Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

PLAINTIFF'S FACTUM
(MOTION RETURNABLE JUNE 11, 2015)

June 1, 2015

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PART I - INTRODUCTION

1. The defendant Brandon Moyse ("Moyse") is an investment analyst, formerly employed by the plaintiff ("Catalyst"). Last year, in the midst of Catalyst's efforts to purchase Wind Mobile, Moyse resigned from Catalyst to work for the defendant West Face Capital Inc. ("West Face"), Catalyst's competitor both generally and in the hunt for Wind Mobile. In doing so, Moyse acted in breach of a non-competition clause in his employment agreement with Catalyst.

2. Catalyst tried to negotiate terms by which the defendants would comply with Moyse's contractual obligations to Catalyst. These failed efforts led to this action and to an urgent motion for interim relief (the "Interim Motion"). Through pursuit of that motion, Catalyst learned that Moyse disclosed Catalyst's confidential information to West Face in March 2014.

3. The Interim Motion settled on consent. The parties agreed to an Order (the "Interim Order") which provided, among other things, that the Defendants would preserve and maintain all records in their possession, including electronic devices, which relate to Catalyst, and/or their activities since March 27, 2014, and/or that are relevant to any of the matters raised in the action.

4. In addition, the Interim Order required Moyse to turn over his personal electronic devices, (the "Devices") to his lawyers for the taking of a forensic image of the Devices (the "Images"). Other relief sought by Catalyst, including an order for an independent supervising solicitor ("ISS") to review the Images, was held over to an interlocutory motion heard on October 27, 2014 (the "Interlocutory Motion").

5. Meanwhile, in July 2014, Catalyst entered into an exclusive negotiating period with VimpelCom Group ("VimpelCom"), the parent of Wind Mobile, to negotiate the potential purchase of Wind Mobile. In mid-August, those negotiations ended without a completed

transaction. Shortly thereafter, West Face, as leader of syndicate of investors, successfully completed a deal with VimpelCom to purchase Wind Mobile.

6. For reasons which are explained in detail below, Catalyst believes that West Face used Catalyst's confidential information to successfully purchase Wind Mobile. In October 2014, Catalyst amended its claim to seek a constructive trust over West Face's interest in Wind Mobile.

7. The Interlocutory Motion was decided on November 10, 2014. In his reasons for decision, Justice Lederer concluded that Moyse and West Face did not have "clean hands" and Catalyst had made out a strong *prima facie* case that Moyse had breached his confidentiality obligations to Catalyst. Justice Lederer granted Catalyst an interlocutory order which, among other things, authorized an ISS to review the Images.[1]

8. An ISS was retained in December 2014 and released its report on February 17, 2015 (the "Report"). The Report disclosed that, on the morning of the Interim Motion, Moyse downloaded military-grade deletion software to his personal computer that would allow him to delete data in such a way that it could never be recovered by a forensic review. The Report also revealed that the night before Moyse's computer was imaged, he ran the deletion software.

9. The plot thickens further: in mid-October 2014, shortly after Catalyst amended its claim to challenge West Face's purchase of Wind Mobile, West Face commenced a campaign to sell short shares of Callidus Capital Corporation ("Callidus"), a publicly traded company that is majority-owned by Catalyst. By mid-November 2014, West Face accumulated a significant short position in Callidus. It then spread misinformation about Callidus to the public in order to drive down the stock price. After the shares dropped in value, West Face closed out its short position.

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[1] The reasons of Justice Lederer dated November 10, 2014 are enclosed herein at Schedule "C".

10. West Face admits it initiated its short position in Callidus before it conducted detailed research on the company. This suggestion defies credulity – it would be negligent, bordering on a breach of its fiduciary obligations, for West Face to make such a risky investment without proper research. The more likely explanation is that West Face initiated its position based on material, non-public information it received from Moyse and then "back-filled" its decision with "research".

11. Catalyst brings this motion to hold Moyse in contempt of the Interim Order, to authorize an ISS to review West Face's electronic devices, and to prevent West Face from voting its Wind Mobile shares pending a determination of Catalyst's claim. This relief is necessary to protect Catalyst's interests and to remedy the contempt Moyse has shown for this Court's orders.

PART II - SUMMARY OF FACTS

A. Background to the Present Motion

12. The reasons for decision of Justice Lederer in the Interlocutory Motion accurately record the facts relating to that motion, which are also relevant to this motion.[2] What follows is a summary of Justice Lederer's relevant findings of fact:

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

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

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

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[2] The Reasons are enclosed at Schedule "C" to this factum. The defendants unsuccessfully sought leave to appeal Justice Lederer's decision. The Court's endorsement dismissing the defendants' motion for leave to appeal is enclosed at Tab 1 of the Joint Book of Authorities ("JBA").

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

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

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

(g) Catalyst approached West Face to try to resolve the dispute amicably, but was unwilling to compromise.

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

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

(j) Following Moyse's departure, Catalyst retained an IT expert to analyze an image of the computer Moyse used while employed at Catalyst. That analysis revealed that:

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

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

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

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

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

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

(n) Moyse admitted at his cross-examination that he could not say with absolute certainty that his search of his Devices had been exhaustive, and he admitted that between March and May 2014, he deleted documents.[3]

13. What follows is a summary of additional facts relevant to the current motion.

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

14. In the prior motion, Catalyst tried to find out what Moyse had worked on while he was employed at West Face. At the time, the defendants refused to disclose this information.[4]

15. One of the four memos Moyse emailed to Dea in March 2014, and which Dea circulated to his partners, concerned Arcan Resources Ltd. ("Arcan").

16. In its factum for the Interlocutory Motion, West Face stated that it was not involved in any of the transactions that were the subject of the Catalyst investment memos and has no use for the information contained therein.[5]

17. What West Face and Moyse did not disclose at the time, and which only came to light after the bringing of the current motion, is that in June 2014, in his first week of employment at West Face, Moyse worked on an analysis of Arcan.[6]

18. While West Face and Moyse now claim that Moyse did so on his own initiative, Moyse claimed at his recent cross-examination that his work on Arcan stopped on June 24,[7] but his notebooks recording his work on Arcan while at West Face, which were only produced by West

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[3] Reasons for Decision of Justice Lederer dated November 10, 2014; enclosed at Schedule "C".
[4] Answers to Undertakings from the Cross-Examination of Brandon Moyse held May 11, 2015 ("Moyse UTs"), Q. 173
[5] West Face's Factum, dated August 5, 2014, p. 12, ¶39; Exhibit "1" to the Cross-Examination of Anthony Griffin held May 8, 2015 ("Griffin Cross").
[6] Affidavit of Anthony Griffin, sworn March 7, 2015 ("Griffin Affidavit"), ¶52-57; West Face's Responding Motion Record ("WF RMR"), Tab A, pp. 20-22.
[7] Cross-Examination of Brandon Moyse held May 11, 2015 ("Moyse 2015 Cross"), qq. 184-187.

Face in answer to a recent undertaking, suggest that Moyse was still working on Arcan on June 25, 2015, and continued to do so as late as July 15, 2014.[8]

19. West Face now tries to minimize the significance of this work, noting that it lost money on its investment. The fact remains that at the Interlocutory Motion, West Face and Moyse refused a question from Catalyst which would have disclosed this supposedly "innocent" information to the Court at that motion. It is only now, in the face of a request for an ISS to review its devices, that West Face has admitted that which it refused, and tried to deny, at the last motion.

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

1) The ISS Discovers Moyse Downloaded and Ran Deletion Software

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

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

(b) The defendants agreed to preserve their records, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014 and/or relate to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst;

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

(d) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[9]

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

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[8] Answers to Undertakings from the Griffin Cross ("Griffin UTs"), Answer No. 29 and Exhibit "19".
[9] Order of Justice Firestone dated July 16, 2014; Motion Record ("MR"), Tab 3-G, pp.130-34.
[10] The Order of Justice Lederer, dated November 10, 2014, is at Catalyst's Motion Record, Tab 3-P, pp. 218-21.

22. The parties retained Stockwoods LLP to act as the ISS and negotiated a document review protocol (the "Protocol") pursuant to which the ISS was to review the Images.[11]

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

> 44. Third, we located two email messages sent to Moyse's Hotmail account dated Saturday, July 12 and Wednesday, July 16, 2014, which require comment. These emails constitute payment receipts and license keys for a software product. The software product purchased on July 12, 2014 was "RegClean Pro" and it is indicated to include "Special Disk Cleaning Tools". The product purchased on July 16, 2014 was "Advanced System Optimizer 3 [Special Edition]" which is said to include "Free PhotoStudio" and "Special Disk Cleaning Tools". According to the promotional website for these products (http://www.systweak.com/aso/), Advanced System Optimizer 3 is software which includes a feature named "Secure Delete", that is said to permit a user to delete, and over-write to military-grade security specifications, data so that it cannot be recovered through forensic analysis.
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> 45. Given the nature and timing of the software installed, I requested that DEI [the ISS's forensic IT expert] take steps to determine whether the product was installed and whether it could be determined if the product had been used to over-write data or files prior to the computer being imaged. DEI advised me that, based on the creation date of the associated folders, RegClean and Advanced System Optimizer 3 were installed on July 16, 2014 at 8:50 and 8:53 a.m. respectively. **The executable files for the Secure Delete feature are contained within the Advanced System Optimizer 3 folder. On July 20, 2014 at 8:09 p.m., a folder entitled "Secure Delete" was created, which suggests that a user of Moyse's computer took steps to make the use of that function available at that point in time.**
>
> 46. DEI reported to me that the Secure Delete feature of the software provides several options for over-writing (i.e., "securely deleting") files.

[11] Exhibit "Q" to the affidavit of James Riley, sworn February 18, 2015 ("Riley Feb 2015 Affidavit"); MR, Tab 3-Q, pp. 222-28.

By default, the setting is "Fast secure delete" which causes a single pass overwriting process in which data is over-written with random characters. The second option is to use three passes using random characters and the third option is the so-called "military-grade" option which uses seven passes overwriting with random characters.

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

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

(b) To wipe an entire drive;

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

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

48. I asked DEI to advise me whether there was evidence that the product had been used in any of these ways. DEI reported that the content of the Moyse computer was not consistent with any use of the Secure Delete function to delete all free space and thereby prevent forensic analysis of the drive as a whole, on the assumption that the product indeed writes with random characters as is claimed in the product literature. Further, it is clear that the function was not used to wipe the entire drive, since there were substantial volumes of data produced to us. **DEI cannot determine whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly cannot express any conclusion on that possibility other than to note that it exists.**[12]

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[12] Report of the ISS, pp. 41-43, ¶44-48; MR, Tab 3-T, pp. 280-82 [emphasis added].

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

24. In response to the ISS report, Moyse admits (as he had to in the face of the conclusive evidence) that he downloaded the Scrubber, but he claims that he did not use the Scrubber to delete "relevant" data. Moyse claims that he only deleted data that he unilaterally determined was "irrelevant" and therefore outside the scope of the Interim Order. The "irrelevant" information Moyse admits to deleting includes his Internet browsing history, which he claims would reveal that he accessed pornographic websites.[13]

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

> I was also concerned that the irrelevant information on the images [a reference to Moyse's alleged accessing of pornographic websites] would somehow become part of the public record through this litigation. **At this point it was not clear to me what would happen to the images, which would include the irrelevant personal information.**[14]

26. Moyse claims he did not run the Scrubber, but he has no explanation for why a "Secure Delete" folder was created on his computer the night before he turned it over to be imaged.[15] Moyse claims that he purchased the Advanced System Optimizer software, which includes the Scrubber, the morning of the Interim Motion because his computer was running slowly and he wanted to "optimize" it.[16]

27. At his cross-examination, Moyse claimed he tried to get information from his lawyers about the ISS process, but they were not sure how the process would unfold. Moyse has refused to

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[13] Affidavit of Brandon Moyse, affirmed April 2, 2015 ("Moyse Affidavit"), ¶38-41; Moyse Responding Motion Record ("Moyse RMR"), Tab 1, pp. 12-13.
[14] Moyse Affidavit, ¶40; Moyse RMR, Tab 1, pp. 12-13 [emphasis added].
[15] Moyse Affidavit, ¶47; Moyse RMR, Tab 1, pp. 14-15.
[16] Moyse 2015 Cross, qq. 338-345.

produce the communications he had with his counsel during this time period on the grounds that he did not put his state of mind at issue.[17]

28. It is beyond controversy that by deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014, because the web browsing history would have included evidence of his efforts to access the web-based storage services at issue in this action and his web-searching activity, including, for example, the searches Moyse ran in July 2014 when he was looking for deletion software.

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

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

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

(b) A "Secure Delete" folder is created when a user runs the Scrubber to delete a file or folder; and

(c) Although the Scrubber includes a summary log recording a user's deletion activity, it is possible to reset the log to appear as if the Scrubber was not used.[18]

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

31. Musters, an expert in computer forensic investigations, concluded that the most likely explanation for the evidence on Moyse's computer is that Moyse ran the Scrubber on the night of

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[17] Moyse 2015 Cross and Moyse UTs, q. 367.

[18] Affidavit of Martin Musters, sworn February 15, 2015, ¶12; MR, Tab 2, p. 26. Supplementary Affidavit of Martin Musters, sworn April 30, 2015, ¶10-19; Catalyst's Supplementary Motion Record ("SMR"), Tab 2, pp. 289-295.

July 20, 2014. Musters relied not only on the forensic IT evidence but also on his knowledge of other facts about Moyse and the context of the behaviour:

(a) The conduct occurred the night before the computer was to be imaged;

(b) Moyse had exhibited a pattern of conduct prior to July 20, 2014 that is consistent with taking confidential information from Catalyst; and

(c) Moyse wiped his Catalyst-issued Blackberry device before he returned it to Catalyst, thereby destroying evidence of his phone and data usage.[19]

3) Moyse's Expert's Inadequate Excuses

32. Moyse retained Kevin Lo, an IT expert ("Lo"), to respond to Musters' evidence. Lo reviewed a copy of the Image that was provided to him by Moyse's counsel.[20] In his first affidavit, Lo noted, correctly, that the "Secure Delete" folder is created when a user launches the Scrubber, whether or not the user actually uses it to delete data. Lo also noted that he could not find a registry log for Secure Delete on Moyse's computer. Lo concluded that the Scrubber was not used to delete data from Moyse's computer.[21]

33. Musters' evidence about the ability to reset the Scrubber via the registry logs was delivered in response to Lo's first affidavit. In response to this evidence, Lo affirmed a second affidavit, in which he stated that through a review of the metadata for the registry editor on Moyse's computer, he could conclude that Moyse's never ran the registry editor on his computer. Lo's conclusion was based on the fact that the metadata for the registry editor recorded a "last accessed date" of July 13, 2009, which is the factory default date.[22]

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[19] Supplementary Affidavit of Martin Musters, sworn April 30, 2015, ¶20-21; SMR, Tab 2, pp. 295-96.
[20] Moyse has refused to provide a copy of the Image to Catalyst, so it is impossible for Catalyst to verify the accuracy of Lo's information by replicating his analyses.
[21] Affidavit of Kevin Lo, affirmed April 2, 2015, ¶11-20; Moyse Responding Motion Record (R RMR), Tab 2, pp. 138-140.
[22] Supplementary Affidavit of Kevin Lo, affirmed May 12, 2015, ¶6-9; Moyse Supplementary Motion Record, Tab 1, p. 2.

34. Lo's evidence on this point is misleading, and is based on facts that Lo knows, and later admitted, are incorrect.

35. As every IT expert knows or ought to know, by default, the most recent releases of Windows operating system software do not update the metadata for the registry editor program to record when the program is run by a user.[23] Thus, the fact that the "last accessed date" for the registry editor on Moyse's computer was recorded as July 13, 2009, is not indication as to whether or not Moyse ran the registry editor.

36. At his cross-examination, Lo's explanation for his mistake was paper-thin:

> Q. Now, let's talk about the registry for a second, because, as I understand the evidence from your second affidavit, you were suggesting in this second affidavit sworn May 12th, 2015, that you concluded Mr. Moyse had not used the Registry Editor to delete data from the registry on his computer, correct? That's what you concluded here?
>
> A. We found no evidence, yes.
>
> Q. That's right. So you found no evidence that he had used the Registry Editor?
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> A. That's right.
>
> Q. And to support this conclusion that there was no evidence, you refer to the fact that the metadata for the Registry Editor showed the system default dates, correct?
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> A. Yes.
>
> Q. And after swearing this affidavit, you had an opportunity to review the third affidavit from Mr. Musters?
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> A. That's correct, yes.
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> Q. The affidavit of Mr. Musters sworn yesterday, May 13th, explains how the metadata for the Registry Editor, by default, is not updated in Windows operating systems, correct?
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> A. That's correct, yes.
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> Q. You know that to be the case yourself?

[23] Second Supplementary Affidavit of Martin Musters, sworn May 13, 2015, ¶

> A. Now I do.
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> Q. You didn't know that before you swore your affidavit?
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> A. It did not occur to me at that time.
>
> Q. It did not occur to you at the time?
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> A. That's correct.
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> Q. Was it a fact -- now that it's been brought to your attention, is that a fact that you may have known prior to swearing your affidavit and may have just forgotten?
>
> A. Exactly. I may have known and it's just at that particular point in time it didn't occur to me.[24]

37. Moyse's expert has tried to come up with different excuses for Moyse's conduct, but ultimately he was unable to point to any evidence that would conclusively demonstrate that Moyse did not use the Scrubber on July 20, 2014 to delete data. The very nature of this type of software makes it impossible for anyone to know for certain, because the data it deletes is deleted forever, without a trace, and it is a simple matter of deleting the registry log for the Scrubber to delete the record of its activity.

38. Catalyst submits that, based on Moyse's prior conduct of misleading the Court and his expert's efforts to rely on evidence he knew or ought to have known to be misleading, the only inference that can be drawn from the conclusive evidence that Moyse launched the Scrubber on July 20, 2014 is that he used it to delete relevant data from his computer the night before he was required to hand it over to his lawyers for the making of a forensic image that would possibly be reviewed by an ISS during these proceedings.

C. West Face Purchased Wind Mobile by Resolving the Issue Catalyst Could Not Resolve

39. Moyse first began working on Catalyst's efforts to purchase Wind Mobile in March 2014, when he helped prepare a PowerPoint presentation on the potential purchase that Catalyst showed

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[24] Cross-Examination of Kevin Lo, held May 14, 2015, qq. 210-223.

to Industry Canada. The presentation concerned Catalyst's plans for Wind Mobile and outlined the regulatory concessions Catalyst needed in order to carry out a Wind Mobile transaction.[25]

40. Moyse was an active member of Catalyst's Wind Mobile team up until May 26, 2014. Through his assistance with this presentation, receipt of confidential emails and participation in discussions at Catalyst concerning Wind Mobile, Moyse knew not only that regulatory risk was a major sticking point for Catalyst, but also what types of regulatory concerns Catalyst had.[26]

41. In August 2014, during an exclusive negotiation period with VimpelCom, Catalyst and VimpelCom participated in a conference call with representatives of Industry Canada to inform Industry Canada that Catalyst had a final but unsigned deal to acquire Wind Mobile. The parties had gone so far as to draft a press release announcing the deal.[27]

42. The transaction was conditional on Industry Canada approval and the granting of certain regulatory concessions to a Catalyst-owned Wind. These concessions were essentially the same regulatory concessions summarized in the PowerPoint presentation Moyse helped to create.[28]

43. Shortly after the call with Industry Canada, VimpelCom changed its negotiation strategy and began insisting that Catalyst yield on regulatory risk issues that had previously been agreed to by the parties.[29]

44. Catalyst later learned that West Face, as leader of an investment syndicate, successfully purchased Wind Mobile from VimpelCom by agreeing to waive the regulatory conditions Catalyst

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[25] Affidavit of James Riley, sworn May 1, 2015 ("Riley May 2015 Affidavit'), ¶36-37; SMR, Tab 1, pp. 10-11.
[26] Riley May 2015 Affidavit, ¶37; SMR, Tab 1, p. 10.
[27] Riley May 2015 Affidavit, ¶41; SMR, Tab 1, p. 11. Riley UTs, #9 and Tab 9-A.
[28] Riley May 2015 Affidavit, ¶42; SMR, Tab 1, pp. 11-12.
[29] Riley May 2015 Affidavit, ¶43; SMR, Tab 1, p. 12.

had insisted upon. Notably, West Face made an unsolicited offer to VimpelCom on August 7, 2015, that resolved the only issue outstanding between Catalyst and VimpelCom.[30]

45. The ISS's review of the image of Moyse's computer revealed that there was a significant number of "hits" for several search terms that are unique to the Wind Mobile situation, including Turbine (Catalyst's code name for the transaction was "Project Turbine"), Spectrum, MHZ, Ministry of Industry, and Industry Canada.[31]

46. The most likely explanation for the presence of these hits on Moyse's personal computer is that he had retained Wind Mobile-related documents on his computer after he left Catalyst. The ISS's Report did not find evidence of communication by Moyse to West Face of Wind Mobile-related information, but that absence is easily explained by Moyse's use of the Scrubber and his deletion of his web browsing history.

D. West Face's Secret Campaign to Short Callidus Stock and Denigrate the Company

1) West Face Claims it Shorted Callidus Stock First, Conducted Research Second

47. Callidus is a publicly-traded company in which investment funds managed by Catalyst own a 60% interest. Callidus is an asset-based lender that lends funds to distressed borrowers on a senior-secured basis. The loans are secured against the borrower's assets.

48. At their meeting in March 2014, Dea and Moyse discussed Callidus.[32]

49. On October 9, 2014, Catalyst amended its statement of claim for this action to add a claim relating to West Face's alleged misuse of Catalyst's confidential information to purchase Wind Mobile.[33]

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[30] Griffin Affidavit, ¶77; WF RMR, Tab A, pp. 29-30.
[31] Riley Feb 2015 Affidavit, ¶54; MR, Tab 3, p. 17.
[32] Exhibit 13 to the Griffin Affidavit; WF RMR, Tab A-13, p. 177.

50. One week later, West Face began selling short shares in Callidus, a company that is 60% owned by Catalyst. According to Anthony Griffin, a partner at West Face ("Griffin"), the short position was initiated by West Face's CEO Greg Boland ("Boland") and Peter Fraser ("Fraser"), its Co-Chief Investment Officer, **before** West Face pursued detailed research into Callidus.[34]

51. According to James Riley, a partner at Catalyst, it would be bordering on negligence and possibly a breach of an investment fund's fiduciary obligations to its investors for a fund manager such as West Face to invest other people's money without conducting proper research and analysis beforehand.[35] This is especially apposite when a fund takes a short position, which has potentially infinite liability.

52. West Face has refused to produce its email correspondence relating to Callidus for the period spanning from April 2014 to October 2014, when it began accumulating its short position. West Face claims that production of these emails would not be "proportionate", notwithstanding that it has already produced hundreds of documents for this motion.

53. Catalyst submits that the Court should draw an adverse inference from this refusal to produce additional evidence that is relevant to matters at issue in this motion. The inference to be drawn is two-fold:

(a) West Face possessed material, non-public information about Callidus that it received from Moyse, which it used to justify taking the short position; and

(b) West Face initiated the short position to "hurt" Catalyst.

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[33] Exhibit "C" to the Riley May 2015 Affidavit; SMR, Tab 1-C, pp. 20.
[34] Griffin Affidavit, ¶118; WF RMR, Tab A, p. 48.
[35] Riley May 2015 Affidavit, ¶11; SMR, Tab 1, pp. 3-4.

2) West Face Distributes Faulty Research to Profit from Its Short Position

54. After it accumulated its short position, West Face prepared an "report" on Callidus that sets out a thesis as to why Callidus was overpriced (the "Callidus Report"). West Face attached a March 2015 draft of the Callidus Report to its Responding Motion Record, but its first draft of a Callidus Report was dated November 2014.[36]

55. In December 2014, Callidus learned that West Face had prepared a research report on Callidus that it was circulating to market participants. By letter dated December 15, 2014, Callidus' outside counsel wrote to Bolan to seek a confirmation that the Callidus Report existed and if so, to request a copy. This request was repeated on December 24, 2014.[37]

56. In later correspondence between counsel, West Face's outside counsel refused to confirm that a report existed (notwithstanding that one clearly did by this point), and refused to verify whether West Face had shared its "research" with other market participants.[38]

57. West Face now admits that on December 17, 2014, it met with representatives of "Veritas", an allegedly independent investment research firm, and at this meeting West Face told Veritas about Callidus. The next day, West Face sent Veritas information about Callidus by email.

58. The evidence regarding this meeting and the email is interesting, in that Griffin's and Boland's accounts differ. Griffin states that he, Boland and Fraser attended on behalf of West Face. Griffin claims it was Boland's decision to email Veritas additional information.[39]

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[36] The March 2015 Callidus Report is at Exhibit "46" to the Griffin Affidavit, WF RMR, Vol. 2, Tab A-46. The November 2014 Callidus Report is reproduced as Exhibit in the Griffin UTs, SSMR, Tab x.
[37] Exhibits "W" and "X" to the Riley Feb 2015 Affidavit; MR, Tabs 3-W and 3-X.
[38] See Exhibits "Y" to "EE" to the Riley Feb 2015 Affidavit; MR, Tabs 3-Y to 3-EE.
[39] Griffin Cross-Examination, qq. 586-610.

59. In contrast, Boland denies that information was sent at his direction. He claims that the information was emailed by an analyst at West Face without his knowledge or permission.[40] The problem with Boland's evidence is that there is no evidence that the analyst, Aland Wang, attended the meeting.

60. Moreover, West Face produced an email from Boland to Taso Gerogopolous of Veritas sent in April 2015, which Boland had flagged for follow up.[41] This email strongly suggests that Bolan was more involved in West Face's efforts to share its research with Veritas than he has stated in answer to Griffin's undertakings.

61. With the exception of Veritas, West Face continues to refuse to answer additional questions regarding to whom it sent its report on the basis that this information is "irrelevant". In fact, the information is highly relevant. As explained below, West Face appears to have engaged in a campaign to misinform the market as to the risks associated with Callidus to profit from its short position and to injure Catalyst. Moreover, it did so at a time when the parties were directly engaged in a dispute over Wind Mobile.

West Face's Inaccurate Information about Callidus

62. Catalyst claims that West Face's Callidus Report contains several inaccurate statements about Callidus. The most egregious of these misstatements include a misleading analysis of the "Arthon" loan and false comparisons of Callidus to U.S. business development corporations ("BDCs").

[40] Griffin UTs, #24.
[41] Griffin UTs, Exhibit 18.

63. With respect to Callidus' loan to Arthon, West Face made much of the fact that Callidus had loaned funds to Arthon while it was in CCAA proceedings. West Face made selective disclosure of the events in those proceedings to create the appearance that Callidus' funds were "stuck" without an exit strategy.[42]

64. In fact, as of March 2015, when the Callidus Report was filed in response to this motion, it was public knowledge that Arthon had successfully restructured under the CCAA by transferring assets from insolvent to solvent entities and placing the insolvent entities into bankruptcy. In so doing, with Callidus' assistance, Arthon was able to successfully restructure and position itself to emerge from CCAA protection.[43]

65. West Face ignored this information in its report. Instead, it used the spectre of insolvency proceedings to create the misleading suggestion that Callidus' loan to Arthon was at risk, even though West Face, as an experienced trader in secured debt, understood that an insolvency event alone is not an indication that a secured loan is impaired or even at risk of being impaired.

66. In similarly misleading fashion, West Face compared Callidus to BDCs, even though Callidus is nothing like a BDC. It would be more accurate to compare Callidus' lending activities to a bank.[44]

67. The errors in West Face's Callidus Report, when coupled with the fact that West Face only starting sharing its "research" with third parties after it had finished accumulating its short position in Callidus, strongly suggest that West Face was attempting to manipulate the market to cause Callidus stock price to fall so that West Face could profit from its short position.

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[42] See Exhibit 46 to the Griffin Affidavit, at p. 28; WF RMR, Vol. 2, Tab A-46, p. 769.
[43] Riley May 2015 Affidavit, ¶16-24; SMR, Tab 1, pp. 6-7.
[44] Riley May 2015 Affidavit, ¶25-28; SMR, Tab 1, pp. 7-8.

E. Moyse's Credibility Problems

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

(a) He admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[45]

(b) He admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have led a due diligence process that he merely participated in with more senior employees at Catalyst;[46]

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

(d) Moyse now claims that he did not understand all of the terms of his employment agreement with Catalyst, even though he indicated by signing the contract that he had reviewed, understood and accepted the terms of the offer;[47]

(e) Moyse admits he made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[48]

(f) Moyse admits that by disclosing a confidential memo to West Face, he knowingly caused Catalyst to breach a non-disclosure agreement;[49]

(g) Moyse admits he wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device;[50]

(h) Moyse claims he misrepresented his opinion of his employment at Catalyst in an email to Dea and another partner at West Face;[51]

(i) Moyse admitted that contrary to his affidavit evidence regarding his "limited" role on the Wind Mobile situation, he was in fact part of the Catalyst deal team for the situation and received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement;[52] and

(j) In his first cross-examination, although asked in general terms what matters he worked on at West Face, Moyse omitted reference, even in general terms, to his

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[45] Cross-Examination of Brandon Moyse, held July 31, 2014 ("Moyse 2014 Cross"), p. 15, qq. 57-62.
[46] Moyse 2014 Cross, pp. 17-20, qq. 69-91;
[47] Moyse 2014 Cross, pp. 27-28, qq. 126-130.
[48] Moyse 2014 Cross, pp. 85-86, qq. 394-396.
[49] Moyse 2014 Cross, pp. 96-98, qq. 446-452.
[50] Moyse 2014 Cross, p. 103-106, qq. 473-486.
[51] Moyse 2014 Cross, pp. 126-27, qq. 596-602 and pp. 153-54, q. 729.
[52] Moyse 2014 Cross, pp. 174-74, qq. 803-809.

work on the Arcan investment, which was only disclosed by West Face in response to the current memo.[53]

69. In light of these repeated misstatements, it is submitted that Moyse is not a credible witness in these proceedings.

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

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

(a) Dea and Moyse discussed Callidus at their March 2014 meeting;

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

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

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

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

(f) West Face was able to resolve the one issue (regulatory risk) that Catalyst could not resolve with VimpelCom shortly after Catalyst's negotiations with VimpelCom stalled; and

(g) West Face commenced its short selling of Callidus stock one week after Catalyst amended its claim to add a claim relating to the Wind Mobile transaction.

71. The problem with all of these "coincidences" is that they only turn up when Catalyst pursues the truth through its motions. As with Moyse, Catalyst submits that West Face's witnesses are not credible on any matter in dispute in this motion.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

72. There are three issues on this motion:

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[53] Moyse 2014 Cross, pp. 171-72, qq. 794-96.

(a) Is Moyse in contempt of the Interim Order?

(b) Should the Court authorize an Independent Supervising Solicitor ("ISS") to review forensic images of West Face's electronic devices?

(c) Should an injunction be granted to restrict West Face's power to vote its interest in Wind?

73. Catalyst respectfully submits that Moyse has acted in contempt of court and intentionally breached the Interim Order for the purpose of permanently destroying inculpatory evidence. As a result, the only way to determine with certainty whether Catalyst's confidential information was communicated by Moyse to West Face and misused by West Face is to authorize an ISS to review West Face's devices, many of which have already been forensically imaged.[54]

74. In the circumstances, all aspects of the test for an injunction are met: the evidence shows that there is a serious issue to be tried on the issue of whether West Face misused Catalyst's confidential information to acquire Wind Mobile, Catalyst will suffer irreparable harm if the injunction is not granted, and the balance of convenience favours granting an injunction.

A. Moyse Acted in Contempt of Court by Breaching the Interim Order

1) The Contempt Power

75. The obligation to obey an Order of the Court is at the heart of the civil justice system. In *United Nurses of Alberta v. Alberta Attorney General,* Justice McLachlin, as she then was, held:

> Both civil and criminal contempt of court rest on the power of the court to uphold its dignity and process. The rule of law is at the heart of our society; without it there can be neither peace, nor order nor good government. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect.[55]

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[54] Cross-Examination of Harold Burt-Gerrans held May 19, 2015 ("Burt-Gerrans Cross"), qq. 52-55 and 84-91. Burt-Gerrans testified that he created forensic images of West Face's primary and back-up servers and has copies of all available (undeleted) email traffic sent between March 27, 2014, and January 13, 2015.

[55] [1992] 1 S.C.R. 901 at 931. JBA, Tab 2.

76. Rule 60.11 and 60.12 of the *Rules of Civil Procedure* grant the Court broad, remedial powers to use against a contemnor to uphold the authority of the Court, to vindicate the rule of law and to keep the administration of justice in repute. When a party disrespects the Court's authority by disobeying its Orders, the party in breach can be cited in contempt of Court.

77. The *Rules* provide the Court with broad discretion to remedy non-compliance with its orders. Upon a finding of contempt, the Court may make such order as it seeks fit in accordance with subrule 60.11(5), which includes ordering the payment of such costs as are just, ordering the payment of fines and ordering the imprisonment of a person found to be in contempt.

2) The Test for Contempt

78. To prove a person in contempt of court, the moving party must establish three things:

(a) that the order breached states clearly and unequivocally what should and should not be done;

(b) that the party who has disobeyed the order has done so deliberately and wilfully; and

(c) that the breach of the order constitutes contempt by the responding party.[56]

79. Because contempt proceedings are criminal or quasi-criminal in nature and the freedom the responding individual is at stake, each of the three elements above, including the misconduct alleged against the responding party, must be established beyond a reasonable doubt.[57] However, in order to constitute contempt, it is not necessary to prove that the defendant intended to disobey or flout the order of the Court. The offense consists in the intentional doing of an act which is in

[56] *Royal Bank of Canada v. Yates Holdings Inc.*, 2008 ONCA 474 at ¶3. JBA, Tab 3.
[57] *Hobbs v. Hobbs*, 2008 ONCA 598 at ¶26. JBA, Tab 4.

fact prohibited by the Order. The absence of the contumacious intent is a mitigating factor at the penalty phase of the motion, but it is not an exculpatory circumstance.[58]

3) The Interim Order is Clear and Unequivocal

80. Paragraph 4 of the Interim Order is clear and unequivocal:

> 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 2014, and/or relate to or are relevant to any of the matters raised in this action, except as otherwise agreed to by Catalyst.[59]

81. The order clearly describes three categories of records that must be preserved:

(a) records that relate to Catalyst;

(b) records that relate to the defendants' activities since March 2014; and

(c) records that relate to or are relevant to any of the matters raised in this action.

82. Notably, the terms of the Interim Order were drafted by the parties' counsel as part of a resolution on consent of Catalyst's motion for interim relief. It does not now lie in Moyse's mouth to suggest that his counsel participated in the drafting of an ambiguous order.

4) Moyse's Wilful and Deliberate Acts

83. The "wilful and deliberate" element of contempt is the alleged contemnor's intent to breach the order. Catalyst need not prove that Moyse intended to defy, disobey, flout or disrespect the Interim Order or to put himself in contempt. Rather, as the Supreme Court of Canada recently held in *Carey v. Laiken*, the moving party must only prove that the alleged contemnor intended to do the act which was in breach of the Court's order:

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[58] *Sabourin and Sun Group of Companies v. Laiken*, 2013 ONCA 53 at ¶60 ("*Sabourin*"), aff'd 2015 SCC 17 (sub nom *Carey v. Laiken*). JBA, Tabs 5 and 6.

[59] Order of Justice Firestone dated July 16, 2014; Motion Record ("MR"), Tab 3-G, p.132.

> It is well settled in Canadian common law that all that is required to establish civil contempt is proof beyond a reasonable doubt of an intentional act or omission that is in fact a breach of a clear order of which the alleged contemnor has notice [citations omitted].[60]

84. In this case, Moyse's conduct can only be characterized as demonstrating a deliberate and wilful intention to commit acts which breached the Interim Order. Moyse admits he deleted his web browsing history, which contained relevant evidence and which related to his activities after March 27, 2014. On that basis alone, he is in contempt of the Interim Order.

85. Catalyst submits it has also been proven beyond a reasonable doubt that Moyse ran the Scrubber on his personal computer the night before he brought the computer to his lawyers' office to be forensically imaged, which is a second, independent act of contempt.

86. Moyse's explanations for his conduct are not credible. He claims that he was concerned about the potential public exposure of his pornographic web history, but he claims he did not communicate those concerns to his counsel. Moreover, Moyse has refused to produce his correspondence with his counsel from the five-day period between the making of the Order and the making of the Images:

> Q. You deleted your entire browsing history. Or you attempted to delete your entire browsing history, right?
>
> A. Yes.
>
> Q. And you made the determination on your own, Mr. Moyse, that your browsing history was irrelevant to this proceeding?
>
> A. It was clear to me that my personal Internet browsing history was not relevant.
>
> Q. Well, it may have been clear to you, but you made that determination yourself, right?
>
> A. Yes.
>
> Q. You certainly didn't tell your counsel you were going to do it?

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[60] *Carey*, 2015 SCC 17 at ¶38.

A. I did not.

Q. Right. And you didn't tell us, that's for sure.

A. No.

[...]

Q. All right. Despite the fact that you say you were concerned about it to the point where you actually purchased two pieces of software to deal with it, you never articulated that concern to anybody?

A. I did not.

Q. You didn't even articulate it to your own counsel, right?

A. I did not.

Q. You didn't articulate it to us while we were having discussions with respect to the order, right?

A. I did not.

Q. And you certainly didn't articulate it to the Court?

A. I did not.

[...]

Q. And this order -- well, first of all, at paragraph 40, you say: "I was also concerned that the irrelevant information on the images would somehow become part of the public record through this litigation. At that point, it was not clear to me what would happen to the images." Right?

A. Yes.

Q. Do you see that?

A. Yes.

Q. You're saying that it wasn't clear to you what would happen to the images notwithstanding that you understood that the process that was being proposed was an ISS process?

A. I -- sorry, can you repeat the question.

Q. Yes. You are saying in your affidavit that it was not clear to you what would happen to the images, which would include irrelevant personal information, right?

A. Yes.

Q. Notwithstanding that you knew at the time that what was being proposed was an ISS?

A. I knew the word "ISS". I didn't know what any of that would entail.

Q. And you are saying you never had any conversations with your counsel that would have assisted you in your understanding?

A. I tried to, but they didn't -- weren't able to provide me with any answers.

[...]

Q. So you understood, Mr. Moyse, I take it, that the simple taking of the forensic image didn't mean that Catalyst had access to the forensic image?

A. I wasn't sure how or who would take the image.

Q. Okay. Well, you read Mr. --

A. Sorry.

Q. Go ahead.

A. Somebody had taken the image; I wasn't sure what would happen to it afterwards.

Q. All right. And I think you just told me that you tried to seek information from your counsel relevant to the question of the ISS, right, or the process that would be followed, if you want to put it more broadly?

A. Yes, yes.

Q. And you didn't get that information?

A. They were not sure how the process would unfold.

MR. DiPUCCHIO: Okay. So because I think, in fairness, the affidavit has put your client's state of mind in issue, Counsel, during this period of time, I am going to ask for the communications between Mr. Moyse and his counsel -- looking for a time frame that we can limit this to, but certainly before the date that he actually brought his computer in for the purpose of forensic imaging relevant to this question of the relief that was being sought on the motion.

U/A MR. CENTA: I don't think my client has put his state of mind in issue in a way that he's relying on the legal advice that he received. We will take it under advisement.[61]

MR. DiPUCCHIO: Okay. I will wait for your position on it.

MR. CENTA: Yes.

MR. DiPUCCHIO: My position on it is that obviously he has said in his affidavit that he was concerned about certain things or wasn't aware of certain things, so to the point -- to the extent he says that in his affidavit, I'm saying he put his state of mind in issue.[62]

87. Moyse also claims that it is just a "coincidence" that he downloaded the Scrubber the morning of the Interim Motion and ran it the night before the Images were made:

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[61] This question was subsequently refused.
[62] Moyse 2015 Cross, qq. 299-303, 356-361 and 363-367.

Q. And one of the pieces of software that you purchased, the Advanced System Optimizer, you purchased the very morning that we appeared in court, right?

A. Yes.

Q. And you say that that piece of software you were purchasing because you wanted to improve the performance of your computer?

A. Yes.

Q. And it was entirely coincidental that you purchased that piece of software the very morning we appeared in court where we were discussing a potential order to have your computer forensically imaged. Is that what you're telling the Court?

A. I don't know if you want to call it a coincidence.

Q. What do you mean you don't know whether I want to call it coincidence? Is it a coincidence?

A. In the sense that two separate things happened, yes.

Q. Was it the only reason you purchased that software, to optimize your system?

A. Yes.

Q. And that was just purely coincidental that the day you are appearing in court on this very matter where you were concerned that a forensic image might be taken of your computer that the only thing you were thinking about that morning was that you had to buy software to optimize the performance of your computer?

A. I don't know if that's the only thing I was thinking that morning.

Q. But it was so important to you to optimize the performance of your computer on the morning that you were appearing in court that you had to actually go out and buy software for that purpose?

A. It was easy to buy the software.

Q. Is that -- is that something you do on the morning that you appear in court?

A. I don't know. I don't know. I don't regularly appear in court.

Q. Well, that's my point. I would have taken as a fact that someone who doesn't regularly appear in court would have been more concerned about what was happening in court that day than about purchasing tools to optimize his computer performance.

A. I don't know.

[...]

Q. Okay. And we know through the report of the ISS that you ultimately purchased a registry cleaner?

A. Yes.

Q. And that happened on July 12th?

A. Yes.

Q. And notwithstanding that you had purchased a registry cleaner on July 12th, you didn't go ahead and use it on July 12th, did you?

A. I don't remember. If they are saying I didn't, then I didn't, but I don't remember.

Q. You don't remember?

A. No.

Q. You don't remember having used the registry cleaner prior to appearing in court on the 16th, do you?

A. I don't remember, no.

Q. And after you bought this registry cleaner -- I think we have already covered this, but you certainly didn't inform anybody that you had bought a registry cleaner?

A. No.

Q. Is it possible that you didn't use the registry cleaner on July 12th because you were awaiting the outcome of the motion on the 16th?

A. I don't know.

Q. And then the morning -- and we have covered this as well. But then on the morning of July 16th, you download Advanced System Optimizer?

A. Yes.

Q. And that's the software that, I take it, you understand includes the secure delete function?

A. I understand that now.

Q. Well, you understood it at some point after you bought the Advanced System Optimizer, right? Not just now, you understood it at some point after you bought the software?

A. Yeah, but I don't -- I didn't remember until I was told I had used it -- or clicked on it, rather.

Q. Right. Because you say in your affidavit that you spent some time reviewing the tools that were available under Advanced System Optimizer, right?

A. I don't know how much time. It was probably just clicking on tabs. It was not much time.

> Q. Okay. But do you remember when that happened?
>
> A. I don't.
>
> Q. Do you remember when you would have taken an interest in Advanced System Optimizer? The functionality of it?
>
> A. I do not remember, but I am told it is on July 20th is when I opened the program.
>
> Q. Okay. That, you have been told as a result of the affidavits that have been filed by the experts in this proceeding?
>
> A. Yes.
>
> Q. Okay. But you don't have a recollection of that?
>
> A. Not exactly the time or date, but I -- I know I opened it.
>
> Q. Okay. So was this another coincidence, that you just happened to be noodling around the various functions of Advanced System Optimizer the day before you were scheduled to go to your lawyer's office to turn over your computer?
>
> A. I don't know. It's a coincidence.[63]

88. Moyse has refused to disclose relevant evidence after putting his state of mind at issue and relies on coincidences to rebut the obvious conclusion to be drawn from the evidence: Moyse not only **bought** the Scrubber the morning the morning of the Interim Motion and **launched** the Scrubber the night before the Images were made, he also **used** the Scrubber to delete data from his computer, in breach of the clear terms of the Interim Order.

B. The Need to Review the Forensic Images of West Face's Electronic Devices

89. As explained above, the ISS review of Moyse's devices has been tainted by his use of the Scrubber to delete data from his computer the night before the computer was imaged. As a result of this conduct, the process that was intended to assist in the determination of whether more of Catalyst's confidential information was shared with West Face has been a complete waste of time and money, as we can never know for sure what data was deleted on July 20, 2014.

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[63] Moyse 2015 Cross, qq. 333-341 and 457-472.

90. West Face has already created forensic images of its primary and backup servers.[64] It would not be a significant hardship for it to create images of the electronic devices of the senior executives at West Face for review by an ISS. Those senior executives – Boland, Fraser, Dea, Griffin and Zhu – were all involved in the Wind Mobile transaction and/or the production of the Callidus Report.

91. In light of Moyse's destruction of evidence in breach of the Interim Order, the only way the Court can determine for certain whether Moyse transferred Catalyst's confidential information relating to Wind and/or Callidus to West Face is to analyze forensic images West Face's devices.

92. Moyse, while he was an employee of West Face, permanently tainted the ISS process ordered by Justice Lederer in November 2014. In these circumstances, the evidence of the presence and use of Catalyst's confidential information by West Face only resides on West Face's electronic devices, many of which have already been imaged. The Court should allow Catalyst to access that evidence though the review by the ISS previously retained by the parties, using a document review protocol similar to the one already agreed to by the parties, with one exception: in this case, Catalyst submits that the cost of the ISS process should be borne by Moyse.[65]

93. The parties have already gone through this process once before. But for Moyse's unlawful interference with that process, there would be no need to do so again. It is submitted that should the relief sought in this motion be granted, the ISS will be able to determine if the devices contain Catalyst's confidential information and if so, what use, West Face made of that information, and report his findings to the parties and to the Court as part of the discovery process in this action.

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[64] Burt-Gerrans Cross, qq. 52-55.

[65] This question can be resolved as part of the penalty phase of Moyse's contempt motion, should he be held in contempt of the Interim Order.

94. At this stage of the proceeding, having already established that Moyse breached the Interim Order, the only way to ensure that evidence that will disclose the full extent of the parties' wrongful conduct is available is through an ISS process.[66]

C. An Interlocutory Injunction Should be Granted to Restrict West Face's Voting of Its Wind Shares

95. An injunction may be granted by a judge where it appears just or convenient to do so. Such an order may include such terms as are just.[67] The test for injunctive relief (the "*RJR* Test") asks:

(i) Is there a serious issue to be tried?

(ii) Will the moving party suffer irreparable harm if the injunction is not granted?

(iii) Does the balance of convenience favour granting the injunction?[68]

96. In the circumstances, all aspects of the *RJR* Test are met.

1) There is a Serious Issue to be Tried

97. The first part of the *RJR* Test requires the moving party to establish that the underlying action is neither vexatious nor frivolous.[69] As explained by Justice Sharpe in *Omega Digital v. Airos Technology*:

> It is not possible on an interlocutory motion with conflicting affidavit evidence to determine finally whether or not the plaintiff is entitled to succeed at trial and whether or not the defendants are, in fact, guilty of copying or misappropriating confidential information acquired from the plaintiff. The test, as these cases hold, is whether there is a serious question to be tried. The Supreme Court in *RJR MacDonald* made it clear that, as Justices Sopinka and Cory put it: "The threshold is a low one. The judge on the application must make a preliminary

[66] See *GDL Solutions Inc. v. Walker*, 2012 ONSC 4378 at ¶89-93, where in similar circumstances a motion for a forensic image was granted. JBA, Tab 7.
[67] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101; *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 40.01.
[68] *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at ¶49 ("*RJR*"). JBA, Tab 8.
[69] *RJR* at ¶50.

> assessment of the merits.... A prolonged examination of the merits is generally neither necessary nor desirable".[70]

98. Justice Sharpe described the necessity of this low threshold in light of the evidentiary challenges facing moving parties in cases involving confidential business information, on reasoning applicable to any scenario in which the actions of the defendants are only directly known by them:

> ...misuse [of confidential information] can rarely be proved by convincing direct evidence. **In most cases employers must construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convince it that it is more probable than not that what employers alleged happened, did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced the testimony of employees and their witnesses who directly deny everything.**[71]

99. There is more than a serious issue to be tried that Moyse misappropriated Catalyst's confidential information, in breach of contractual and common law duties he owes Catalyst. In this case, the evidence overwhelming demonstrates that Moyse transferred Catalyst's confidential information to West Face and that West Face circulated that information within the firm.

100. Moreover, despite his attempts to downplay his involvement in the Wind Mobile situation while at Catalyst, Moyse had access to Catalyst's sensitive and confidential information regarding Wind Mobile, including information concerning regulatory risks and communications with Industry Canada about Catalyst's regulatory concerns. This is the one issue that remained unresolved between VimpelCom and Catalyst, but which West Face managed to resolve.

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[70] *Omega Digital Data Inc. v. Airos Technology Inc.*, [1996] O.J. No. 5382 at ¶10 (Gen. Div.) ("*Omega Digital*"). JBA Tab 9.
[71] *Omega Digital* at ¶20 [emphasis added].

101. In the circumstances, including the fact that Moyse attempted to diminish the significance of his role on the Wind Mobile file while at Catalyst, Moyse's general lack of credibility on all issues concerning Catalyst's confidential information, and that fact that West Face now admits it invested in a company named in one of the four investment memos, the facts establish a serious issue to be tried as to whether Moyse communicated confidential information about Catalyst's plans to acquire Wind Mobile and whether West Face acted on that confidential information.

102. Moyse admitted he is unable to identify Catalyst's confidential information, which means he is incapable of determining in advance what information from his employment at Catalyst he is forbidden from discussing with his new West Face colleagues. His confusion appears to arise from his inability to distinguish the confidentiality of the data obtained by Catalyst and the use Catalyst made of this data. But the law is less confused. As Justice Sharpe held in *Omega Digital*:

> Even when all of the information becomes public, if an ex-employee is able, by information provided by or developed for the previous employer, to gain an advantage that the ex-employee would not have had if he or she had to check only public sources such ex-employee would still be liable for breach of confidence despite public disclosure. This reflects an obligation to pay for the advantage gained from the "convenient" confidential source, or the head start that the disclosure had given such employee over other members of the public.
>
> **What is really being protected in situations of this nature is the original process of mind.** The protection is enforced against persons who wish to use the confidential information without spending time, trouble and expense of going through the same process. One can reconcile the springboard principle with the overriding principle denying confidence and information in the public domain, by describing the "springboard" as a measure of the scope and duration of the obligation enforcing good faith upon an ex-employee while the rest of the world catches up.[72]

103. West Face and Catalyst were competing to successfully purchase Wind Mobile. While he was at Catalyst, Moyse had access to Catalyst's confidential information concerning Wind

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[72] *Omega Digital*, *supra*, at ¶22 [emphasis added].

Mobile, including, among other things, its efforts to address regulatory risk issues, which all of the parties understood to be a key issue in the transaction.

104. Departing employees are constrained by common law from misappropriating a former employer's confidential information or using it to compete with the former employer or at all.[73] In addition to this common law duty, Moyse contractually agreed not to disclose or misuse the confidential information of Catalyst.[74]

105. Catalyst has already proven once before that Moyse took Catalyst's confidential information with him after resigning from Catalyst and that he transferred Catalyst's confidential information to West Face.

106. In addition to that conduct, which Moyse initially denied, Catalyst learned through the ISS process (which Moyse vehemently opposed) that Moyse ran military-grade deletion software the night before his computer was imaged.

107. Moreover, in the course of pursuing this motion, Catalyst has learned that in June 2014, West Face invested in Arcan, one of the four companies analyzed in the Catalyst memos Dea circulated to his partners. Notably, this conduct was not disclosed to Catalyst or to the Court in July 2014 through the affidavits of Dea or West Face's former in-house counsel, or at those witnesses' cross-examinations.

108. In these circumstances, prohibiting West Face from voting its shares in Wind Mobile will protect Catalyst's interests. At the same time, as argued below, neither Moyse nor West Face will

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[73] *GasTOPS Ltd. v. Forsyth,* 2012 ONCA 134 at ¶56-58 ("*GasTOPS*"). JBA, Tab 10.
[74] Employment Agreement, p. 6; Moyse RMR, Tab 1-E, pp. 96-97.

suffer any irreparable harm if this relief is granted while the parties proceed expeditiously to a trial of the issue.

C. Catalyst Will Suffer Irreparable Harm

2) Catalyst Will Suffer Irreparable Harm in any Event

109. In any event, Catalyst will suffer irreparable harm if the injunction is not granted.

110. Irreparable harm is harm that either cannot be quantified in monetary terms or that cannot be cured. The Court must consider the nature of the harm, rather than its magnitude.[75] Unfair competition often leads to irreparable harm:

> Cases of unfair competition have often been recognized as ones in which damages may not adequately compensate the plaintiff for the loss suffered due to the defendant's conduct. Not only is it difficult to quantify the loss of goodwill or market share suffered by the plaintiff due to the defendant's actions, but the damage to relationships with customers is inherently difficult to assess. In a competitive industry, where there can be considerable fluidity of customer allegiances, it may be difficult for the moving party to establish an accurate measure of damages.[76]

111. Potential loss of goodwill has long been recognized as constituting irreparable harm. In such circumstances, it is difficult, if not impossible, to know or prove the impact of the conduct of the employee.[77]

112. Misappropriation and use of confidential information gives rise to irreparable harm.[78]

113. It will not be possible to calculate the harm caused by the defendants' potential misuse of Catalyst's confidential information to purchase Wind Mobile. Dea admits that once a special

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[75] *RJR*, at ¶59.
[76] *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703 at ¶25 (S.C.J.). JBA, Tab 11.
[77] *Gunning and Associates Marketing, Inc. v. Kesler*, [2005] O.J. No. 1059 at ¶30-34 (S.C.J.); *GDL* at ¶70-72. JBA, Tab 12.
[78] *Messa Computing Inc. v. Phips*, [1997] O.J. No. 4255 at ¶32-33 (Gen. Div.). JBA, Tab 13.

situation is compromised, it is impossible to determine the extent of the loss suffered and mere damages cannot compensate for a loss that will carry on indefinitely into the future.[79]

114. Moreover, Wind Mobile is currently seeking to raise additional capital. That capital may come from, among others, West Face and/or will be raised with the assistance of West Face.[80] There is a risk of irreparable harm to Catalyst if West Face provides capital or causes Wind Mobile to raise capital on terms to which Catalyst, in West Face's shoes, would not agree.

115. It is impossible to accurately quantify how the defendants' misuse of Catalyst's confidential information will damage Catalyst in the long term.

D. The Balance of Convenience Favours Granting Interlocutory Relief

116. Assessing the balance of convenience requires evaluating whether the harm prevented in granting an injunction to a moving party will outweigh the potential harm that the party facing the injunction may suffer.[81]

117. Here, the balance of convenience favours Catalyst as it is likely to suffer significant and ongoing harm if West Face is not restrained from voting its interest in Wind Mobile. If an interlocutory injunction is not granted but Catalyst successfully proves at trial that West Face misused Catalyst's confidential information, the Court will be able to reverse the consequences of that misuse of confidential information that occurred during the interlocutory relief period.

118. By contrast, an interlocutory injunction will not cause West Face or Wind Mobile any material harm.

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[79] Dea Cross, pp. 48-54, qq. 196-218.
[80] Cross-Examination of Asser El-Shanawany, held May 12, 2015, qq. 200-202.
[81] *Gunning* at ¶35 and 40.

119. West Face provided no evidence that it will suffer irreparable harm if the interlocutory relief sought is granted. It only suggests that such harm will occur, without explaining how that harm will manifest itself.

120. West Face fills two of Wind Mobile's ten positions on the board of directors, which includes three eminently qualified outside directors who have extensive experience in the financial and mobile telecommunications industries. West Face's long-term interests in Wind Mobile can be adequately protected by these other directors, who bear statutory obligations to act in the best interests of Wind Mobile, which include the interests of West Face.[82]

121. In these circumstances, West Face will face no harm if the interlocutory relief sought is granted. The balance of convenience favours Catalyst, who will suffer irreparable harm if the relief sought is not granted.

PART IV - ORDER REQUESTED

122. Catalyst requests:

(a) An Order declaring that Moyse is in contempt of the Interim Order dated July 16, 2014;

(b) An order that forensic images of West Face's servers and of the electronic devices belonging to Greg Boland, Peter Fraser, Thomas Dea, Anthony Griffin, and [VP] be created and reviewed by an independent supervising solicitor (the "ISS") identified by and pursuant to a protocol to be jointly agreed to by counsel for the parties or, failing such agreement, by way of further direction from the Court;

(c) An Order that the creation of the forensic images and the ISS review referred to above be performed at the Defendants' expense;

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[82] Cross-Examination of Asser El-Shanawany, held May 12, 2015, qq. 135-65 and 206-216 and Exhibit "1".

(d) An order that the review of the Forensic Images by the ISS shall be completed before any examinations for discovery conducted in this action; and

(e) An order that West Face is prohibited from voting its interest in Wind Mobile pending a determination of the issues raised in this action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 1st day of June, 2015.

Rocco DiPucchio

Andrew Winton

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Lawyers for the Plaintiff

TAB A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Catalyst v. Moyse et al.*, 2015 ONSC 2384.

2. *United Nurses of Alberta v. Alberta Attorney General*, [1992] 1 SCR 901

3. *Hobbs v. Hobbs*, 2008 ONCA 598.

4. *Royal Bank of Canada v. Yates Holdings Inc.*, 2008 ONCA 474.

5. *Sabourin and Sun Group of Companies v. Laiken*, 2013 ONCA 53.

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

7. *GDL Solutions Inc. v. Walker*, 2012 ONSC 4378.

8. *R.J.R. Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

9. *Omega Digital Data Inc. v. Airos Technology Inc.*, [1996] O.J. No. 5382 (Gen. Div.).

10. *GasTOPS Ltd. v. Forsyth*, [2009] O.J. No. 3969 (S.C.J.), aff'd 2012 ONCA 134.

11. *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703 (S.C.J.).

12. *Gunning and Associates Marketing, Inc. v. Kesler*, [2005] O.J. No. 1059 (S.C.J.).

13. *Messa Computing Inc. v. Phips*, [1997] O.J. No. 4255 (Gen. Div.).

TAB B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY - LAWS

1. *Courts of Justice Act*, R.S.O. 1990, c. C.43, ss. 101, 104

Injunctions and receivers

101.(1)In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2)An order under subsection (1) may include such terms as are considered just.

[...]

Interim order for recovery of personal property

104.(1)In an action in which the recovery of possession of personal property is claimed and it is alleged that the property,

(a) was unlawfully taken from the possession of the plaintiff; or

(b) is unlawfully detained by the defendant,

the court, on motion, may make an interim order for recovery of possession of the property.

2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 40

RULE 40 INTERLOCUTORY INJUNCTION OR MANDATORY ORDER

HOW OBTAINED

40.01 An interlocutory injunction or mandatory order under section 101 or 102 of the *Courts of Justice Act* may be obtained on motion to a judge by a party to a pending or intended proceeding.

[...]

TAB C

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2014 ONSC 6442
COURT FILE NO.: CV-14-507120
DATE: 20141110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
THE CATALYST CAPITAL GROUP INC. Plaintiff	*Rocco DiPucchio & Andrew Winton*, for the Plaintiff
– and –	
BRANDON MOYSE and WEST FACE CAPITAL INC. Defendants	*Jeff C. Hopkins & Justin Tetreault*, for the Defendant, Brandon Moyse *Jeff Mitchell & Matthew J.G. Curtis*, for the Defendant, West Face Capital Inc.
	HEARD: October 27, 2014

LEDERER J.:

INTRODUCTION

[1] This is a motion for an interlocutory injunction. The defendant, Brandon Moyse, has changed jobs. His former employer seeks to enjoin him from breaching a confidentiality clause that was part of his employment contract and compelling him to comply with a clause that, for a time, would prevent him from working for a competitor.

[2] An injunction is an equitable remedy. It has long been said that: "He who seeks equity must do equity" or "He who comes into equity must come to court with clean hands". This is not just true of those who ask for an injunction, but also to those who oppose it.

BACKGROUND

[3] Brandon Moyse was employed by the plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), as an analyst. On March 14, 2014, Brandon Moyse sent an e-mail to Thomas Dea, a partner at the defendant, West Face Capital Inc. ("West Face"), expressing interest in "working with West Face".[1] At the time, West Face was recruiting analysts. They met on March 26, 2014. On May 19, 2014, West Face offered Brandon Moyse a job. On May 24, 2014, while on vacation, Brandon Moyse gave notice of his resignation to Catalyst, effective June 22, 2014.[2] The e-mail sent by Brandon Moyse made no reference to his plans or to having accepted employment with West Face. This information came to light within the following few days. By letter, dated May 30, 2014, counsel for Catalyst wrote to West Face and counsel for Brandon Moyse concerned about the implications of the departure of Brandon Moyse and his accepting employment with West Face, a competitor in a narrow field of investing. In particular, the letter states that the valuation methodologies used by Brandon Moyse, at Catalyst, were proprietary and that the information he received and generated was "highly sensitive and confidential". It relates Catalyst's concern that Brandon Moyse "has imparted or will be imparting Confidential Information to West Face that he acquired in the course of his employment with [Catalyst]." The letter refers to provisions in the Catalyst's Employment Agreement with Brandon Moyse dealing with confidentiality, "Non-Solicitation" and "Non-Competition".[3]

[4] Answers were not long in coming. On June 3, 2014, counsel for West Face responded, followed two days later by counsel for Brandon Moyse. The former took the position that the non-competition and non-solicitation clauses were both unenforceable. The latter agreed. Counsel for West Face said little about the concern for confidentiality indicating only that West Face "had impressed upon Mr. Moyse that he is not to share or divulge any confidential information that he obtained during his employment with [Catalyst]".[4] Counsel for Brandon Moyse said more. He denied that Brandon Moyse had used "proprietary valuation methodologies" and said that Brandon Moyse did not understand what investment strategies were being referred to "in the context or proprietary information". Counsel assured the representatives of Catalyst that Brandon Moyse had no intention of revealing "any information which could reasonably be considered confidential or proprietary in nature". Counsel offered that Brandon Moyse would "abide by the confidentiality provisions contained in the [Catalyst] Employment Agreement".[5]

[5] A single reply was delivered by counsel for Catalyst. This letter, dated June 13, 2014, pointed out that the rejection of Catalyst's reliance on the non-competition and non- solicitation clauses failed to account for the fact that West Face was a direct competitor of Catalyst "...in a highly specialized field in which very sensitive and proprietary information is shared every day

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[1] *Affidavit of Thomas Dea,* sworn July 7, 2014, at para. 20.
[2] *Affidavit of James Riley,* sworn June 26, 2014, at Exhibit H.
[3] *Ibid,* at Exhibit I.
[4] *Ibid,* at Exhibit J.
[5] *Ibid,* at Exhibit K.

with trusted analysts such as Mr. Moyse". The response recognized the assurances provided in respect of confidential information, but concludes that they "do not go far enough."[6]

[6] These letters demonstrate two things of importance. The first is that West Face and Brandon Moyse, while they did not and do not dispute the enforceability of the confidentiality clause, were unprepared to recognize any substance to the concerns for confidentiality raised by Catalyst. The second is how quickly this turned litigious. In his first letter, counsel for Catalyst, having repeated the concern of his client that confidential information had been or would be given to West Face, said that the business interests of Catalyst "have been and will continue to be irreparably harmed" and referred to the "Remedies" provision in the agreement. The letter went on to say that Catalyst would consider any proposal that would answer "the current situation".[7] In his response, the lawyer acting for West Face complained that "no evidence to support your allegation that your client has suffered irreparable harm"[8] had been provided. This letter was written on June 3, 2014, which is to say, three weeks before Brandon was to start working at West Face (June 23, 2014) and only ten days after he had given his notice to Catalyst. It is difficult to see how such proof could be prepared so early and so quickly without any understanding of what Brandon Moyse had in his possession and could have or had delivered to West Face. West Face and Brandon Moyse simply gave their assurances; thereby denying there was any reason for concern. Their letters propose that either Catalyst accept their assurance or go to court. They volunteered nothing.

[7] Was Catalyst right? Was there any reason for concern?

MARCH 27, 2014 E-MAIL AND THE INVESTMENT MEMOS

[8] Thomas Dea deposed that, at the meeting on March 26, 2014, he requested that Brandon Moyse provide a copy of his resumé "so that I could circulate it to others at West Face".[9] What Thomas Dea did not say was that, at the meeting, he also requested that Brandon Moyse deliver samples of his research and writing.[10] Rather, further on in the affidavit, Thomas Dea indicated that "[s]ince the commencement if this litigation...West Face has conducted a diligent search of its emails to determine whether there was any information of Catalyst disclosed by Brandon". He says that, as a result of the search, West Face found an e-mail, dated March 27, 2014, which delivered examples of the written work of Brandon Moyse.[11]

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[6] *Ibid*, at Exhibit L.
[7] *Ibid*, at Exhibit I.
[8] *Ibid*, at Exhibit J.
[9] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 21.
[10] *Cross-examination of Thomas Dea*, July 31, 2014, at qq. 289-292, *Cross-examination of Brandon Moyse*, July 31, 2014, at q. 624. In making this request, Thomas Dea cautioned Brandon Moyes that that these writing samples should not contain confidential material.
[11] *Affidavit of Thomas Dea*, sworn July 7, 2014, at para. 42.

[9] Brandon Moyse deposed an affidavit he said was in response to two affidavits made in support of the application for an injunction.[12] The first of these was an affidavit of James Riley, the Chief Operating Officer of Catalyst; and the second, an affidavit of Martin Musters, a consultant retained by counsel for Catalyst to undertake a forensic examination of a computer that had been used by Brandon Moyse during his employment with Catalyst. Neither of these affidavits refers to the e-mail of March 27, 2014 and attached memos. Presumably for that reason, there is no mention of them in the affidavit of Brandon Moyse. It was not referred to and so it was not part of the response.

[10] What Brandon Moyse did say is that he was aware of "three potential investments" being considered by Catalyst. He reviewed his involvement with each and described Catalyst's interest and the information he had, and used, variously as "widely known", available "to any potential purchaser", "publically available" and containing "no confidential information".[13] He cited the paragraphs of the affidavit of James Riley this responds to and summarized them, as follows:

> Contrary to the allegations at paragraphs 8 and 67 of Mr. Riley's Affidavit, there was nothing confidential and proprietary in the methodology that I used to value certain investment opportunities while I worked at Catalyst. Rather, I used commonly used and well-known valuation methods.[14]

[11] In paragraph 8 of his initial affidavit, the first of the two paragraphs to which Brandon Moyse was responding, James Riley explained the harm that can arise if "... a competitor learns of the opportunities Catalyst is considering or studying, the investment models it is using for a particular situation, the methodology Catalyst is considering for acquiring control or influence, or the turnaround plan Catalyst is considering once it acquires control."[15] In paragraph 67, the second of the two paragraphs referred to, James Riley outlined the specific harm to Catalyst if Brandon Moyse is not compelled to comply with the non-compete clause and to return all confidential information to Catalyst.[16]

[12] James Riley swore a second and subsequent affidavit. It refers to the affidavit of Brandon Moyse and indicates that it was only upon its receipt that Catalyst learned that Brandon Moyse had sent "....Catalyst's confidential information to West Face as part of his efforts to secure employment there".[17] James Riley deposed that, prior to receiving the affidavit of Brandon Moyes, West Face did not inform Catalyst that it had received the memos attached to the e-mail

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[12] *Affidavit of Brandon Moyes,* sworn July 7, 2014, at para. 2.
[13] *Ibid,* at paras. 9-13.
[14] *Ibid,* at para. 15.
[15] *Affidavit of James Riley,* sworn June 26, 2014, at para. 8.
[16] *Ibid,* at para. 67.
[17] *Affidavit of James Riley,* sworn July 14, 2014, at para. 12.

of March 27, 2014.[18] He contested the assertions of Brandon Moyse that the information delivered was not confidential and publicly available:

> Moyse's analysis of active and potential investments contain highly confidential information belonging to Catalyst which Moyse should not have shared with a competitor such as West Face under any circumstances.[19]

[13] What is clear from this review is that, despite their assurances that there was no reason for concern, West Face and Brandon Moyse were both aware that memos, regarded by West Face as confidential, had been sent by Brandon Moyse to Thomas Dea with the e-mail of March 27, 2014. The memos, as delivered, each say on the first page, "Confidential" and "For Internal Discussion Purposes Only".[20] There can have been little doubt that West Face would have and did understand the perspective of those at Catalyst. Having received the memos, Thomas Dea circulated them to the other partners and a Vice-President at West Face.[21] He did this understanding that the information was confidential and of the concern associated with its disclosure. When he was cross-examined, Thomas Dea was asked and answered:

> Q. Did any of the partners, or did Mr. Zhu express any concern about the fact that Mr. Moyse had sent West Face Catalyst's confidential information?
>
> A. Yes. Prior to us extending the offer I discussed with one of the partners, with Tony, we were generally favourably disposed to his capabilities, but one concern we had was that he had conveyed confidential information to us, and I agreed with that, and so I asked our General Counsel to have a discussion with him specifically about that, to convey to him the seriousness with which we view the protection of confidential information, to make sure that -- and to explain that we'd have the highest expectation that he would uphold that if he were to come and work for us.[22]

[14] For his part, when cross-examined, Brandon Moyse professed not to understand what makes a memo confidential:

> Q. So what makes a memo confidential?
>
> A. I'm not sure really.[23]

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[18] *Ibid*, at para.13.
[19] *Ibid*, at para. 12.
[20] *Affidavit of Thomas Dea*, sworn July 7, 2014, at Exhibit L (The e-mail of Mach 27, 2014 and the enclosed "writing samples".
[21] *Cross-examination of Thomas Dea*, July 31, 2014, at q. 313.
[22] *Ibid*, at q. 335.
[23] *Cross-examination of Brandon Moyse*, July 31, 2014, at q. 429.

And, later, in the same cross-examination, after some discussion about the substance of confidentiality:

> Q. Right. Right? It's the level of analysis, that's the work product that's being performed for your employer; you surely understand that.
>
> A. Yes.
>
> Q. And that's what makes it confidential.
>
> A. I don't know.
>
> Q. Do you disagree with that?
>
> A. I don't know what makes it confidential.[24]

[15] I note that, during the course of his submissions, counsel for Brandon Moyes acknowledged that it was an error to deliver these memos to West Face. He referred to this as a "rookie mistake". I assume this refers to the idea that Brandon Moyes was young and inexperienced. He may be. Often, the term "rookie mistake" is used in the context of professional athletics. In hockey or football, or any other sport, a "rookie" (a first-year player) who makes a mistake, and in so doing breaks the rules, is penalized in the same way as a more experienced participant. The fact that Brandon Moyes is young, and may be inexperienced, does not serve to decrease any responsibility or liability for the harm that may attach to his actions.[25]

[16] What appears to have happened is that, rather than be forthcoming and allow Catalyst to understand what had happened and to consider what, if any, impact there was to its business, West Face and Brandon Moyse determined to take the position that there was no impact. They sought to have Catalyst rely on their assurances that this was so. Once it became known that information that was considered by Catalyst to be confidential had been delivered, West Face and Brandon Moyse chose to argue that the information really should not be considered as being confidential or proprietary. On his cross-examination, Brandon Moyes was asked and said:

> Q. Okay. And in terms of the actual confidential information, you say it didn't include any confidential information, you don't mean to suggest again that the analysis that you're performing is not confidential?
>
> A. I don't believe it is. It was based on publicly available information.

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[24] *Ibid*, at qq. 435-437.

[25] During his cross-examination, Thomas Dea also referred to the delivery of these memos as a "rookie error" (*Cross-examination of Thomas Dea,* July 31, 2014, at q. 336). I confess I find this peculiar in circumstances where Thomas Dea says and Brandon Moyse acknowledges that when asked to provide samples of his written work, Brandon Moyse was cautioned not to send material that was confidential (see: fn. 10).

> Q. Right. But lots of things are based on publicly available information, but the fact that you're performing an analysis that may not be readily available to the public is what makes it confidential. That's your work product is analyzing.
>
> A. I agree it's a work product and proprietary.
>
> Q. And that's what makes it confidential. That's what you're being paid for, to perform this analysis that's not publicly available.
>
> A. I multiply publicly available numbers by publicly available numbers. Like-minded people would have done the same thing.[26]

At this point, counsel for Catalyst makes the following comment and receives the following response:

> Q. You do far more than multiply, Mr. Moyes. Let's be fair. Anybody can take a calculator. You're not hired to be a calculator. You're hired to bring your experience and expertise in performing an analysis, right? That's why you're being paid $200,000 a year.
>
> A. One sixty-two.[27]

[17] Thomas Dea recognized that the information he received from Brandon Moyse was "confidential to Catalyst"[28]. Nonetheless, West Face concluded that the information disclosed was not particularly sensitive or damaging to Catalyst. Based on a review of the documents, West Face had concluded that the information in the documents was primarily a recitation of public information and contained a pedestrian analysis.[29]

[18] The determination of Brandon Moyse and those at West Face as to what constitutes confidential information that should be protected is too narrow. This is demonstrated by the assertion of Brandon Moyse that all he did he was to multiply publically-available numbers by publically-available numbers and that, in some way, this removes his work from being considered confidential. There is more to the question than that:

> A person who has obtained information in confidence is not allowed to use it as a springboard for activities detrimental to the person who made the confidential communication and springboard it remains even when all the features have been published or can be ascertained by actual inspection by any member of the public . . . the possessor of the confidential information still has a long start over any

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[26] *Cross-examination of Brandon Moyse,* July 31, 2014, at qq. 431-433.
[27] *Ibid,* at q. 434.
[28] *Cross-examination of Thomas Dea,* July 31, 2014, at q. 328.
[29] *Ibid,* at qq. 311-312.

> member of the public . . . the possessor of such information must be placed under a special disability in the field of competition in order to ensure that he does not get an unfair start.[30]

and:

> Even when all of the information becomes public, if an ex- employee is able, by information provided by or developed for the previous employer, to gain an advantage that the ex-employee would not have had if he or she had to check only public sources such ex-employee would still be liable for breach of confidence despite public disclosure. This reflects an obligation to pay for the advantage gained from the 'convenient' confidential source, or the head start that the disclosure had given such employee over other members of the public.
>
> What is really being protected in situations of this nature is the original process of mind. The protection is enforced against persons who wish to use the confidential information without spending time, trouble and expense of going through the same process. One can reconcile the springboard principle with the overriding principle denying confidence and information in the public domain, by describing the 'springboard' as a measure of the scope and duration of the obligation enforcing good faith upon an ex-employee while the rest of the world catches up.[31]

[19] When, in the letter sent by its counsel on June 3, 2014, West Face told Catalyst: "Your assertion that West Face induced Mr. Moyse to breach his contractual obligation to [Catalyst] is...baseless"[32], it may have been technically accurate. (This depends on how you interpret the fact that Thomas Dea asked for the samples of the work of Brandon Moyse.) However, it is clear that this and the other assurances found in the letter were written knowing that West Face had received information marked "Confidential" and that West Face was sufficiently concerned that it felt it was necessary to remind Brandon Moyse of his obligations. Despite this, West Face said nothing to Catalyst other than to provide, what I believe can fairly be called, its ineffectual assurances.

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[30] *Terrapin Ltd. v. Builders Supply Co. (Hayes) Ltd.*, [1967] R.P.C. 375, at pp. 391-92, quoted in *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 OR (3d) 21, at p. [29].

[31] *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at pp. 2463-64, quoted in *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 OR (3d) 21, at p. [29].

[32] *Supra*, (fn. 4).

[20] Similarly, Brandon Moyse knew he had sent material marked "Confidential" and "For Internal Discussion Purposes Only" to West Face. More than that, he knew that the information it contained was confidential and should not have been given to West Face. Having come to this realization, he had deleted the e-mail:

> Q. Now, you yourself had actually deleted a copy of that March 27th email from your computer system, right?
>
> A. Yes.
>
> Q. And the reason you chose to delete that particular email, I take it, as opposed to other emails which you didn't delete, was because you thought that there was something perhaps improper about your having sent that email?
>
> A. Upon, further reflection after sending it, yes.
>
> Q. And that is what you thought was wrong about that? That you had disclosed confidential information to West Face?
>
> A. That I had disclosed information to West Face.
>
> Q. And you're not denying that your analysis and the analysis of other people at Catalyst in those memos that you did send to West Face was proprietary and that belonged to Catalyst?
>
> A. I agree it's proprietary.
>
> Q. And you're not denying I take it that the analysis that was performed, in particular – and we'll look in some detail at these presentations or memos. But some of the analysis that was performed was certainly confidential?
>
> A. Yes.
>
> Q. In other words, it wouldn't be known by third parties?
>
> A. Yes.
>
> Q. The, how long did it take you to come to that realization?
>
> A. That I shouldn't have sent it?

> Q. Yes.
>
> A. I don't remember exactly.
>
> Q. And was around the time that you came to that realization that you thought you might cover your tracks deleting it?

> A. No. I deleted it within a week of sending it probably I just don't remember exactly the date.[33]

[21] Yet, in the letter sent, on behalf of Brandon Moyse, on June 5, 2014[34], nothing was said about this. The letter makes the general assertion to the effect that Brandon Moyes, in performing valuations of companies, did not use "proprietary valuation methodologies" and that while he is aware of "3 to 5 prospective acquisitions", he would not disclose any confidential information concerning them. He said he is prepared to sign a letter confirming he would abide by the confidentiality provisions in his contract of employment, an agreement to which he was already bound.

[22] What is apparent is that both West Face and Brandon Moyse did not provide information or respond to the concerns of Catalyst, in a meaningful way, until the evolution of this motion required them to do so. They waited until Catalyst discovered that information it considered to be confidential had been delivered before acknowledging there was an issue and then proclaimed that, based on their analysis, the material should not be considered to be confidential.

[23] This is to be contrasted to the approach taken by the defendants in *GDL Solutions In. v. Walker.*[35] In that case, a business was sold. As part of the sale, a non-competition provision was negotiated and agreed to. The vendor and others joined a new company that was in direct competition with the business that had been sold. It was alleged that they had misappropriated confidential information. Upon the commencement of the ensuing action, they undertook to and did review their files and "promptly" returned all confidential proprietary information. They undertook to and did preserve the electronic and other records of the employees who had left.[36]

[24] In the case I am to decide, it is a question whether, in the end, the approach adopted by Brandon Moyse and West Face will meet the test that allows a party to obtain equity.

[25] It is important to note that Catalyst is adamant that the investment memos delivered with the March 27, 2014 e-mail were sensitive and confidential. [37] For his part, Brandon Moyse acknowledged that these memos may disclose strategies that Catalyst could employ in a given situation. In his cross-examination, Brandon Moyes did agree that these memos contain information that Catalyst would not want disclosed to a third party.[38] Thomas Dea acknowledged

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[33] *Cross-examination of Brandon Moyse,* July 31, 2014, at qq. 412-420.
[34] *Supra,* (fn. 5).
[35] [2102] O.J. No. 3768; 2012 ONSC 4378.
[36] *Ibid,* at para. 92.
[37] *Affidavit of James Riley,* sworn July 14, 2014, at para.12.

[38] *Cross-examination of Brandon Moyse,* July 31, 2014, at qq. 685-691.

that West Face considered its investment strategies to be confidential and that West Face has a proprietary interest in protecting that confidentiality.[39]

THE AFFIDAVIT OF DOCUMENTS

[26] This is not the first time this motion for an interlocutory injunction has been to court. On July 16, 2014. Mr. Justice Firestone made a consent order imposing interim terms that were to remain in place until August 7, 2014, the date it was, at that time, anticipated that this motion would be heard. It was subsequently re-scheduled to today. The order of Mr. Justice Firestone includes the following term:

> THIS COURT FURTHER ORDERS that prior to the return of interlocutory motion, Moyse shall deliver a sworn affidavit of documents to Catalyst, including copies of Schedule 'A' documents, setting out all documents in his power, possession or control, that relate to his employment with Catalyst (the 'Documents'). Moyse shall also advise whether any of the Documents have been disclosed to third parties, including West Face, and the details of any such disclosure.

[27] By letter, dated July 22, 2014[40], counsel for Brandon Moyse delivered an Affidavit of Documents, as required by the order of Mr. Justice Firestone. Like the letter, the Affidavit of Documents is dated July 22, 2014.[41] It lists 819 documents. The accompanying letter states that:

> Many (and possibly most) of the enclosed documents are public documents (publicly available financials/presentations/research, etc.) with many duplicates and various versions of the same document.[42]

[28] In a third affidavit, this one sworn on July 24, 2014, James Riley contests this understanding. From a review of the titles alone, he says that he, and a colleague, identified "at least 245 confidential documents that were in Moyse's possession on July 22, 2014".[43] He provides some examples:

- Document 27: a spreadsheet created by Catalyst to analyze the debt structure and asset valuation of an identified prospective investment. Catalyst used the spreadsheet to decide whether and how to invest in the situation and at what price.[44]

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[39] *Cross-examination of Thomas Dea,* July 31, 2014, at qq. 252-259.
[40] *Affidavit of James Riley,* sworn July 28, 2014, at Exhibit B.
[41] *Ibid,* at Exhibit A.
[42] *Supra,* (fn. 38).
[43] *Affidavit of James Riley,* sworn July 28, 2014, at para. 5.
[44] *Ibid,* at para. 7.

- Document 82: a presentation Catalyst gave to potential investment bankers it was interviewing to walk them through the concept, strategy and results of a situation. The aim was to explore the potential for debt and equity financing.[45]

- Document 88: is related to the presentation referred to in Document 82. It is a spreadsheet containing full details of the company's operating model, including projections on a granular, store-by-store basis.[46]

- Document 163: is one of many documents that contain Catalyst's analysis of information received pursuant to non-disclosure agreements.[47]

[29] James Riley summarizes this portion of his affidavit of July 22, 2014 with the following two paragraphs:

> The confidential documents identified by Michaud and I contain information that is not publicly available. In many cases, the documents disclose Catalyst's confidential financial modeling and/or analyses of situations and investments it is either considering or that it has invested in. In other cases, the documents shed insight into Catalyst's management of its investments, including its associates, which if shared with a competitor would give the competitor an insight into Catalyst's confidential operations.
>
> In all cases, the documents contained in the information that Moyse, as a former employee of Catalyst, should not have retained in his power, possession or control when he resigned from Catalyst, especially when he intended to immediately begin working for a competitor to Catalyst in the special situations investment industry.[48]

[30] As with the March 27, 2014 e-mail and enclosures, it took the processes of this motion before Catalyst learned that the documents it alleges are confidential had been retained by Brandon Moyse. In his initial affidavit, Brandon Moyse said:

> It is noteworthy that neither Mr. Riley nor Mr. Musters provide any actual evidence that I transferred information, confidential or otherwise, from Catalyst's

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[45] *Ibid*, at para. 8.
[46] *Ibid*, at para. 8.
[47] *Ibid*, at para. 9.
[48] *Ibid*, at paras. 10-11.

> services to my Dropbox or Box accounts or other personal devices. Instead, Mr. Riley and Mr. Musters rely solely on unsupported speculation and innuendo.[49]

[31] At his cross-examination, Brandon Moyse said that, when he made this statement, he did so in circumstances where his search of his personal electronic devices had not been "exhaustive enough".[50] He conceded that, at the time, he did have "confidential information on [his] personal computer devices".[51]

[32] It took the appearance before Mr. Justice Firestone and the order it produced to demonstrate that Brandon Moyse had retained documents belonging to Catalyst, some of them allegedly confidential. It is possible that there is more. At the cross-examination of Brandon Moyse, he could not say with absolute certainty that his most recent search had been exhaustive.[52]

[33] It bears asking if a party questions the concerns of the other as "speculation and innuendo" when it knew or should have realized that it was wrong to do so, does it come to court in a fashion that allows it to ask that equity balance in its favour?

[34] Having said this, counsel for Brandon Moyse, joined by counsel for West Face, pointed out that there is no evidence to suggest that any of these documents have been delivered to, or are in the possession of West Face. In the letter enclosing the Affidavit of Documents, counsel for Brandon Moyes, in compliance with the order of Mr. Justice Firestone, states: "save the March 27, 2014 email from [Brandon] Moyse to West Face Capital, there has been no documentary disclosure or dissemination to any third-party."[53]

THE PERSONAL COMPUTER OF BRANDON MOYSE

[35] The order of Mr. Justice Firestone included the following provisions:

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

[36] It is not just that documents thought by Catalyst to be confidential have been found in the possession of Brandon Moyse. On June 19, 2014, Catalyst learned that not only was Brandon

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[49] *Affidavit of Brandon Moyes,* sworn July 7, 2014, at para. 36.
[50] *Cross-examination of Brandon Moyse,* at qq. 326-331.
[51] *Ibid,* at qq. 343-344.
[52] *Ibid,* at qq. 332-333
[53] *Affidavit of James Riley,* sworn July 28, 2014, at Exhibit B.

Moyse leaving Catalyst, but also that he had accepted employment with West Face. Catalyst sees West Face as a competitor. Although the factum filed on behalf of West Face tends to minimize competition between the two firms ("...while West Face and Catalyst do compete in certain respects, their primary business focuses are different"[54]), at the hearing of the motion, counsel for West Face conceded the two firms do compete. The next day, on June 20, 2014, Computer Forensics Inc., a company that "...specializes in the retrieval of data from hard drives, servers, laptops, cell phones... and other devices"[55] was retained, on behalf of Catalyst, to produce a forensic image of a desktop computer that had been used by Brandon Moyse. Martin Musters is the Director of Forensics at Computer Forensics Inc. In the affidavit he swore, Martin Musters said that, as a result of the analysis undertaken in respect of the desktop computer, he was able to determine that, on specific dates, Brandon Moyes had accessed particular files[56]:

- on March 28, 2014, over an eleven-minute period, Brandon Moyse accessed a series of files from an 'Investors Letters' directory;[57]
- on April 25, 2014, over a seventy-minute period, Brandon Moyse accessed several files which contain the word 'Stelco' in the file directory or in the file name; [58]
- on May 13, 2014, over a sixty-one-minute period, Brandon Moyse accessed several files through his Dropbox account which had the name 'Masonite' in the file name;[59]
- also, on May 13, 2014, over a twenty-four-minute period, Brandon Moyse accessed several files from a '2014 Potential Investment' directory.[60]
- on May 26, 2014, at 12:31 p.m., Brandon Moyse accessed a document entitled '14-05-26 Notes' from a directory entitled 'Monday Meeting'.[61]

[37] Brandon Moyse has answers that explain each of these inquiries. He wanted to review the Investment Letters (March 28, 2014) because he was thinking of leaving Catalyst and wanted to understand what might be said about him if he left.[62] Brandon Moyse reviewed the Stelco files (April 25, 2014) out of personal curiosity. At the time, the transaction was no longer active.[63]

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[54] *Factum of the Defendant/Responding Party, West Face Capital Inc.*, at para. 18.
[55] *Affidavit of Martin Musters,* sworn June 26, 2014, at para. 2.
[56] *Ibid*, at para. 11.
[57] *Ibid,* at para. 12 and Exhibit C. The exhibit suggests that, at that time, Brandon Moysse accessed 18 "files".
[58] *Ibid*, at para. 13 and Exhibit D. The exhibit suggests that, at that time, Brandon Moyse accessed 63 "files".
[59] *Ibid*, at para. 14 and Exhibit E. The exhibit suggests that, at that time, Brandon Moyse accessed 43 "files".
[60] *Ibid*, at para. 14 and Exhibit F. The exhibit suggests that, at that time, Brandon Moyse accessed 29 "files".
[61] *Ibid*, at para. 15 and Exhibit G.
[62] *Affidavit of Brandon Moyes,* sworn July 7, 2014, at para. 45.
[63] *Ibid*, at para. 48.

The Masonite material (May 13, 2014) he reviewed was not found in files that belonged to Catalyst. It was part of an exercise associated with an interview process being conducted by, or on behalf of, Mackenzie Investments. The material was provided to Brandon Moyse by Mackenzie Investments or obtained from Masonite's website.[64] On May 13, 2014, Brandon Moyse also accessed files related to WIND Mobile. This was done as part of his duties at Catalyst. He was working on a chart to include in an investment memo.[65] Lastly, the reference to Monday Meeting Notes (May 26, 2014) were his notes for, not from, that meeting.[66]

[38] Martin Musters has indicated that he cannot determine whether any Catalyst files were transferred by Brandon Moyse from his computer to any other device[67]; for example; to any personal computer he owned. There is no evidence that any of the material accessed by Brandon Moyse through the files of Catalyst have been disclosed to West Face. On the other hand, there is no certainty that everything that was accessed has been disclosed or discovered through the work of Martin Musters. At his cross-examination, Brandon Moyse admitted that, between March and May 2014, he deleted documents.[68] As already noted, one of these was the e-mail of March 27, 2014.[69]

[39] Pursuant to the order of Mr. Justice Firestone, forensic images of the electronic devices belonging to Brandon Moyse have been created. They are being held in trust by his counsel. At this point, it appears that any evidence of the presence and use of any confidential information belonging to Catalyst would be found on the personal computers and other electronic devices of Brandon Moyes.

THE MOTION

[40] On June 19, 2014, counsel for Brandon Moyse wrote to counsel for Catalyst reiterating the assurance that had already been given and that Brandon Moyse remained "amenable to confirming these legal obligations in writing".[70] Any effort to resolve the issues having failed, counsel for Catalyst responded by e-mail to counsel for Brandon Moyse, with a copy to counsel for West Face. He indicated that he had received instructions to commence proceedings and went on:

> I will try to get our materials to you and [counsel for West Face] forth with, but in the event that we cannot get the matter heard before next Monday, we trust that

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[64] *Ibid*, at paras. 51-52.
[65] *Ibid*, at para. 55.
[66] *Ibid*, at para. 60.
[67] *Affidavit of Martin Musters*, sworn June 26, 2014, at para. 18.
[68] *Cross-examination of Brandon Moyse*, at qq. 346-354.
[69] *Ibid*, at qq. 355-357; and, see para. [20], above.
[70] *Affidavit of James Riley*, sworn June 26, 2014, at Exhibit M.

> no steps will be taken by each of your clients to alter the existing status quo prior to the matter being heard by the court.[71]

[41] The only response, also dated June 19, 2014, was from counsel for West Face. It said that Brandon Moyse had "agreed, contractually with West Face" that he would maintain confidentiality over any confidential information he had obtained through his employment with Catalyst. The letter reiterates that Catalyst had not provided any evidence that Brandon Moyse had breached those obligations and that a "confidentiality wall" had been put in place in respect of a "telecom deal" that had been a particular concern of Catalyst. The letter indicated that any "litigation-related material" be directed to a particular lawyer in the firm.[72]

[42] Counsel for Catalyst took this as an indication that the status quo would not necessarily be maintained. On that basis, counsel "moved with urgency" to seek interim relief. Counsel for Catalyst says that receipt of the affidavits of Brandon Moyes and Thomas Dea, both sworn on July 7, 2014, "confirmed Catalyst's worst fears: [Brandon] Moyse had transferred Catalyst's confidential information to West Face....".[73] I understand this to refer to the e-mail of March 27, 2014, and the accompanying four "Investment Memos".

[43] As matters have developed:

- where West Face and Brandon Moyse provided assurance that no confidential information had been or would be received by West Face, material that Catalyst believes to be confidential had been delivered to West Face by Brandon Moyse; and,

- where Brandon Moyes challenged Catalyst on the basis that the allegation that he had maintained confidential information of Catalyst on his 'personal devices' was only speculation and innuendo, he has subsequently found such documents on a personal computer.

[44] Now, as part of the position taken on this motion, counsel for West Face and Brandon Moyse, submit that, in the absence of any immediate proof, the court should accept the assurances of Brandon Moyse that his accessing files of Catalyst between March 28, 2014 (two days after he met with Thomas Dea) and May 26, 2014 (two days after he resigned from Catalyst) was, in every respect, proper, innocent and should be of no concern to Catalyst.

[45] I repeat what was said at the outset. An injunction is an equitable remedy. Reliance on that premise is challenged where the assurances of parties who seek what equity offers are, based on past actions, open to question.

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[71] *Ibid*, at Exhibit N.
[72] *Ibid*, at Exhibit O.
[73] *Plaintiff's Factum (Motion for Interlocutory Relief)*, at para. 31.

[46] The test for an interlocutory injunction is well-known. It asks three questions:

(i) Is there a serious issue to be tried?

(ii) Will the moving party suffer irreparable harm if the injunction is not granted?

(iii) Where does the balance of convenience lie?[74]

(i) Is there a serious issue to be tried?

[47] There is a clause in the Employment Agreement signed by Brandon Moyse that deals with the requirement to maintain confidentiality. It says:

> You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation... and the like (collectively 'Confidential Information'). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute 'Confidential Information'.
>
> You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

[48] It is not possible on an interlocutory motion to determine if such a clause has been breached. The threshold is low:

> It is not possible on an interlocutory motion with conflicting affidavit evidence to determine finally whether or not the plaintiff is entitled to succeed at trial and whether or not the defendants are, in fact, guilty of copying or misappropriating confidential information acquired from the plaintiff. The test, as these cases hold,

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[74] *R.J.R.- MacDonald v. Canada (Attorney General),* [1994] 1 S.C.R. 311; [1994] S.C.J. No. 17, at paras. 82-85.

> is whether there is a serious question to be tried. The Supreme Court in RJR MacDonald made it clear that, as Justices Sopinka and Cory put it: 'The threshold is a low one. The judge on the application must make a preliminary assessment of the merits. . . . A prolonged examination of the merits is generally neither necessary nor desirable'.[75]

[49] It is necessary that the threshold be low in light of the evidentiary challenges which face a moving party in cases involving confidential business information:

> In cases involving confidential business information misuse can rarely be proved by convincing direct evidence. In most cases employers must construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convince it that it is more probable than not that what employers alleged happened, did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced the testimony of employees and their witnesses who directly deny everything.[76]

[50] The parties agree that the Confidentiality clause applies to Brandon Moyse. It is enforceable. Given the evidence that the Investment Memos included with the e-mail of March 27, 2014 are marked confidential, were recognized as such by Thomas Dea and could demonstrate strategies in a narrow, competitive business, I have no trouble in finding that the standard has been met. There is a serious issue to be tried. This conclusion is strengthened by the demonstration that, despite his assurances to the contrary, there were confidential documents on personal electronic devices belonging to Brandon Moyse.

[51] This does not fully resolve the issue of whether the first of the three components of the test for an interlocutory injunction have been met. Counsel for Catalyst seeks an order that Brandon Moyse be prohibited from "commencing or continuing employment at [West Face] until December 25, 2014".[77] Counsel for West Face submitted that this request engages the non-competition clause also found within the Employment Agreement of Brandon Moyse. Counsel said only if that clause is enforceable and has been breached, can the court restrain Brandon Moyse from working. It is not clear that this is so. If it is apparent that without such restraint breaches of the confidentiality clause would or could be expected to continue and cause irreparable harm, why would it not be open to the court to require that a former employee not work in order to ensure the promised confidentiality is maintained? Thomas Dea had no compunction about taking documents he recognized as confidential and distributing them to other partners and senior management. Brandon Moyse had difficulty understanding the line that separates what is confidential from that which is not.

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[75] *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 O.R. (3d) 21, [1996] O.J. No. No 5382 (Gen, Div.), at para. 10.
[76] *Ibid*, quoting *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at p. 2246.
[77] *Notice of Motion*, dated June 26, 2014, at para. (f).

[52] The non-competition clause found in the contract of employment of Brandon Moyse states:

> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:
>
> > (i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the 'protected entities'), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employees; and
> >
> > (ii) render any service of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst].
>
> [Emphasis by underlining added]

[53] It may be that covenants in restraint of trade are generally unenforceable as contrary to the public interest. Nonetheless, reasonable restraints of trade may be enforceable:

> The jurisprudence has recognized the reasonableness of restrictive covenants in two circumstances: (i) covenants which restrain competition by an employee with his former employer, and (ii) those restraining the vendor of a business from competing with its purchaser.[78]

[54] The validity of a restrictive covenant of employment is subject to a two-stage inquiry: the proponent of the covenant (in this case, Catalyst) must establish that it is reasonable, as between the parties, at which point the party seeking to challenge the covenant (in this case, Brandon Moyse) bears the onus of proving that the covenant is contrary to the public interest.[79]

[55] Reasonableness is to be determined by examining the details of the case being considered:

> The test of reasonableness can be applied, however, only in the peculiar circumstances of the particular case. Circumstances are of infinite variety. Other

[78] *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.* 2011 ONSC 1456, at para. 10.

[79] *Ibid.*

> cases may help in enunciating broad general principles but are otherwise of little assistance.
>
> . . .
>
> The validity, or otherwise, of a restrictive covenant can be determined only upon an overall assessment, of the clause, the agreement within which it is found, and all of the surrounding circumstances.[80]

[56] In *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc.*[81], Mr. Justice David Brown posited that, where the nature of the employment may result in the employee gaining significant influence over the employer's customers, a non-solicitation covenant might be inadequate to protect the employer's interests and a non-competition clause would be reasonable.[82] Could it be that a similar idea is raised here? Could it be that the same principle applies to the potential harm arising from the misuse of confidential information? Counsel for Catalyst suggests that there may be circumstances where the advantage gained by the employee in taking and mis-using confidential information demonstrates that a confidentiality covenant will be inadequate to protect the employer's proprietary interests.

[57] In such circumstances, the non-competition clause would be available to protect against the harm caused by a breach of the confidentiality clause.

[58] For their part, counsel for West Face and Brandon Moyse say that the non-competition clause is ambiguous and overbroad and, on that basis, is unreasonable and unenforceable.[83] Counsel for West Face referred to the wording of the clause and pointed to the following areas of concern:

- What is the scope of the restraint? What "Fund" is being referred to? What businesses are caught by the terms "Associate" and "undertaking of the type conducted by Catalyst"?
- What is the time duration that would reasonably protect the interests of Catalyst, is it three months or six month?
- What is the reasonable geographic limit? Is it Ontario, as stated in the contract, or should it be Toronto?[84]

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[80] *Elsley v. J.G. Collins Ins. Agencies*, [1978] 2 S.C.R. 865, at pp. 923-924, quoted in *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc., supra*, (fn. 75), at para. 11.
[81] *Supra*, (fn. 75).
[82] *Ibid*, at para. 17. In saying this, the Court referred to *Elsley v. J.G. Collins Ins. Agencies, supra*, (fn. 77), at 926-7.
[83] *KRG Insurance Brokers (Western) Inc. v. Shafron* 2009 S.C.C. 6, 2009 CarswellOnt 79, at para. 27.
[84] See para. [52], above where the non-competition clause is quoted and each of these terms underlined.

[59] This kind of dissection is not helpful. It considers the issue of whether the clause is reasonable out of any context and presumes no knowledge of the business involved:

> It is important, I think, to resist the inclination to lift a restrictive covenant out of an employment agreement and examine it in a disembodied manner, as if it were some strange scientific specimen under microscopic scrutiny.[85]

[60] Presumably, the requirement that a non-competition clause not be ambiguous is so that the limits it imposes are clearly understood by the employee. The prescription that it should not be overly-broad is to allow the employee to find work and not be limited in that regard by the overreaching of the employer. There is a question as to whether such concerns are warranted in the present case. In *GDL Solutions Inc. v. Walker*, in examining the scope of a restrictive covenant, Madam Justice C.J. Brown took into account what the employee would have known and understood:

> The plaintiff submits that on cross-examination, Walker agreed that he understands what the terms 'same as' and 'competitive with' mean.[86]

[61] It cannot be that Brandon Moyse was unaware that working for West Face was going to be a breach of the clause. The firms compete. Brandon Moyse knew it. In an e-mail, dated February 8, 2013, he observed:

> They've [meaning West Face] been hammered on one activist play we're [meaning Catalyst] looking at (though we don't like)---and we're fighting them on a different distressed name right now.[87]

[62] In *GDL Solutions Inc. v. Walker*, the judge found that a non-competition clause covering businesses "similar to or competitive with" the business of concern (in that case, a business that had been sold) was not vague. "Similar to" is plain language. It is clear what it means.[88] The same could be said for "any business ... of the type conducted by [Catalyst]."[89]

[63] For the purposes of the non-competition clause, "Associates" is to be taken as defined in the *Ontario Business Corporations Act.* Catalyst has only seven. The clause only applies to four of them. The other three are not located "within Canada".[90] It may be, as suggested by counsel for West Face and Brandon Moyse, that as a result of there being an "Associate" in the restaurant business[91], Brandon Moyse is unable, during the currency of the clause, to work in that

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[85] *Elsley v. J.G. Collins Ins. Agencies, supra*, (fn. 77), at pp. 923-924, quoted in *The Dent Wizard (Canada) Ltd. v. Catastrophe Solutions International Inc., supra,* (fn. 75), at para. 11.
[86] *GDL Solutions Inc. v. Walker, supra*, (f.n. 35), at paras. 61-63.
[87] *Affidavit of James Riley,* June 26, 2014, at Exhibit D.
[88] *GDL Solutions Inc. v. Walker, supra*, (fn. 35), at para. 63.
[89] See para. [52], above.
[90] *Ibid.*
[91] National Markets Restaurant Corporation described as a retail food and restaurant company.

industry.[92] I do not agree that this would have a "profound effect on [Brandon] Moyse's career options".[93] The clause, in these circumstances, is only effective for six months. It may be, as was suggested during the course of the hearing, that Brandon Moyse never did any work with the restaurant company, but he has made it plain that he reviewed files he was not working on. It is in the nature of its business that Catalyst would have various investments. I do not find it unreasonable that it would, for a brief time, seek to protect them all.

[64] Catalyst and West Face are in the same city. Regardless of whether "Ontario", as used in the non-competition clause, is vague when examined outside any particular context or whether, as suggested on behalf of Catalyst, the boundaries of "Toronto" are difficult to determine with certainty, it must have been clear that going to work with a competitor in Toronto would offend the clause.[94]

[65] It was suggested that there was some uncertainty as to how long the non-competition clause was to be effective. Was it six months? Was it three months?[95] The difference is both understandable and justified. When an employee leaves of his own volition or is terminated for cause, the company will not be ready. If the parting is cordial, or accompanied by working notice, the employer will be able to prepare. The employer will not require protection of the same duration.

[66] Taken as a whole, read in context, I would not be prepared to find the non-competition clause unreasonable.

[67] Little was said and I am not prepared to find that the public interest militates against the acceptance of this non-competition clause. There are two competing policy concerns. On the one hand, there is a reticence to allow a restraint of trade. On the other hand, parties should be left free to contract.[96] In this case, there was consideration to be accounted for by Brandon Moyse if he was considering leaving Catalyst. In addition to his base salary and annual bonus, Brandon Moyse participated in "Catalyst's 60/40 Scheme", whereby sixty percent of the carried interest from Catalyst's investment funds is allocated to the professionals who participated on the deals made by the fund. By May 2014, that is, within one- and-a-half years of his joining Catalyst, Brandon Moyse had accrued over $500,000 in this scheme.[97]

[68] In the circumstances, I find that there is, at least, a serious case to be tried:

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[92] *Cross-examination of James Riley,* July 29, 2014, at q. 591.

[93] *Factum of the Responding Party, Brandon Moyse,* at para. 69.

[94] Catalyst is or was located at 77 King Street West, Royal Trust Tower, TD Bank Centre in Toronto (see: *Affidavit of James Riley,* sworn June 26, 2014, at Exhibit A) and West Face Capital is located at 2 Bloor St. East, in Toronto (see: *Statement of Claim*).

[95] See para. [52], above.

[96] *GDL Solutions Inc. v. Walker, supra,* (fn. 34), at para. 44, quoting *Elsley v. J.G. Collins Ins. Agencies, supra,* (fn. 79), at pp. 923-924.

[97] *Affidavit of James Riley,* sworn June 26, 2014, at paras. 11-13 and 16; *Affidavit of James Riley,* sworn July 14, 2014, at para. 9; and, *Cross-examination of Brandon Moyes,* July 31, 2014, at qq. 160-168 .

- Was information confidential to Catalyst delivered to West Face and was it used by West Face to the detriment of Catalyst?

  and

- Was the non-competition clause found in the employment contract of Brandon Moyse enforceable and, if it was enforceable, has it been breached?

[69] Counsel for West Face and counsel for Brandon Moyse say that, in the circumstances, this is not enough to demonstrate that the first test from *R.J.R.- MacDonald v. Canada (Attorney General)*[98] has been met. Counsel for Brandon Moyse relied on cases which demonstrate that "when the injunction sought is intended to place restrictions on a person's ability to engage in their chosen vocation and to earn a livelihood, the higher threshold of a strong *prima facie* case is the more appropriate test to be applied".[99]

[70] In *Kohler Canada Co. v. Porter,* [100] the defendant had worked for Kohler, in its plumbing products business, since his graduation from university in 1988. He was promoted from time to time until he became Sales Manager for Central and Western Canada, In 2001, for the first time, he was asked to sign an employment contract. It contained a non-competition clause. He signed without giving the matter much thought. In 2002, he accepted a job, offered by a competitor, with more responsibility and better pay. Kohler sought an injunction to restrain its former employee from working for his new employer on the grounds that he was in breach of the agreement he had signed. The judge observed that the overwhelming preponderance of case authority supported applying the strong *prima facie* test in non-competition injunction cases. The higher standard was not met; the injunction was refused.

[71] In the case I am asked to decide, there is a strong *prima facie* case that Brandon Moyse had breached the confidentiality clause of his Employment Agreement. He has taken and delivered to his new employer confidential information which may demonstrate strategies his former employer used in a narrow and competitive business. Upon receipt, the new employer understood the material would be seen by the former employer as confidential, warned the employee that he should do nothing similar with any information he obtained while in its employ and distributed the information to each of the partners and a Vice-President. When the former employer raised concern, it was met with assurances that did not stand up. It is difficult to see how, in such circumstances, the higher standard should necessarily inure to the benefit of the employee and the new employer. Put another way, it is with this analysis that the direction that one who seeks equity should do equity becomes relevant to this situation.

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[98] *Supra*, (fn. 72).
[99] *Jet Print Inc. v. Cohen,* 1999 CarswellOnt 2357 (Sup. Ct. J.), at para. 11, relying on *Gerrard v. Century 21 Armour Real Estate Inc.* (1991), 35 C.C.E.L. 128, 4 O.R. (3d) 191, 35 C.P.R. (3d) 448 (Ont. Gen. Div.); and see: *Kohler Canada Co. v. Porter* 2002 CarswellOnt 2009 14-16.
[100] *Ibid*, (*Kohler Canada Co. v. Porter*).

[72] In *Jet Print Inc. v. Cohen*,[101] a principal of the plaintiff had two brothers. They worked for the company. They both fell out with their brother (the principal of the company): one because he was accused of submitting fraudulent invoices to the plaintiff; and the other because the plaintiff did not pay him a bonus he said he was owed. Subsequently, the brothers who had left went into business for themselves. The plaintiff brought a motion for an interlocutory injunction prohibiting the two brothers from soliciting the business of the plaintiff, contrary to the employment agreements they had entered into. The higher standard, the requirement that there be a strong *prima facie* case, was applied. The motion did not succeed. In that case, the non-competition clause was so onerous that it made it almost impossible for the two brothers to work. First, it applied for two years. Second, under the terms of the employment agreement, they were not permitted to solicit work from any client of the employer. "Client" was defined to include "...clients existing at the time of the termination of the contractual relationships together with any clients during the proceeding year [*sic*] and any prospective clients to which the Employer had a presentation within the proceeding two years [*sic*]." The employment agreement went on to specify that any breach of these restrictions "...will cause irreparable injury to the Employer and that any money damages will not provide an adequate remedy to the Employer".[102] At the time the employment agreement was presented, the two brothers (the employees) were denied the time to seek legal advice. They were instructed that they must sign the agreements and were not provided with copies until after the litigation seeking the injunctions against them had been commenced. It is not difficult to see that these agreements were unremittingly burdensome, unfair and contrary to the broader public concern that people should be permitted to work. If the contract had been sustained, employers could effectively ruin the careers of former employees and make it impossible for them to continue to earn a living in areas of work with which they were familiar.

[73] This is not the case here. Where the employee left of his or her own volition, the non-competition clause at issue would apply for six months. Brandon Moyse left Catalyst on June 23, 2014. This matter was heard on October 27, 2014. If an order is made requiring Brandon Moyse to abide by the non-competition clause, it can be for no longer than to December 22, 2014, that is less than two months. Moreover, counsel for Catalyst, while not agreeing, acknowledged that it would be possible for the court to order that Catalyst pay the salary of Brandon Moyse for the few weeks remaining before the non-competition clause expires. This situation is not comparable to that confronting the two brothers in *Jet Print Inc. v. Cohen.* There is no long-term inability to work and there need be no short-term material loss.

[74] The better view is that the failure to satisfy the higher standard does not inexorably lead to the refusal of an interlocutory injunction. In *GDL Solutions Inc. v. Walker*, Madam Justice C. J. Brown considered the impact of any determination that there was more than a serious issue to be tried. She considered several lines of cases and opted for the view that, where a strong *prima facie* case can be made out, there is no need to give great regard to the second and third parts of

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[101] *Ibid.*
[102] *Jet Print Inc. v. Cohen, supra*, (fn. 72), at para. 5.

the injunction test (irreparable harm and the balance of convenience). Where only a serious issue to be tried can be established, greater regard should be given to those considerations:[103]

> ...[I]n the case of an interlocutory injunction to restrain a breach of a negative covenant, irreparable harm and the balance of convenience need to be still considered. The extent of the consideration, however, will be directly influenced by the strength of a plaintiff's case. Even where there is a clear breach of a negative covenant which is reasonable on its face, the issues of irreparable harm and balance of convenience cannot be ignored. They may, however, become less of a factor in reaching the final determination of the issue depending on the strength of the plaintiff's case.[104]

[75] In this case, I do not propose to forego or limit consideration of the second and third parts of the test for an interlocutory injunction. For that reason, I see no reason to go beyond finding that there is a serious issue to be tried and, on that basis, to conclude that the first part of the test has been met. Before going further, it may be as well to recall that the three tests which mark the standard for the granting of an interlocutory injunction are, in any event, not to be seen as a checklist:

> The list of factors which the courts have developed – relative strength of the case, irreparable harm and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.[105]

(ii) Will the moving party suffer irreparable harm if the injunction is not granted?

[76] I turn to irreparable harm. Catalyst is concerned that the delivery of confidential material will, or has, put it at a competitive disadvantage. In particular, reference was made to a "telecom situation". This refers to a matter that was clearly of some sensitivity. West Face constructed a

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[103] *GDL Solutions Inc. v. Walker, supra,* (fn. 35), at para. 34.

[104] *Van Wagner Communications Co., Canada v. Penex Metropolis Ltd.,* [2008] O.J. No. 190 (S.C.), at para. 39, leave to appeal refused, [2008] O.J. No. 1707 (Div. Ct.). In coming to this conclusion, Mr. Justice Pattillo "pointed to statements from *Canada (Attorney General) v. Saskatchewan Water Corp.*, [1991] S.J. No. 403, at para. 37 (Sask. C.A.), which had been adopted in *CBJ International Inc. v. Lubinsky*, [2002] O.J. No. 3065 (Div. Ct.); and see Sharpe, *Injunctions and Specific Performance,* looseleaf, (Toronto: Canada Law Book, 2013, at para. 9.40:

> ....The stronger the plaintiff's case, however, the less emphasis should be placed on irreparable harm and balance of convenience and, in cases of a clear breach of an express negative covenant, interlocutory relief will ordinarily be granted.

[105] *Ibid,* (Sharpe, *Injunctions and Specific Performance* looseleaf), at para. 2.630.

"confidentiality wall". While there is considerable disagreement about its effectiveness, the fact that it was put in place substantiates the concern. As already noted, among the Catalyst documents accessed by Brandon Moyse on May 13, 2014, were files related to WIND Mobile.[106] As I understand it, this relates to the "telecom situation" of concern. The chart Brandon Moyse was working on was to be included with an investment memo. The delivery of the information it contained would be advantageous to West Face, which had an interest in the same opportunity. Unfair competition can lead to irreparable harm:

> Cases of unfair competition have often been recognized as ones in which damages may not adequately compensate the plaintiff for the loss suffered due to the defendant's conduct. Not only is it difficult to quantify the loss of goodwill or market share suffered by the plaintiff due to the defendant's actions, but the damage to relationships with customers is inherently difficult to assess. In a competitive industry, where there can be considerable fluidity of customer allegiances, it may be difficult for the moving party to establish an accurate measure of damages.[107]

[77] As this suggests, misappropriation and use of confidential information can give rise to irreparable harm:

> Messa has no way of knowing the extent to which Phipps might be using successfully any confidential information from Messa to effectively compete with Messa; and therefore Messa cannot easily quantify damages in this action.[108]

[78] In such circumstances, it is not possible to quantify the damage. The harm that may be caused would be irreparable. In this case, the problem is underscored by the apparent uncertainty of Brandon Moyse as to what is confidential information, that he accused Catalyst of innuendo and speculation as to the possibility that he had maintained confidential information when, in fact, he had and that information that was considered by Catalyst to be confidential and was marked as such had been delivered to West Face despite assurances that suggested the contrary. This points, again, to the proposition that those seeking to rely on equity must act in a fashion that is consistent with the request; they have to do equity. In this situation, how can the court be certain that, if Brandon Moyse goes to work for West Face, confidential information won't slide through some crack in whatever protections are erected? I am not sure it can be. This is all the more true where Thomas Dea, rather than returning the material, decided, in effect on behalf of Catalyst, that the material was not confidential and distributed it to partners and a Vice-President at West Face.

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[106] See para. [37], above.

[107] *Precision Fine Papers Inc. v. Durkin*, [2008] O.J. No. 703, at para. 25, which, in turn, refers to *EJ Personnel Services Inc. v. Quality Personnel Inc.* (1985), 6 C.P.R. (3d) 173 (Ont. H.C.J.); *Sheehan & Rosie Ltd. v. Northwood*, 2000 CarswellOnt 670 (S.C.J.); and, *KJA Consultants Inc. v. Soberman*, 2002 CarswellOnt 467 (S.C.J.).

[108] *Messa Computing Inc. v. Phipps*, [1997] O.J. No. 4255, at para. 32.

(iii) Where does the balance of convenience lie?

[79] To take into account the balance of convenience, I turn to the possible impact on Brandon Moyse. I cannot see how delaying his career at West Face until December 22, 2014 would have any lasting effect.

[80] I pause to point out that the order of Mr. Justice Firestone contains the following paragraph:

> THIS COURT FURTHER ORDERS that the above terms are being agreed to on a without prejudice basis and shall not be voluntarily disclosed by the parties. The parties are agreed and request that the court hearing the interlocutory motion shall not consider or draw any inference from the terms of this consent order.

[81] I draw no inference from this order. On the other hand, it is difficult to ignore the fact that, pursuant to this order, Brandon Moyse agreed to be bound by the non-competition clause in his Employment Agreement until this interlocutory injunction is determined. This being so, he has not been at work. An order requiring him to continue to abide by the non-competition clause would prevent him from working at West Face for approximately seven more weeks. This does not, nor would the full six months, constitute irreparable harm. Nor will it have any short term effect if Calalyst is required to continue to pay Brandon Moyse while he waits for the period affected by the non-competition clause to wind down.

[82] The balance of convenience favours Catalyst.

CONCLUSION

[83] This is not a case where the actions of Brandon Moyse and West Face demonstrate that equity should balance in their favour. In the circumstances, I make the following orders:

In order to ensure that any information, confidential to Catalyst, that may remain in the possession of Brandon Moyse is not provided to West Face.

1. An interlocutory injunction enjoining the defendant, Brandon Moyse, or anyone acting on his behalf or at his direction from using, misusing or disclosing any and all confidential and/or proprietary information, including all records, materials, information, contracts, policies, and processes of The Catalyst Capital Group Inc.

To ensure that Brandon Moyse does not, through carelessness, by accident or with intention, communicate information, confidential to Catalyst, to representatives of West Face and, thus, create unfair competition.

2. A further interlocutory injunction enjoining the defendant, Brandon Moyes, from engaging in activities competitive to Catalyst in compliance with the non-competition clause of his employment agreement (clause 8) until its

expiry six months after his leaving his employment with The Catalyst Capital Group Inc., being December 22, 2014.

3. On the understanding that, as a result of this order, Brandon Moyse will be unable to commence his employment with West Face until December 22, 2014, The Catalyst Capital Group Inc. shall pay Brandon Moyse his West Face Capital Inc. salary until December 21, 2014.

Finally, counsel for Catalyst submitted that an independent supervising solicitor should be identified and required to review the forensic images that have been created and held in trust by counsel for Brandon Moyse to identify what, if any, material these images may contain that are confidential to Catalyst. What is personal to Brandon Moyse would be returned to him. Counsel for Brandon Moyse opposed this request. It would be an extraordinary order. It is the view of counsel for Brandon Moyse that material that is confidential to Catalyst will have to be produced. It should be left to Brandon Moyse to review and determine what must be produced. The difficulty with this is that it is another assurance where those made in the past were not sustained.

4. The forensic images that were created in compliance with the order of Mr. Justice Firestone shall be reviewed by an independent supervising solicitor identified, pursuant to a protocol to be jointly agreed to by counsel for the parties, or, failing such agreement, by way of further direction of the court.

5. The review of the forensic images by the independent supervising solicitor shall be completed before any examinations-for-discovery are conducted in this action.

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

COSTS

[85] If the parties are unable to agree as to costs, I will consider written submissions on the following terms:

1. On behalf of The Catalyst Capital Group Inc., within fifteen days of the release of these reasons, such submissions are to be no longer than five pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

2. On behalf of Brandon Moyse, within ten days thereafter, such submissions ae to be no longer than four pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

3. On behalf of West Face Capital Inc., within ten days thereafter, such submissions are to be no longer than four pages, double-spaced, not including any Bill of Costs, Costs Outline or caselaw that may be referred to.

4. If necessary, in reply, on behalf of The Catalyst Capital Group Inc., within five days thereafter such submissions to be no longer than four pages, double-spaced (two pages with respect to any submissions made on behalf of Brandon Moyse and two pages with respect to any submissions made on behalf of West Face Capital Inc.).

LEDERER J.

Released: 20141110

CITATION: The Catalyst Capital Group Inc. v. Moyse, 2014 ONSC 6442
COURT FILE NO.: CV-14-507120
DATE: 20141110

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

JUDGMENT

LEDERER J.

Released: 20141110

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

PLAINTIFF'S FACTUM
(MOTION RETURNABLE JUNE 11, 2015)

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