price.	~~Section 6.3 shall include committing to any and all undertakings, divestitures, licenses or hold separate or similar arrangements with respect to its assets or the assets of the Globalive Entities and committing to any undertakings or other arrangements relating to conduct of its business or the business of the Globalive Entities as a condition to obtaining any and all approvals or clearances from any Governmental Authority or Person necessary to consummate the transactions contemplated hereby, including taking any and all actions necessary in order to ensure the receipt of the necessary consents, approvals, clearances or forbearances, or the termination, waiver or expirations of the necessary waiting periods, under applicable Law. In addition, subject to Section 6.4, the Purchaser shall not knowingly take or cause to be taken any action which would be expected to prevent or delay the obtaining of any consent or approval required hereunder, including entering into any timing or other agreements with any Governmental Authority without the express written consent of the Seller, for the consummation of the transactions contemplated hereby. No action taken under this Section 6.3 shall entitle the Purchaser to any reduction to the Purchaser Price.~~Notwithstanding anything in this Agreement, the Purchaser is not obligated to provide Seller with	cause to be taken any action which would be expected to prevent or delay the obtaining of any consent or approval required hereunder, including (a) without the written consent of the Seller, not to be unreasonably withheld, seeking an approval from any Governmental Authority for a transaction other than the transactions contemplated hereby; or (b) without the written consent of the Seller, entering into any timing or other agreements with any Governmental Authority for the consummation of the transactions contemplated hereby. For greater certainty, for the duration of the Interim Period, the Purchaser shall not: (i) develop, evaluate or analyze any studies, analyses, reports or plans relating to the sale of the Business, or any of its assets, by the Purchaser to an Incumbent; or (ii) discuss with any Governmental Authority the sale or transfer of the Business, or any of its assets, by the Purchaser to an Incumbent; provided that nothing in clause (i) or (ii) shall preclude the Purchaser from doing any act or thing requested by any Governmental Authority or necessary or desirable in connection with or for purposes of obtaining either such approval. Notwithstanding anything in this Agreement, the Purchaser is not obligated to provide the Seller with commercially or competitively sensitive information in relation to the Purchaser, unless the Purchaser is satisfied that the confidential nature of such information can be

	commercially or competitively sensitive information in relation to the Purchaser, unless the Purchaser is satisfied that the confidential nature of such information can be preserved through redaction or the sharing of such information only to the Seller's outside counsel.	preserved through redaction or the sharing of such information only to the Seller's outside counsel. (e) During the Interim Period, the Purchaser shall not, without the consent of the Seller, take any action with respect to seeking or pursuing concessions from any Governmental Authority which would be expected to prevent or delay the obtaining of any consent or approval required hereunder. The Seller hereby agrees that the Purchaser shall be entitled to continue to pursue the regulatory concessions from Industry Canada that GWMC is presently seeking on the date hereof (the "Regulatory Concessions") to the extent that its actions will not prevent or delay the obtaining of any consent or approval required hereunder. For greater certainty, the Purchaser may, with the prior written consent of GTH, not to be unreasonably withheld, take any action with respect to seeking or pursuing concessions from any Governmental Authority so long as such action would not be expected to prevent or delay the obtaining of any consent or approval required hereunder. The Seller agrees that it shall, and shall cause GWMC to, cooperate and use reasonable efforts to assist the Purchaser in pursuing the Regulatory Concessions during the Interim Period. (f) Nothing in this Agreement shall preclude the Purchaser from approaching

		and engaging Persons to co-invest with the Purchaser in the Business so long as such co-investment would not be expected to prevent or delay the obtaining of any consent or approval required hereunder and would not result in the Purchaser's representation and warranty in Section 5.9 of this Agreement being untrue.
6.5 Industry Canada Approval Matters The Purchaser shall use its best efforts to obtain the Industry Canada Approval. The Seller shall co-operate with the Purchaser and render all necessary assistance required by the Purchaser in connection with any application, notification or filing of the Purchaser to or with Industry Canada.	**6.5 Industry Canada Notification and Approval Matters** The Purchaser shall use its best efforts to obtain the Industry Canada Approval, and make any required notifications to Industry Canada. The Seller shall co-operate with the Purchaser and render all necessary assistance required by the Purchaser in connection with any application, notification or filing of the Purchaser to or with Industry Canada.	**6.5 Industry Canada Notification and Approval Matters** The Purchaser shall use its best efforts to obtain the Industry Canada Approval, and make any required notifications to Industry Canada. The Seller shall co-operate with the Purchaser and render all necessary assistance required by the Purchaser in connection with any application, notification or filing of the Purchaser to or with Industry Canada.
7.3 General Conditions The obligation of the Parties to complete the Transaction is subject to the following conditions, which are for the benefit of all of the Parties: (a) Competition Act Approval. Without limiting the Purchaser's obligations herein, including in Section 6.4, the Purchaser having obtained Competition Act Approval. (b) Industry Canada Approval.	**7.3 General Conditions** The obligation of the ~~Parties~~Purchaser and the Seller to complete the Transaction is subject to the following conditions, which are for the benefit of ~~all of~~ the ~~Parties~~Purchaser and the Seller: (a) Competition Act Approval. Without limiting the Purchaser's obligations herein, including in Section 6.4, the Purchaser having obtained Competition Act Approval.	**7.3 General Conditions** The obligation of the Purchaser and the Seller to complete the Transaction is subject to the following conditions, which are for the benefit of the Purchaser and the Seller: (a) Competition Act Approval. Without limiting the Purchaser's obligations herein, including in Section 6.4, the Purchaser having obtained Competition Act Approval, which approval shall not be subject to any

Without limiting the Purchaser's obligations herein, including in Section 6.5, the Purchaser having obtained Industry Canada Approval.	(b) Industry Canada Approval. Without limiting the Purchaser's obligations herein, including in Section 6.5, the Purchaser having obtained Industry Canada Approval. (c) Escrow Agreement. Each of the Purchaser, the Seller, GWMC and the Escrow Agent shall have executed and delivered the Escrow Agreement. (d) Pre-Closing Reorganization. All of the Pre-Closing Reorganization steps set out in Schedule 6.6 shall have been completed prior to the Closing.	terms or conditions that would in the opinion of the Purchaser acting reasonably, have a material impact on the Transaction, and subject to no other material conditions unacceptable to the Purchaser acting reasonably. (b) Industry Canada Approval. Without limiting the Purchaser's obligations herein, including in Section 6.5, the Purchaser having obtained Industry Canada Approval on substantially similar conditions and in substantially similar form, in the opinion of the Purchaser acting reasonably, as currently applied to the Spectrum Licenses and subject to no other material conditions unacceptable to the Purchaser acting reasonably. (c) ~~Escrow Agreement. Each of the Purchaser, the Seller, GWMC and the Escrow Agent shall have executed and delivered the Escrow Agreement. (d)~~Pre-Closing Reorganization. All of the Pre-Closing Reorganization steps set out in Schedule 6.6 shall have been completed prior to the Closing.

THE CATALYST CAPITAL GROUP INC. Plaintiff/Moving party	and	MOYSE ET AL Defendants/Responding Party	Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto.

FACTUM OF THE RESPONDING PARTY
WEST FACE CAPITAL INC.
(RE: PLAINTIFF'S MOTION FOR INTERLOCUTORY RELIEF RETURNABLE JUNE 11, 2015)

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