

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**THE CATALYST CAPITAL GROUP INC.**

**Plaintiff/Moving Party**

**- and -**

**BRANDON MOYSE and WEST FACE CAPITAL INC.**

**Defendants/Responding Parties**

**FACTUM OF THE RESPONDING PARTY, BRANDON MOYSE  
(Motion Returnable June 11, 2015)**

**June 8, 2015**

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## **PART I. OVERVIEW**

1. On this motion, the Catalyst Capital Group Inc. ("Catalyst") relies entirely on unfounded speculation to ask this court to find one of its former junior employees, Brandon Moyse in contempt of court and send him to jail. It asks this court to use its contempt power, which lies at the heart of its ability to maintain the integrity of its process and the rule of law, to find Mr. Moyse in contempt of an undertaking to preserve all relevant documents (the "Undertaking"), and of an order of Mr. Justice Firestone, dated July 16, 2014 (the "Firestone Order"). The Undertaking and the Firestone Order required Mr. Moyse to, among other things, maintain and preserve all documents relevant to these proceedings in his power, possession, and control, and to turn over his personal computing devices for the creation of forensic images of the data stored on those devices.

2. Catalyst alleges that Mr. Moyse deleted relevant information from his computer prior to turning it over for forensic imaging. However, Catalyst has provided no direct evidence – let alone proven beyond a reasonable doubt – that Mr. Moyse engaged in any conduct that violated either the Undertaking or the Firestone Order.

3. Mr. Moyse acted in good faith and took reasonable steps to comply with this court's orders. Prior to turning over his devices, Mr. Moyse attempted to delete his personal Internet browsing history, which recorded that Mr. Moyse had visited websites containing pornography. He found this fact embarrassing and wished to keep it private and he did not want Catalyst to access it. The browsing history that Mr. Moyse attempted to delete from his computer was irrelevant to this proceeding, and doing so was not in violation of the Firestone Order.

4. Contempt proceedings are a powerful tool which allow this court to uphold its own dignity and its processes, and to maintain the rule of law. It would work an injustice to allow Catalyst to exploit this power to have Mr. Moyse found in contempt of court in these circumstances.

## PART II. FACTS

### **A. *Mr. Moyse's employment with Catalyst***

5. Mr. Moyse is 27-years-old. He was born and raised in Montreal, Quebec. He earned a degree in mathematics and began his career working at major financial institutions in Toronto.<sup>1</sup>

6. On or around November 1, 2012, Mr. Moyse began to work as an analyst for the plaintiff, Catalyst.<sup>2</sup> Catalyst is an investment firm which invests in distressed and undervalued Canadian situations for control or influence. It has in excess of \$3 billion under management.<sup>3</sup>

7. As an analyst, Mr. Moyse was the lowest level professional at Catalyst.<sup>4</sup> He performed financial and qualitative research both on potential investment opportunities and companies already owned by Catalyst. He had no direct input into Catalyst's investment decisions or strategy, but rather worked on discrete research projects.<sup>5</sup>

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<sup>1</sup> Affidavit of Brandon Moyse, affirmed April 2, 2015 ("Moyse Affidavit"), Responding Motion Record of Brandon Moyse ("Moyse RMR"), Tab 1, para. 2.

<sup>2</sup> Moyse Affidavit, Moyse RMR Tab 1, para. 6.

<sup>3</sup> Affidavit of James Riiey, sworn February 18, 2015 ("Riley Affidavit"), Catalyst Motion Record ("MR") Tab 3A, p. 58, para. 3.

<sup>4</sup> Moyse Affidavit, Moyse RMR Tab 1, para. 7.

<sup>5</sup> Moyse Affidavit, Moyse RMR Tab 1, paras. 7-8.

8. Mr. Moyse's employment with Catalyst was governed by an employment agreement dated October 1, 2012.<sup>6</sup> That employment agreement contained confidentiality and non-competition clauses.<sup>7</sup>

***B. Mr. Moyse's departure from Catalyst***

9. About a year after he began working for Catalyst, Mr. Moyse began looking for alternative employment.<sup>8</sup> Mr. Moyse ultimately obtained a position with the other defendant in this proceeding, West Face Capital Inc. ("West Face"). During the recruitment process, West Face asked Mr. Moyse to provide writing samples. On March 27, 2014, he e-mailed West Face four research memoranda he had created at Catalyst, some of which were marked as confidential.<sup>9</sup>

10. Mr. Moyse has acknowledged that providing these documents to West Face was a mistake, and he should not have done so.<sup>10</sup> Nevertheless, only one of the memos concerned a company in which Catalyst actually invested (and in which West Face has not made an investment),<sup>11</sup> and Catalyst has not alleged that it has suffered any adverse consequences as a result of the disclosure of the memos.

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<sup>6</sup> Employment Agreement from the Catalyst Group Inc. to Brandon Moyse, dated October 2, 2012 ("Employment Agreement"), Exhibit "E" to the Moyse Affidavit, Moyse RMR Tab 1E, p. 92.

<sup>7</sup> Employment Agreement, Exhibit "E" to the Moyse Affidavit, Moyse RMR Tab 1E, p. 96.

<sup>8</sup> Affidavit of Brandon Moyse, sworn July 4, 2014 ("Moyse July 4, 2014 Affidavit"), Moyse RMR Tab 1A, p. 28, para. 27.

<sup>9</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 9, para. 29

<sup>10</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 9, para. 29;

Cross-Examination of Brandon Moyse, May 11, 2015 ("Moyse Cross"), Second Supplementary Motion Record ("Second Supp. MR"), Tab 13, p. 311, q. 489.

<sup>11</sup> Cross-Examination of James Riley, May 13, 2015 ("Riley Cross"), Joint Supplementary Responding Motion Record of the Defendants ("Defendants' Supp. MR"), Tab 10, p. 34, Q. 272.

11. Contrary to Catalyst's claim in its factum that it "proved" that Mr. Moyse transferred Catalyst's confidential information to West Face, Mr. Moyse freely disclosed that he had transmitted the memos to West Face.<sup>12</sup>

12. Before Mr. Moyse began working at West Face, West Face made clear to Mr. Moyse the importance of respecting and abiding by his confidentiality obligation to his former employer. Mr. Moyse understands and has respected the obligation to preserve the confidentiality of Catalyst's information.<sup>13</sup>

13. There is no evidence in this proceeding that Mr. Moyse ever transmitted any confidential Catalyst information to West Face other than the memos attached to his March 27, 2014 email. The Independent Supervising Solicitor ("ISS") subsequently appointed to review Mr. Moyse's electronic devices found no evidence that any confidential Catalyst information was ever provided to West Face.<sup>14</sup> Indeed, the disclosure of the four memos to West Face during his recruitment was Mr. Moyse's lone misstep, which he admitted from the outset of this proceeding, and which Catalyst has seized upon to pursue a year-long and increasingly desperate vendetta against its former junior employee and its competitor, West Face.

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<sup>12</sup> Moyse July 4, 2014 Affidavit, Exhibit "A" to the Moyse Affidavit, Moyse RMR Tab 1A, p. 35, para. 62. This evidence was delivered on July 7, 2014, as part of Mr. Moyse's responding motion materials on Catalyst's motion for injunctive relief.

<sup>13</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 10, para. 31.

<sup>14</sup> Amended Report of the Independent Supervising Solicitor, ("Amended ISS Report"), Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 1D, p. 89, para. 59.

14. On May 24, 2014, the second-to-last day of a ten-day vacation, Mr. Moyse resigned by email from Catalyst.<sup>15</sup> On May 26, 2014, Catalyst instructed Mr. Moyse to remain at home for the balance of his notice period.<sup>16</sup>

15. Prior to returning his Catalyst-issued Blackberry to Catalyst, Mr. Moyse deleted photographs and text messages of a personal and private nature, and Mr. Moyse took these steps to ensure that these would not be accessible to the next user of the company-issued Blackberry.<sup>17</sup> The only email address associated with the Blackberry was Mr. Moyse's Catalyst email address, and Catalyst continued to have full access to those emails on its server.<sup>18</sup> Moreover, Catalyst has access to all of Mr. Moyse's phone records, which would show any communications between Mr. Moyse and West Face through his company-issued device.<sup>19</sup> In any event, Mr. Moyse returned the Blackberry to Catalyst several weeks before the undertaking or the Firestone Order, and accordingly, his handling of the Blackberry is not relevant to Catalyst's contempt motion.

***C. Catalyst commences these proceedings seeking injunctive relief***

16. Following Mr. Moyse's resignation from Catalyst and the announcement of his intention to begin working at West Face, Catalyst commenced this action against Mr. Moyse and West Face, and brought a motion seeking injunctive relief.

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<sup>15</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 5, paras. 14-15.

<sup>16</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 5, para. 15.

<sup>17</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 19, para. 59.

<sup>18</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 19, para. 59;

Riley Cross, Defendants' Supp. MR, Tab 10, p. 39, Q. 156-157;

List of undertakings, advisements, and refusals given at the cross-examination of James Riley ("Riley Answers to Undertakings"), Second Supp. MR, Tab 16, p. 389, Answer to Question No. 1.

<sup>19</sup> Riley Answers to Undertakings, Second Supp. MR Tab 16, p. 389, Answer to Question No. 4.



17. In its motion materials, Catalyst expressed concerns that Mr. Moyse had misappropriated Catalyst's confidential information and that he would transfer that information to West Face.<sup>20</sup>

18. The parties attended Motion Scheduling Court on June 30, 2014 to schedule Catalyst's motion for urgent interim and interlocutory relief. At that attendance, the defendants, including Mr. Moyse, entered into the Undertaking, pursuant to which the defendants agreed to preserve all relevant documents related to this litigation (as they would be required to do in any event):

Defendants' counsel agree to preserve the status quo with respect to relevant documents in the defendants' power, possession or control.<sup>21</sup>

19. Catalyst's focus in obtaining the Undertaking was to ensure that Mr. Moyse would preserve all relevant documents. It was not concerned with irrelevant documents, and thus the Undertaking did not require Mr. Moyse to preserve irrelevant documents. Catalyst also did not seek or obtain an order requiring that Mr. Moyse not use or hand over his computer immediately at that attendance.<sup>22</sup>

20. Mr. Moyse was advised of the Undertaking entered into on his behalf by his counsel. He abided by the Undertaking and preserved the status quo with respect to any relevant documents in his power, possession or control.<sup>23</sup> There is no evidence to the contrary in the record.

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<sup>20</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 9, para. 28.

<sup>21</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 10, para. 32; Endorsement of Justice Himel, June 30, 2014, Exhibit "H" to the Moyse Affidavit, Moyse RMR Tab 1H, p. 105.

<sup>22</sup> Riley Cross, Defendants' Supp. MR Tab 10, p. 32 Q. 35-38.

<sup>23</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 10, para. 33.

**D. Mr. Moyse's brief period working at West Face**

21. Mr. Moyse began working at West Face on June 23, 2014. West Face advised Mr. Moyse of his obligation to preserve the confidentiality of Catalyst's information, and the importance of that obligation. Mr. Moyse understands and has abided by that obligation.<sup>24</sup>

22. Catalyst fixates in its factum on the fact Mr. Moyse worked very briefly on a strategic, standalone transaction with respect to Arcan Resources Limited ("Arcan") during his first week at West Face. Catalyst's concern arises from the fact that one of the four memos Mr. Moyse emailed to Mr. Dea in March, 2014 concerned Arcan. Mr. Moyse only briefly researched Arcan while at West Face. His research involved a strategic transaction unrelated to the circumstances described in the Arcan memo he had prepared while at Catalyst. He began the research at West Face of his own initiative, and never delivered it or spoke with anyone at West Face about his research.<sup>25</sup>

23. Mr. Moyse stopped working at West Face after just three and a half weeks, on July 16, 2014.<sup>26</sup>

**E. The Firestone Order**

24. On July 16, 2014, the parties attended before Justice Firestone on Catalyst's motion for injunctive relief. Following discussions, the parties consented to an order (the "Firestone Order").<sup>27</sup> The Firestone Order included a number of terms, including terms which required Mr. Moyse to:

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<sup>24</sup> Moyse Affidavit, Moyse RMR Tab 1, pp. 9, 10, paras. 27, 31.

<sup>25</sup> Moyse Cross, Second Supp. MR Tab 13, p. 319, Qs. 661-671; Cross-Examination of Anthony Griffin, May 8, 2015, Second Supp. MR Tab 2, p. 13, Q. 122-125.

<sup>26</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 21, para. 64.

<sup>27</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 10, para. 34;

- (a) preserve and maintain all relevant records in his power, possession or control;
- (b) deliver a sworn affidavit of documents setting out all documents in his power, possession or control that related to his employment with Catalyst; and
- (c) turn over all his personal computer and electronic devices for the taking of a forensic image of the data served on his devices, to be conducted by a professional firm as agreed to between the parties.

25. Catalyst agreed that the Firestone Order appropriately captured the relief that it sought and obtained on July 16, 2014,<sup>28</sup> and it did not take any steps to seek any further relief.<sup>29</sup>

***F. Mr. Moyse's actions between the Firestone Order and turning over his personal devices***

26. Catalyst alleges that certain of Mr. Moyse's actions between Wednesday, July 16, 2014 (the day of the Firestone Order) and Monday July 21, 2014 (turning over his personal devices to his counsel for the taking of a forensic image) amount to contempt of the Firestone Order and the Undertaking. In its Notice of Motion, Catalyst alleges that on July 20, 2014, Mr. Moyse deleted files and/or folders from his computer, and that:

by intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014, and the terms of the [Firestone Order], Moyse has acted in contempt of Court.<sup>30</sup>

27. During the five-day period between July 16-21, 2014, counsel for the parties discussed and agreed to the process by which Mr. Moyse's devices would be imaged.<sup>31</sup>

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Order of Justice Firestone, dated July 16, 2014 ("Firestone Order"), Exhibit "I" to the Moyse Affidavit, Moyse RMR Tab 1I, p. 108.

<sup>28</sup> Riley Cross, Defendants' Supp. MR, Tab 10, p. 33, Qs. 52-53.

<sup>29</sup> Riley Cross, Defendants' Supp. MR, Tab 10, p. 33, Qs. 55-56.

<sup>30</sup> Catalyst Amended Notice of Motion, Catalyst MR, p. 16, para (ss.9)-(ss.10).

Catalyst's counsel was aware at that time that Mr. Moyse would not be turning over his personal devices for imaging until Monday, July 21, 2014, and did not object to this.<sup>32</sup>

**1. Mr. Moyse's concerns about the images of his personal devices**

28. In the days leading up to the Firestone Order, Mr. Moyse was aware that it was possible that his personal computer would have to be turned over to be reviewed for documents relevant to this matter.<sup>33</sup>

29. Following the Firestone Order, Mr. Moyse understood that a forensic image would be created of his computer's hard drive for the purpose of determining what, if any, documents he had in his possession that related to Catalyst or to the issues raised in Catalyst's lawsuit.<sup>34</sup>

30. Mr. Moyse was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit: he had good, reasonable explanations for every Catalyst-related document that would be found on his computer,<sup>35</sup> and in any event intended to disclose all such documents in his affidavit of documents, as required under the Firestone Order.<sup>36</sup>

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<sup>31</sup> Email correspondence between J. Hopkins and A. Winton dated July 16 and 17, 2014, Exhibit "H" to the Riley Affidavit, Catalyst MR Tab 3H, p. 135-138;

Email from J. Hopkins dated July 17, 2014, Exhibit "I" to the Riley Affidavit, Catalyst MR Tab 3I, p. 139-144;

Correspondence between A. Winton and J. Hopkins dated July 18, 2014, Exhibit "J" to the Riley Affidavit, Catalyst MR Tab 3J, p. 145-148;

Email from J. Hopkins dated July 18, 2014, Exhibit "K" to the Riley Affidavit, Catalyst MR Tab 3K, p. 149-152.

<sup>32</sup> Riley Cross, Defendants' Supp. MR, Tab 10, p. 34, Q. 74-79.

<sup>33</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 12, para. 37.

<sup>34</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 12, para. 37.

<sup>35</sup> Set out in Moyse Affidavit, Moyse RMR Tab 1, p. 17-19, para. 58.

<sup>36</sup> Mr. Moyse swore an affidavit of documents on July 22, 2014, and a supplementary affidavit of documents on July 29, 2014.

31. Mr. Moyse was, however, concerned that an image of his computer hard drive would capture not only the Catalyst documents in his possession, which he agreed were relevant to this proceeding and which he would preserve in any event, but also a raft of irrelevant personal information. In particular, he was troubled that Catalyst would have access to his personal Internet browsing history, which was not relevant to the matters in dispute in this litigation but would be embarrassing to have reviewed by others and potentially become part of the public record. Mr. Moyse was particularly concerned that his personal Internet browser history would show that he had accessed a number of adult entertainment websites.<sup>37</sup>

32. At that point it was not clear to Mr. Moyse what would happen to the forensic image of his personal computer, which would include this irrelevant personal information: it was not clear how the image would be taken, who would take the image, or what would happen to it afterwards. The parties had not agreed to appoint an Independent Supervising Solicitor ("ISS"), and no protocol had been implemented to prevent Catalyst from accessing such irrelevant information and to prevent his irrelevant personal information from ending up in the public record.<sup>38</sup>

## **2. Mr. Moyse's research on how to delete his Internet browsing history**

33. Mr. Moyse understood and respected his obligations under the Undertaking and the Firestone Order, and took his obligations under each very seriously.<sup>39</sup> He was very careful

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The ISS found that only all of the documents generated by its search process were previously disclosed in Mr. Moyse's affidavits of documents, other than five files in an "AppData...Content.MSO" folder: Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 2D, p. 76, para. 33.

<sup>37</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 12, para. 39.

<sup>38</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 12, para. 40;

Moyse Cross, Second Supp. MR Tab 13, pp. 305-306, Q. 359-365.

<sup>39</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 15, para. 48;

Moyse Cross, Second Supp. MR Tab 13, p. 313, Q. 523.

in how he maintained his computer following the Firestone Order.<sup>40</sup> He decided that, prior to delivering his computer to his counsel, he would attempt to delete his Internet browsing history from his computer. Mr. Moyse did not believe there was anything improper about doing so: neither the Undertaking nor the Firestone Order required him to maintain his computer "as is" before he was to deliver the computer or to preserve irrelevant files.<sup>41</sup>

34. He read the order very closely, and was confident that by deleting his Internet browsing history, he was deleting personal information which was not relevant to the litigation.<sup>42</sup> The focus of both the Undertaking and the Firestone Order was to maintain and preserve documents relevant to this action. If Catalyst had sought and obtained an order requiring that Mr. Moyse maintain the computer "as is", he would not have used it at all prior to the image being taken.<sup>43</sup>

35. Mr. Moyse does not have advanced knowledge about computers. However, he was aware that the mere act of deleting one's Internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently deleted material.<sup>44</sup>

36. Mr. Moyse did some Internet searches on how to ensure a complete deletion of his Internet browsing history. Through these searches, Mr. Moyse came to believe that "cleaning" the computer's registry following the deletion of the Internet history would ensure the permanent deletion of that history.<sup>45</sup> Despite the information gleaned by Mr. Moyse through his online research, but consistent with Mr. Moyse's lack of technological

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<sup>40</sup> Moyse Cross, Second Supp. MR Tab 13, p. 312, Qs. 512-513.

<sup>41</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 12, para. 41.

<sup>42</sup> Moyse Cross, Second Supp. MR Tab 13, p. 312, Qs. 512-513.

<sup>43</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 12, para. 41.

<sup>44</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 13, para. 42.

<sup>45</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 13, para. 42.

sophistication, cleaning a computer's registry will not in fact permanently delete a user's Internet browsing history.<sup>46</sup>

**3. Mr. Moyse's purchase and use of registry cleaning products**

37. Mr. Moyse then did some further online research for "registry cleaning" products, and ultimately purchased two software products from a company called "Systweak". Systweak's website lists two of its "top products", the first called "RegCleanPro" and the second called "Advanced System Optimizer" ("ASO"). The website describes:

(a) the ASO product as an "all in one PC tuneup suite," which "includes everything your PC needs". ASO is described as a "suite" because it contains many different programs. One of the programs contained in the suite is a program called "Secure Delete".

(b) RegCleanPro as "[s]oftware to optimize the registry."<sup>47</sup>

38. Mr. Moyse purchased RegCleanPro on Saturday, July 12, 2014, for the purpose of deleting his Internet browser history.<sup>48</sup>

39. Four days later, on Wednesday, July 16, 2014, the day of the Firestone Order, Mr. Moyse purchased the ASO product. Mr. Moyse intended to use this program to improve his system's functionality. Within the single program, ASO provided a number of different optimization products.<sup>49</sup>

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<sup>46</sup> Supplementary Affidavit of Martin Musters, sworn April 30, 2015 ("Musters Supplementary Affidavit"), Catalyst Supplementary Motion Record ("Supp MR"), Tab 2, p. 287, para. 4;

Lo Cross, Second Supp. MR Tab 12, p. 269, Q. 115.

<sup>47</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 14, para. 43.

<sup>48</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 14, para. 44.

<sup>49</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 14, para. 44;

Promotional information for Advanced System Optimizer 3, Exhibit "E" to the Affidavit of Martin Musters, sworn February 15, 2015, MR Tab 2E, pp. 47-53.

40. The ISS who, as described below, was subsequently appointed to review the forensic images taken of Mr. Moyse's devices and email accounts, found the payment receipts and license keys for Mr. Moyse's purchase of the two Systweak products on that day in his personal email inbox.<sup>50</sup>

41. On Sunday, July 20, 2014, the day before Mr. Moyse was scheduled to deliver his computer and other devices to his counsel, he opened both the "RegCleanPro" and ASO software products on his computer. He looked into how each operated. To the best of his recollection, and consistent with the forensic evidence on this motion, Mr. Moyse ran the "RegCleanPro" software to clean up the computer registry after he deleted his Internet browser history.<sup>51</sup>

4. The **Secure Delete** folder on Mr. Moyse's computer

42. The forensic evidence on this motion also shows that on July 20, 2014, at 8:09 p.m., a folder called "Secure Delete" was created on Mr. Moyse's computer.<sup>52</sup>

(a) ***Mr. Moyse's unchallenged evidence: he did not run Secure Delete***

43. Mr. Moyse's evidence is that when he was running the RegCleanPro software, he also investigated the ASO software suite to investigate what products it offered and what the use of those products would entail.<sup>53</sup>

44. Mr. Moyse's evidence, unchallenged on cross-examination, was that he did not:

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<sup>50</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 1D, p. 84, para. 44.

<sup>51</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 14, para. 46;

The RegCleanPro Log for Mr. Moyse's computer reflects that he ran the RegCleanPro performed a scan at 8:11 p.m. on July 20, 2014: Exhibit "E" to the Lo Affidavit, Moyse RMR Tab 2E, p. 151

<sup>52</sup> Lo Affidavit, Moyse RMR Tab 2, pp. 139-140, para. 16.

Amended ISS Report, Moyse RMR Tab 1D, p. 84, para. 45;

<sup>53</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 14, paras. 46-47.



- (a) run the "Secure Delete" product included in the ASO suite; or
- (b) use "Secure Delete" or in any other way delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation.<sup>54</sup>

**(b) *The presence of a Secure Delete folder does not mean it was run***

45. In its factum, Catalyst claims that the ISS's report revealed that on July 20, 2014, the day before the forensic image of his computer was created, Mr. Moyse ran the Secure Delete program (which Catalyst refers to as a "Scrubber").<sup>55</sup> This is a misstatement of the ISS's conclusions. In fact, the ISS's forensic expert (DEI) reached the following conclusion:

DEI **cannot determine** whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly **cannot express any conclusion** on that possibility other than to note that it exists.<sup>56</sup> (emphasis added)

46. Both Mr. Moyse and Catalyst retained forensic experts in connection with this motion, both of whom were asked to provide an opinion concerning the presence of the Secure Delete folder on Mr. Moyse's computer.

47. Both experts ultimately agreed that the presence of a Secure Delete folder on a device does not mean that the Secure Delete program was run on the device to delete any files or folders. Rather, a Secure Delete folder, such as the one found on Mr. Moyse's computer, is created as soon as a user clicks Secure Delete on the ASO menu, but before the product is used for any other purpose.<sup>57</sup> The Secure Delete folder is created even if a user does not delete a file.<sup>58</sup>

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<sup>54</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 14-15, para. 47.

<sup>55</sup> Catalyst Factum, at paras. 8, 23.

<sup>56</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 2D, p. 86, para. 48,

<sup>57</sup> Affidavit of Kevin Lo, affirmed April 2, 2015 ("Lo Affidavit"), Moyse RMR Tab 2, p. 138, para. 13;

48. In its factum, Catalyst cites only the affidavit evidence of its forensic expert, Martin Musters, that a Secure Delete folder "is created when a user runs [Secure Delete] to delete a file or folder."<sup>59</sup> Catalyst does not note that Mr. Musters conceded on cross-examination that this point – the central question he was retained to answer, and the central factual question on this motion – was simply incorrect:

Q: And again, my question for you is one of the critical things that you were investigating and reporting on here was how / under what circumstances does a Secure Delete folder end up on a user's computer?

A: Correct.

Q: That was one of the focuses of your inquiry?

A: That was one of the focuses, yes.

Q: Okay. And in paragraphs 12 and 13, you were reporting on your findings in that regard?

A: Correct.

Q: And the reason this was important is because the ISS had identified that Secure Delete on Mr. Moyse's computer and everybody was wondering what implications could be drawn from that fact?

A: I can't speak to everyone, but, yes, I wanted to understand what implications could be drawn from that fact, yes.

...

Q: Okay. And my question for you, Mr. Musters, is do you stand by, sitting here today, the conclusion in the last line of paragraph 12, namely, that a Secure Delete folder is only created when a user runs the Secure Delete folder from his computer?

A: The answer is no.

...

A: Secure Delete is a subprogram within ASO, and when the Secure Delete program is launched, the Secure Delete program – sorry – the Secure Delete folder is created. Should the user choose at that moment not to run, as in not run files or folders or anything else, the folder – the Secure Delete folder will still exist.

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Cross-Examination of Martin Musters, May 19, 2015 ("Musters Cross"), Second Supp. MR Tab 15, pp. 357-58, Q. 78-83, 93.

<sup>58</sup> Lo Affidavit, Moyse RMR Tab 2, p. 138, para. 13.

<sup>59</sup> Catalyst Factum at para. 29.

Q: Okay.

A: **So the correction that I would like to make for the record is that launching the – that the existence of the Secure Delete folder means that the program was – the Secure Delete program was launched, but it doesn't yet speak to whether or not files or folders were deleted.** (emphasis added)

49. Mr. Musters' concession on this point is crucial. It confirms the opinion of Mr. Moyse's forensic expert, Kevin Lo, that the presence of a "Secure Delete" folder on Mr. Moyse's system is not evidence that he ran the "Secure Delete" program, or used it to delete any files. It is, at its highest, evidence that Mr. Moyse clicked on the program, one of many programs in the ASO suite of products.

50. Having made that concession, Mr. Musters' opinion loses any force it might otherwise have had, as it amounts to an acknowledgment of the complete lack of evidence of any deletion of files or folders by Mr. Moyse.

51. The fact that Catalyst relies in its factum on an allegation that Mr. Musters has withdrawn is shocking.

**(c) *There is no evidence on Mr. Moyse's computer that he ran Secure Delete or deleted relevant documents***

52. The only evidence that Mr. Musters relied on for his conclusion that Mr. Moyse ran the Secure Delete program to delete files was the presence of the Secure Delete folder on Mr. Moyse's computer. As described above, he subsequently conceded that his opinion in this regard was incorrect.

53. Mr. Lo conducted a complete forensic analysis of Mr. Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Mr.

Moyse's computer.<sup>60</sup> Mr. Lo explained that if the program had been run on the computer, a log would have been found which maintains records of the files deleted, but no such log exists on Mr. Moyse's computer (the "Secure Delete Log").<sup>61</sup> Mr. Lo then considered and ruled out a number of ways in which Mr. Moyse could theoretically have deleted the Secure Delete Log.<sup>62</sup>

54. Mr. Musters gave evidence that it was a "relatively simple" matter to "reset" Secure Delete (i.e., to delete the Secure Delete Log), by using a function called a Registry Editor, to hide any trace of having run the program. Catalyst in its factum also repeatedly suggests that it would be "relatively simple" for a user to hide any traces of his use of Secure Delete using the Registry Editor.<sup>63</sup> Mr. Musters based his opinion that this was a relatively simple process on what he described as a simple Internet search of how to delete the remnant files of ASO from a computer's registry.<sup>64</sup> Mr. Musters however did not append to his affidavit the "publicly available information" which he claimed would advise a user on how to simply delete "the remnant files" from a computer's registry. He subsequently described his failure to include that documentation with his affidavit as an "oversight".<sup>65</sup>

55. When pressed on his evidence on cross-examination, Mr. Musters insisted that the "publicly available information" was focused on deletion of the Secure Delete logs:

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<sup>60</sup> Lo Affidavit, Moyse RMR Tab 2, p. 138-140, paras. 14-19.

<sup>61</sup> Lo Affidavit, Moyse RMR Tab 2, p. 140, paras. 17-18.

<sup>62</sup> Lo Affidavit, Moyse RMR Tab 2, p. 142, paras. 25-27.

<sup>63</sup> Catalyst Factum at paras. 30, 37.

<sup>64</sup> Musters Supplementary Affidavit, Supp. MR Tab 2, p. 288, para. 8. Mr. Musters relies on a "publicly available information" for his evidence, though he did not append that information to his affidavit, and only produced it as an answer to undertaking: Letter from Andrew Winton to Matthew Milne-Smith and Robert A. Centa, May 21, 2015 and attachments thereto, Defendants' Supp. MR Tab 17, p. 196.

<sup>65</sup> Musters Cross, Second Supp. MR Tab 15, p. 363, Q. 168.

Q: And I take it, Mr. Musters, that the publicly available information that you are referring to provided advice on removal of the entire program of ASO and not simply of the remnant files?

A: That's not correct. It provided step-by-step instructions on how to – we'll use the word "reset"; it's a good word – to reset the Secure Delete logs.

56. In an answer to an undertaking subsequently delivered by Catalyst's counsel, Mr. Musters was once again compelled to acknowledge another critical error in his evidence:

Mr. Musters wishes to correct an error in his testimony. At question 162, Mr. Musters stated that it was incorrect the information he was referring to provided advice as on the removal of the entire ASO program and not simply the removal of the remnant files. Upon reviewing the publicly available information, Mr. Musters notes that **the information includes advice on the removal of the entire ASO program** and his answer to question 162 was incorrect.<sup>66</sup> (emphasis added)

57. Once again, this concession is crucial, and undermines completely Mr. Musters' opinions concerning Mr. Moyse's conduct. As described above, the ASO program remained on Mr. Moyse's computer at the time the forensic image was taken. Mr. Musters' corrected opinion therefore requires one to believe that Mr. Moyse, having used the ASO software to delete relevant files in flagrant violation of a court order, then:

- (a) obtained information which explained how to remove the ASO software from his computer,
- (b) yet chose not to use that information to remove traces of that software,
- (c) but rather removed only the "remnant files" of the ASO (though Mr. Musters did not provide any publicly available information which would "simply" instruct Mr. Moyse how to do so),
- (d) leaving the ASO software, receipts, and emails in place to be easily found by a forensic investigator.

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<sup>66</sup> Letter from Andrew Winton to Matthew Milne-Smith and Robert A. Centa, May 21, 2015 and attachments thereto, Defendants' Supp. MR Tab 17, p. 196.

58. Mr. Lo's forensic review of Mr. Moyse's computer found no evidence to show that the Secure Delete Log had been deleted through the use of the Registry Editor in the manner suggested by Mr. Musters.<sup>67</sup>

**G. *This litigation since Mr. Moyse turned over his devices***

59. Mr. Moyse turned over his personal devices to his counsel on Monday, July 21, 2014 for imaging, as scheduled.<sup>68</sup> On that day, H & A eDiscovery created two images of Mr. Moyse's devices and email accounts.<sup>69</sup>

60. Pursuant to the Firestone Order, Mr. Moyse swore two affidavits of documents on July 22, 2014, and July 29, 2014, which outlined 833 items which were the documents in his power, possession, or control, that related to his employment with Catalyst.<sup>70</sup>

61. Catalyst's motion for interlocutory relief was heard before Mr. Justice Lederer on October 27, 2014. The court issued its reasons on November 10, 2014. The court ordered, among other things, that an ISS be appointed to review the images of Mr. Moyse's devices created on July 21, 2014 pursuant to a protocol to be jointly agreed to by counsel for the parties.<sup>71</sup> The general purpose of the review, as described by Justice Lederer, was "to identify what, if any, material these images may contain that are confidential to Catalyst".<sup>72</sup>

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<sup>67</sup> Cross-examination of Kevin Lo, May 14, 2015 ("Lo Cross"), Second Supp. MR Tab 12, pp. 274-275, Q. 227-236, pp. 276-277, Q. 249-253.

<sup>68</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 15, para. 49.

<sup>69</sup> Email from J. Hopkins dated July 22, 2014, Exhibit "M" to the Riley Affidavit, Catalyst MR Tab 3M, p. 161.

<sup>70</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR p. 56, para. 28.

<sup>71</sup> Reasons of Justice Lederer, November 10, 2014, Exhibit "P" to the Riley Affidavit, Catalyst MR Tab 3P, p. 215, para. 83.

<sup>72</sup> Reasons of Justice Lederer, November 10, 2014, Exhibit "P" to the Riley Affidavit, Catalyst MR Tab 3P, p. 215, para. 83.

62. Following the ISS's appointment, H & A eDiscovery provided a copy of the image of Mr. Moyse's devices and email accounts to the forensic firm retained by the ISS.<sup>73</sup>

63. The ISS released its initial report following a review of Mr. Moyse's devices and email accounts on February 17, 2015, followed by an amended report on March 13, 2015. The ISS report was consistent with Mr. Moyse's position that he had not transmitted any confidential Catalyst information to West Face, other than the March 27 email described above.

64. The ISS found no evidence of Mr. Moyse transmitting Catalyst confidential information to West Face. The only Catalyst document found to have been transmitted by Mr. Moyse to West Face was a redacted copy of his Catalyst Employment Agreement, which he delivered by email to West Face's General Counsel.<sup>74</sup>

65. The ISS concluded that:

We found no further concrete evidence from our review of the files, their surrounding metadata, or Moyse's email material or mobile devices, that confidential information belonging to Catalyst was provided to West Face. That of course does not exclude the possibility that such information was transmitted to West Face in other ways, or that records of other confidential information could have been destroyed through deletion and overwriting, as noted [below].<sup>75</sup>

66. In addition to its observations with respect to the Catalyst documents found on Mr. Moyse's computer, the ISS noted in its report that it had identified the presence of the Secure Delete folder on Mr. Moyse's computer.

67. That observation gave rise to this motion against Mr. Moyse.

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<sup>73</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 2D, p. 48, para. 8.

<sup>74</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 2D, p. 83, para. 42.

<sup>75</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 2D, p. 89, para. 59.

68. In the meantime, Mr. Moyse remains on leave from West Face and has not worked since the date of the Firestone Order, July 16, 2014.<sup>76</sup>

### **PART III. LAW AND ARGUMENT**

69. There are two issues to be resolved on this motion with respect to Mr. Moyse.<sup>77</sup>

- (a) Has Catalyst proven beyond a reasonable doubt that Mr. Moyse is in contempt of the Firestone Order and the Undertaking?
- (b) In the event this court is satisfied that Catalyst has proven Mr. Moyse is in contempt of court, should it nevertheless exercise its discretion and decline to enter a finding of contempt in these circumstances?

70. Mr. Moyse submits that Catalyst has offered no evidence, let alone proven beyond a reasonable doubt, that he is in contempt of court. Regardless, it would work an injustice to enter a finding of contempt in these circumstances, where Mr. Moyse acted in good faith and sought to comply with this court's orders.

#### **A. *The nature of the court's contempt power***

71. The court's contempt power lies at the heart of its ability to maintain the integrity of its process and the rule of law. Through contempt proceedings, the court may impose potentially serious penalties on those who disobey its orders. Recently, in *Carey v. Laiken*, the Supreme Court of Canada described the significance and centrality of the contempt power to the justice system:

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<sup>76</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 21, para. 64.

<sup>77</sup> In the event that this court finds Mr. Moyse in contempt of the Firestone Order, the issue of penalty should be determined in a separate phase: *Carey v. Laiken*, 2015 SCC 17 ["*Carey v. Laiken*"], **Joint Book of Authorities ("JBA") Tab 6**, at para. 18.



[R]est[s] on the power of the court to uphold its dignity and process . . . . The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.<sup>78</sup>

72. Civil contempt has three elements which must be established beyond a reasonable doubt before a court may make a finding of civil contempt:

- (a) the order that was breached must state clearly and unequivocally what should and should not be done;
- (b) the party alleged to have breached the order must have had actual knowledge of it; and
- (c) the party who disobeys the order must have done so in a deliberately and wilfully.<sup>79</sup>

73. The court applies the heightened beyond a reasonable doubt standard of proof to ensure that an individual is only exposed to the potential penal consequences of a contempt finding, such as those Catalyst seeks in this case, where it is appropriate.<sup>80</sup> The Supreme Court of Canada explained the principles underlying the beyond a reasonable doubt standard as follows:

- the standard of proof beyond a reasonable doubt is inextricably intertwined with that principle fundamental to all criminal trials, the presumption of innocence;
- the burden of proof rests on the prosecution throughout the trial and never shifts to the accused;
- a reasonable doubt is not a doubt based upon sympathy or prejudice;

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<sup>78</sup> *Carey v. Laiken, supra*, **JBA Tab 6**, at para. 30.

<sup>79</sup> *Carey v. Laiken, supra*, **JBA Tab 6**, at paras. 31-35, citing *Prescott-Russell Services for Children and Adults v. G.(N.)* (2006), 82 OR (3d) 686 (C.A.) ("*Prescott-Russell Services for Children and Adults*") **JBA Tab 14**, at para. 27

<sup>80</sup> *Carey v. Laiken, supra*, **JBA Tab 6**, at para. 32.

- rather, it is based upon reason and common sense;
- it is logically connected to the evidence or absence of evidence;
- it does not involve proof to an absolute certainty; it is not proof beyond any doubt nor is it an imaginary or frivolous doubt; and
- more is required than proof that the accused is probably guilty -- a jury which concludes only that the accused is probably guilty must acquit.<sup>81</sup>

74. In determining whether or not Catalyst has satisfied its burden of proof, the court must assess Mr. Moyse's evidence and all other evidence before it in accordance with the principles set out by the Supreme Court in *R. v. W. (D.)*:<sup>82</sup>

- (a) if the court accepts Mr. Moyse's evidence that he did not breach the Firestone Order or the Undertaking, it must conclude that he is not in contempt of court;
- (b) even if the court does not believe Mr. Moyse's evidence, if it leaves the court with a reasonable doubt about his liability for contempt, the court must find that he did not commit contempt of court;
- (c) even if Mr. Moyse's evidence does not raise a reasonable doubt, the court may only find him in contempt if the rest of the evidence proves his culpability beyond a reasonable doubt.<sup>83</sup>

75. Any doubt must be resolved in favour of Mr. Moyse.<sup>84</sup>

76. The contempt power is ultimately discretionary, and should not be routinely used to obtain compliance with court orders.<sup>85</sup> Rather, restraint and caution should be used both in

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<sup>81</sup> *R. v. Lifchus*, [1997] 3 SCR 320, at para. 36 **JBA Tab 15**.

<sup>82</sup> *R. v. W.(D.)*, [1991] 1 SCR 742, **JBA Tab 16** [*W.(D.)*]

<sup>83</sup> *W.(D.)*, *supra*, **JBA Tab 16**, at pp. 757-758;

The *W.(D.)* analysis is routinely applied in civil contempt proceedings: e.g. *Cellupica v. Di Giulio*, 2010 ONSC 5839, **JBA Tab 17**, at paras. 60-61; *Funnell v. Jackscha*, 2012 ONSC 4234, **JBA Tab 18**, at para. 15

<sup>84</sup> *Prescott-Russell Services for Children and Adults*, *supra*, **JBA Tab 14**, at para. 27.

initiating contempt proceedings and in the making of a contempt order: “[i]f contempt is found too easily, “a court’s outrage might be treated as just so much bluster that might ultimately cheapen the role and authority of the very judicial power it seeks to protect””.<sup>86</sup> It is a power which should be used cautiously as a last, rather than first resort.<sup>87</sup>

77. In *Carey v. Laiken*, Justice Cromwell, writing for the Court, described the court’s discretion to decline to make a finding of contempt in circumstances where an alleged contemnor acted in good faith:

[W]here an alleged contemnor acted in good faith in taking reasonable steps to comply with the order, the judge entertaining a contempt motion generally retains some discretion to decline to make a finding of contempt ... I wish to leave open the possibility that a judge may properly exercise his or her discretion to decline to impose a contempt finding where it would work an injustice in the circumstances of the case.<sup>88</sup>

**B. Catalyst has failed to satisfy the high burden of proving contempt**

78. Catalyst has failed to satisfy its burden of proving beyond a reasonable doubt that Mr. Moyse is in contempt of the Firestone Order and the Undertaking.

79. The particulars of Mr. Moyse’s alleged contempt are set out in Catalyst’s Amended Notice of Motion. Catalyst alleges that:

- (a) Mr. Moyse used the Secure Delete program to delete files and/or folders from his personal computer at 8:09 p.m. on Sunday, July 20, 2014;<sup>89</sup> and

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<sup>85</sup> *Hefkey v. Hefkey*, 2013 ONCA 44, **JBA Tab 19**, at para. 3.

<sup>86</sup> *Carey v. Laiken*, *supra*, **JBA Tab 6**, at para. 36, citing *Centre commercial Les Rivières Itée v. Jean Bleu inc.*, 2012 QCCA 1663 (CanLII), **JBA Tab 20**, at para. 7.

<sup>87</sup> *Carey v. Laiken*, *supra*, **JBA Tab 6**, at para. 36;

*St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182, **JBA Tab 21**, at paras. 41-42.

<sup>88</sup> *Carey v. Laiken*, *supra*, **JBA Tab 6**, at para. 37.

<sup>89</sup> Amended Notice of Motion, MR Tab 1, p. 15, para. ss.8.

- (b) by “intentionally deleting data from his computer, contrary to the express terms of the undertaking given to the Court on June 30, 2014 and the terms of the Interim Order, Moyse has acted in contempt of Court.”<sup>90</sup>

80. Catalyst’s motion must fail:

- (a) There has been no breach of the Firestone Order and the Undertaking:
    - (i) Mr. Moyse did not breach any court order in deleting his personal Internet browsing history. The Firestone Order and the Undertaking did not prohibit Mr. Moyse from “deleting data from his computer” (as Catalyst submits), but rather required him to preserve and maintain all records in his possession, power, or control which were relevant to this litigation.
    - (ii) There is no evidence that Mr. Moyse breached the Firestone Order or the Undertaking. Catalyst has pursued this motion entirely on mere speculation that Mr. Moyse ran the Secure Delete program and that he used that program to delete relevant records from his computer. The weight of the evidence does not support Catalyst’s speculation.
  - (b) Mr. Moyse’s conduct should not attract this court’s most serious sanction. Mr. Moyse acted in good faith and took reasonable steps to comply with the Firestone Order and the Undertaking.
1. **The Firestone Order and the Undertaking required Mr. Moyse to preserve relevant information**

81. The premise of Catalyst’s motion for contempt is fundamentally flawed: the Firestone Order did not prohibit Mr. Moyse from, as Catalyst submits, “intentionally deleting data from his computer”. Rather, the Firestone Order by its terms only required Mr. Moyse to preserve relevant information:

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<sup>90</sup> Amended Notice of Motion, MR Tab 1, p. 16, para. ss.10.

4. THIS COURT FURTHER ORDERS that Moyse and West Face, and its employees, directors and officers, shall preserve and maintain all records in their possession, power or control, whether electronic or otherwise, **that relate to Catalyst, and/or relate to their activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in this action**, except as otherwise agreed to by Catalyst.<sup>91</sup> (emphasis added)

82. Catalyst cannot point to a provision of the Firestone Order which prevented Mr. Moyse from "intentionally deleting data" from his computer as it alleges in its Amended Notice of Motion. The Firestone Order did not require Mr. Moyse to deliver his devices "as is". Although it could have, Catalyst did not seek such an order either at the attendance at Motion Scheduling Court, or before Justice Firestone.

83. Moreover, Catalyst's counsel did not object to Mr. Moyse remaining in possession of his devices for the five days between the Firestone Order and the taking of the images of his devices.

84. Catalyst argues in its factum that "[i]t does not now lie in Moyse's mouth to suggest that his counsel participated in the drafting of an ambiguous order."<sup>92</sup> Mr. Moyse takes no such position. To the contrary, the terms of the Firestone Order are clear, and it is Catalyst that seeks to expand the application of the order beyond its explicit terms.

85. Mr. Moyse obeyed this court's orders "in both letter and spirit with every diligence".<sup>93</sup> These orders required him to preserve and maintain all relevant records in his possession, power, or control, which he did. He understood and respected his obligations under the Firestone Order and the Undertaking, and took those obligations seriously.<sup>94</sup> Mr. Moyse

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<sup>91</sup> Firestone Order, Exhibit "I" to the Moyse Affidavit, Moyse RMR Tab 11, p. 109

<sup>92</sup> Catalyst Factum, para. 82.

<sup>93</sup> *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650, **JBA Tab 22**, at para. 21

<sup>94</sup> Moyse Cross, Second Supp MR Tab 13, p. 301, Q. 243

read the Firestone Order closely, and it was clear to Mr. Moyse what was relevant to this action, and what was personal and irrelevant.<sup>95</sup>

86. It was Mr. Moyse's unchallenged evidence that nothing in his personal Internet browsing history was relevant to this litigation. Catalyst implies that Mr. Moyse's browsing history would have been relevant because it "would have included evidence of his efforts to access the web-based storage services at issue in this action." Although it does not elaborate on this point, Catalyst is presumably arguing that Mr. Moyse's access to documents in his Dropbox account would have been relevant to this action. However, the ISS conclusively foreclosed this line of inquiry in its report, where it noted that none of the files in Mr. Moyse's Dropbox folder contained Catalyst confidential information:

32. ... We also reviewed a series of files contained at "Users/BrandonMoyse/Desktop" and at "Users/BrandonMoyse/Dropbox" but identified no items there that contained Catalyst confidential information.

...

52. With respect to the Dropbox account, all but a small number of file records were contained in folders marked "/Education", "/Camera Uploads" and "/Personal". Although we are not able to actually access the files themselves (since they are stored not on the device, but on the cloud-based Dropbox storage facility), it can at least be said that the file names of the documents appear to be consistent with those categorization, and they do not appear to be Catalyst-related. Of the other files contained in the Dropbox, none appear to contain Catalyst information.<sup>96</sup>

87. The ISS's conclusion that the files on the Dropbox storage facility did not contain Catalyst confidential information is consistent with Mr. Moyse's sworn evidence that his Dropbox account was purely personal, and was not used to store any such files.<sup>97</sup> Accordingly, there is no basis for the suggestion that Mr. Moyse's "efforts to access" Dropbox could have any relevance to this proceeding.

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<sup>95</sup> Moyse Cross, Second Supp MR Tab 13, p. 301, Q. 250-252.

<sup>96</sup> Amended ISS Report, Exhibit "D" to the Moyse Affidavit, Moyse RMR Tab 2D, pp. 57, 87, paras. 32, 52,

<sup>97</sup> Moyse Affidavit, Moyse RMR Tab 1, p. 18, para. 58(d).

88. Mr. Moyse's attempt to delete his web browsing information from his personal computer was thus not in breach of the Firestone Order or the Undertaking.

**2. There is no evidence that Mr. Moyse ran the Secure Delete program and/or deleted relevant documents from his computer**

89. As described above, there is no evidence that Mr. Moyse ran the Secure Delete program on his devices and/or deleted relevant documents from his computer. The court must conclude that Mr. Moyse is not in contempt of court if it accepts Mr. Moyse's evidence (which Mr. Moyse submits it should), or his evidence raises a reasonable doubt about his liability (which Mr. Moyse submits it does). Mr. Moyse's evidence, unchallenged on cross-examination, was that he did not run the Secure Delete program and/or delete relevant documents from his computer.

90. Even if Mr. Moyse's evidence does not raise a reasonable doubt, the court may only find him in contempt of court if the rest of the evidence on this motion proves his culpability beyond a reasonable doubt. The rest of the evidence on this motion establishes no such thing, but instead raises significant doubt about Mr. Moyse's culpability.

91. The opinions of the respective forensic experts retained by both parties were consistent with Mr. Moyse's evidence that he did not run the Secure Delete program and/or delete relevant documents from his computer. They agreed that the presence of a Secure Delete folder on Mr. Moyse's system is not evidence that he ran the "Secure Delete" program, or used it to delete any files. Mr. Lo's forensic analysis of Mr. Moyse's computer found no Secure Delete Log, which would have been generated if the program had been used to delete any files or folders on that computer.

92. In light of a complete lack of evidence that Mr. Moyse used the Secure Delete program, and in the face of Mr. Musters' belated acknowledgment that his conclusion in this regard was based on a fatally flawed premise, Catalyst seeks to rely on misstatements and overstatements of the evidence on the one hand, and on circumstantial evidence and speculation on the other, to build a case against Mr. Moyse. This includes increasingly desperate and illogical speculation from Mr. Musters, who adopted the role of advocate rather than impartial expert, and attacks on Mr. Moyse's credibility based on his evidence on Catalyst's motion for an interlocutory injunction.

**(a) Mr. Musters' evidence is biased and should be given no weight**

93. This court should give no weight to Mr. Musters' evidence. His evidence is biased towards Catalyst's position in this litigation. He has not abided by his duty to provide the court with opinion evidence that is fair, objective, and non-partisan.

94. The common law has long recognized that an expert witness has a duty to the court to provide assistance by way of an "objective unbiased opinion".<sup>98</sup> In 2010, Ontario codified this basic common law principle by amending the *Rules of Civil Procedure* to explicitly provide that expert witnesses have a duty to "provide opinion evidence that is fair, objective and non-partisan."<sup>99</sup>

95. The record on this motion is replete with examples of Mr. Musters failing to fulfill his duties to the court as an expert, and acting as an advocate for Catalyst's position that Mr. Moyse ran the Secure Delete program and deleted relevant information. For instance:

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<sup>98</sup> *White Burgess Langille Inman v. Abbott and Haliburton*, 2015 SCC 23, **JBA Tab 23**, at paras. 26-27.

<sup>99</sup> *Moore v. Getahun*, 2015 ONCA 55, **JBA Tab 24**, at paras. 37-40 and 52;

See also *Rules of Civil Procedure*, Ontario Regulation 194, rule 4.1.01(1)(a) and 53.03(2.1)



- (a) After significant attempts to avoid admitting that he was required to correct the record, Mr. Musters conceded on cross-examination that the key element of his conclusion that Mr. Moyse ran the Secure Delete program – i.e., his belief that the mere presence of a Secure Delete folder on Mr. Moyse's computer confirmed that the program had been used to delete files – was incorrect.<sup>100</sup> He had realised this error prior to swearing his second affidavit on this motion, yet failed to correct his evidence on this crucial point until he was pressed to do so in cross-examination.<sup>101</sup>
- (b) Despite having conceded that the key element of his conclusion that Mr. Moyse ran the Secure Delete program was incorrect, Mr. Musters refused to revisit and reassess this conclusion, or his conclusion that Mr. Moyse used that program to delete relevant information.<sup>102</sup>
- (c) An expert's evidence must remain within the proper bounds of his or her expertise,<sup>103</sup> but Mr. Musters' opinion evidence went well beyond the bounds of his expertise as a forensic expert. He purported to give opinions with respect to human behaviour which took him into the realm of giving opinion evidence on the ultimate issue on this motion, and Catalyst expressly relies on that opinion evidence.<sup>104</sup> His opinion in his first affidavit was as follows:

In my experience, in situations involving the departure of an employee to a competitor, when I encounter evidence that someone used a secure delete tool to delete data in such a way as to make it impossible to

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<sup>100</sup> Mr. Musters admitted on cross-examination that his original evidence that the "Secure Delete" folder "is only created when a user runs the Secure Delete feature to delete a file or folder from his computer" was incorrect: Affidavit of Martin Musters, sworn February 15, 2015 ("Musters Affidavit"), Catalyst MR Tab 2, p. 26, para. 12;

Musters Cross, Second Supp. MR Tab 15, p. 357, Q. 78-83, 93.

<sup>101</sup> Mr. Musters swore a supplementary affidavit, dated April 30, 2015 after reviewing the affidavit of Kevin Lo, Mr. Moyse's forensic expert, which concluded that the presence of a Secure Delete folder does not indicate that the program was run to delete files. Mr. Musters' supplementary affidavit did not address or disagree with Mr. Lo's evidence on this point.

On cross-examination, Mr. Musters admitted that though he had reached the same conclusion as Mr. Lo had after reading Mr. Lo's affidavit, affirmed and served on April 2, 2015, he did not advise the Court that his evidence was incorrect in his supplementary affidavit, sworn April 30, 2015: Musters Cross, Second Supp. MR Tab 15, p. 358, Q. 84-87.

<sup>102</sup> See e.g. Musters Cross, Second Supp. MR Tab 15, p. 360, Qs. 125-128.

<sup>103</sup> *R. v. Sekhon*, 2014 SCC 15, **JBA Tab 25**, at paras. 46-47.

<sup>104</sup> Catalyst Factum, para. 31.

review through forensic analysis, the deletion was committed to hide evidence that the person took confidential information from a former employer and communicated it to their new employer.<sup>105</sup>

- (d) Mr. Musters again purported to provide this court with opinion evidence which exceeded the scope of his expertise as a forensic expert in his supplementary affidavit:

... while it is impossible to know for sure, it is my opinion that Moyse most likely did use the Secure Delete program on July 20, 2014 to delete files from his computer so as to prevent those files from being recovered by a forensic analysis of his computer by an independent supervising solicitor.<sup>106</sup>

- (e) On cross-examination, Mr. Musters refused to acknowledge clear contradictions in his evidence. For instance, he gave evidence in his supplementary affidavit that Mr. Moyse's understanding of a registry cleaner made "no sense", while also opining that Mr. Moyse displayed "a level of IT sophistication that exceeds that of the ordinary user". Mr. Musters refused to concede that contradiction on cross-examination.<sup>107</sup>
- (f) Mr. Musters' evidence on cross-examination was evasive, and he failed to consider points which should have caused a fair, objective, and non-partisan expert to revisit and revise his opinion.<sup>108</sup>

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<sup>105</sup> Musters Affidavit, MR Tab 2, p. 26, para. 16.

<sup>106</sup> Musters Supplementary Affidavit, Supp MR Tab 2, p. 296, para. 10.

<sup>107</sup> Mr. Musters described Mr. Moyse's explanation about why he attempted to clean his registry as making "no sense": Musters Supplementary Affidavit, Supp MR Tab 2, p. 287, para. 4. Later in the same affidavit, he concluded that Mr. Moyse's "admitted conduct of investigating how to 'clean' his registry displays a level of IT sophistication that exceeds that of the ordinary user." Musters Supplementary Affidavit, Supp MR Tab 2, p. 296, para. 20(c). Mr. Musters then refused to admit this inconsistency on his cross-examination: Musters Cross, Second Supp. MR Tab 15, p. 366, Qs. 197-201.

<sup>108</sup> See e.g. Musters Cross, Second Supp. MR Tab 15, p. 360-362; Qs. 125-149; p. 360-362, Qs. 194-202.

**(b) *The circumstantial forensic evidence suggests Mr. Moyse did not delete confidential Catalyst information***

96. The weight of the circumstantial evidence supports Mr. Moyse's evidence that he did not use the Secure Delete program, nor did he delete any relevant files or folders prior to surrendering his computer for forensic analysis.

97. Catalyst and Mr. Musters seek to paint Mr. Moyse as someone with a high degree of technical sophistication who used a variety of tools to delete files from his computer and cover his tracks to evade detection. However, on cross-examination, Mr. Musters ultimately reluctantly conceded the obvious point that someone engaged in wrongdoing and looking to cover his tracks would not, prior to turning over his computer for forensic analysis, have:

- (a) left the ASO software on his computer;
- (b) left the Secure Delete folder on his computer; or
- (c) left the emails recording his purchase of the registry cleaner and the ASO software on his computer.

98. It is inconceivable that Mr. Moyse would have gone to the lengths Mr. Musters describes in his affidavit to hide evidence that he had used Secure Delete,<sup>109</sup> while then failing to remove all of this easily discovered evidence of his purchase of the program. Mr. Moyse's conduct is consistent with his sworn evidence that he did not engage in any conduct in violation of the Undertaking or the Firestone Order prior to turning over his computer. It is entirely inconsistent with Catalyst's theory of the case.

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<sup>109</sup> Musters Supplementary Affidavit, Supp. MR Tab 2, p. 288-295, paras. 6-18.

99. Catalyst also seeks to satisfy its high burden of proof through an attack on Mr. Moyse's credibility.<sup>110</sup> It does not identify any examples of Mr. Moyse's evidence on this motion that suggests his evidence should not be believed. Further, Catalyst chose not to cross-examine Mr. Moyse on the central issue on this motion: whether he used the Secure Delete program to delete relevant information.

***C. This court should exercise its discretion and decline to enter a finding of contempt***

100. This is not a case for the use of the contempt power, even if this court is satisfied that Catalyst has met its high burden of proof. Rather, this is a case which cries out for the court to exercise its discretion and decline to impose a contempt finding.

101. Contempt proceedings allow the court to respond to those who act in deliberate disobedience of court orders. It is targeted at those who "ignore, disobey, or defy [a society's] law and its courts' orders at their whim because in their own particular view it is right to do so."<sup>111</sup> Justice Blair (as he then was) described that in the face of such conduct, contempt proceedings prevent our society from "tottering on the precipice of disorder and injustice."<sup>112</sup>

102. Mr. Moyse's actions pose no such risk to the rule of law. Rather, finding Mr. Moyse in contempt of court in these circumstances runs the risk of cheapening and watering down the contempt power. Mr. Moyse acted in good faith and took reasonable steps to comply with the Firestone Order and the Undertaking, as outlined above. He was careful in using his computer, and took steps to ensure that he preserved relevant information. Any breach

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<sup>110</sup> Catalyst Factum, para. 68. Catalyst relies on a laundry list of frivolous examples which it argues detract from Mr. Moyse's credibility. Those examples are based entirely on his previous evidence, and include Mr. Moyse's admission that he admitted he embellished his C.V.

<sup>111</sup> *Surgeoner v. Surgeoner*, 1991 CarswellOnt 465, (Gen. Div.), ["*Surgeoner*"], **JBA Tab 26**, at para. 5.

<sup>112</sup> *Surgeoner*, *supra*, **JBA Tab 26**, at para. 5.


of the Firestone Order, which is not admitted, was entirely inadvertent and has not prejudiced Catalyst's position in this litigation.

103. Catalyst has not exhibited any caution or restraint in initiating this motion. Dissatisfied with the results of the ISS Report, which showed that Mr. Moyse had not transferred any confidential Catalyst information to West Face, it has continued to pursue Mr. Moyse through this motion. It has done so based entirely on speculation, and has persisted in the face of all evidence to the contrary. It would work an injustice to find Mr. Moyse in contempt of court in the circumstances of this case.<sup>113</sup>

#### **PART IV. ORDER SOUGHT**

104. Mr. Moyse asks that Catalyst's motion be dismissed against him, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF JUNE, 2015



Chris Paliare / Robert Centa / Kristian Borg-Olivier

**Paliare Roland Rosenberg Rothstein LLP**  
Lawyers for the Defendant Brandon Moyse

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<sup>113</sup> *Carey v. Laiken, supra, JBA Tab 6*, at para. 37.

**Tab A**

## SCHEDULE "A"

### List of Authorities

1. *Carey v. Laiken*, 2015 SCC 17.
2. *Prescott-Russell Services for Children and Adults v. G.(N.)* (2006), 82 OR (3d) 686 (C.A.)
3. *R. v. Lifchus*, [1997] 3 SCR 320
4. *R. v. W.(D.)*, [1991] 1 SCR 742.
5. *Cellupica v. Di Giulio*, 2010 ONSC 5839.
6. *Funnell v. Jackscha*, 2012 ONSC 4234.
7. *Hefkey v. Hefkey*, 2013 ONCA 44.
8. *Centre commercial Les Rivières ltée v. Jean Bleu inc.*, 2012 QCCA 1663 (CanLII).
9. *St. Elizabeth Home Society v. Hamilton (City)*, 2008 ONCA 182.
10. *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 3650.
11. *White Burgess Langille Inman v. Abbott and Haliburton*, 2015 SCC 23.
12. *Moore v. Getahun*, 2015 ONCA 55.
13. *R. v. Sekhon*, 2014 SCC 15.
14. *Surgeoner v. Surgeoner*, 1991 CarswellOnt 465 (Gen. Div.)

# Tab B



## **SCHEDULE "B"**

### **Applicable Statutes / Regulations**

*Rules of Civil Procedure, RRO 1990, Reg 194*

#### **DUTY OF EXPERT**

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,

(a) to provide opinion evidence that is fair, objective and non-partisan;

(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise; and

(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

...

#### **EXPERT WITNESSES**

##### **Experts' Reports**

53.03 (1) A party who intends to call an expert witness at trial shall, not less than 90 days before the pre-trial conference scheduled under subrule 50.02 (1) or (2), serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2) A party who intends to call an expert witness at trial to respond to the expert witness of another party shall, not less than 60 days before the pre-trial conference, serve on every other party to the action a report, signed by the expert, containing the information listed in subrule (2.1).

(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.

2. The expert's qualifications and employment and educational experiences in his or her area of expertise.

3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
  - i. a description of the factual assumptions on which the opinion is based,
  - ii. a description of any research conducted by the expert that led him or her to form the opinion, and
  - iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

...

## **CONTEMPT ORDER**

### **Motion for Contempt Order**

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

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

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

...

### **Content of Order**

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

- (a) be imprisoned for such period and on such terms as are just;
- (b) be imprisoned if the person fails to comply with a term of the order;
- (c) pay a fine;

(d) do or refrain from doing an act;

(e) pay such costs as are just; and

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

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

THE CATALYST CAPITAL GROUP INC.

Plaintiff

-and- BRANDON MOYSE et al

Defendants

Court File No. CV-14-507120

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**FACTUM OF THE DEFENDANT, BRANDON MOYSE  
(Motion Returnable June 11, 2015)**

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