Court File No. C60799/M45378

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

and

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

Defendants
(Respondents/Moving Parties)

MOTION RECORD
(Motion to Quash Appeal)

September 9, 2015

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
robert.centa@paliareroland.com
Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com
Denise Cooney (LSUC# 64358R)
Tel: 416.646.74908
denise.cooney@paliareroland.com

Lawyers for the Defendant
(Respondent/Moving Party),
Brandon Moyse

TO: **Lax O'Sullivan Scott Lisus LLP**
Barristers and Solicitors
145 King Street West
Suite 1920
Toronto, ON M5H 1J8
Tel: 416.598.1744
Fax: 416.598.3730

Rocco Di Pucchio
Tel: 416.598.2268

Andrew Winton
Tel: 416.644.5342

Lawyers for the Plaintiff
(Appellant/Responding Party)

AND TO: **Davies Ward Phillips & Vineberg LLP**
Barristers and Solicitors
155 Wellington Street West
40th Floor
Toronto, ON M5V 3J7
Tel: 416.863.0900
Fax: 416.863.0871

Matthew Milne-Smith
Tel: 416.863.5595

Andrew Carlson
Tel: 416.367.7437

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

INDEX

INDEX

TAB 1

M45378

Court File No. C60799

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

and

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

Defendants
(Respondents)

NOTICE OF MOTION TO QUASH APPEAL

TAKE NOTICE THAT the defendant (respondent), Brandon Moyse, will make a motion to the Court of Appeal for Ontario at Osgoode Hall, 130 Queen Street West, Toronto, Ontario, M5H 2N5, on a date to be fixed by the Registrar.

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

THE MOTION IS FOR

(a) An order quashing the plaintiff's appeal from the order of Justice Glustein dated July 7, 2015, on the basis that the Court of Appeal for Ontario does not have jurisdiction to hear this appeal;

(b) The costs of this motion; and,

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

THE GROUNDS FOR THE MOTION ARE

(a) The plaintiff brought a motion seeking:

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

(ii) an order authorizing an Independent Supervising Solicitor to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face at the defendants' expense (the "Imaging Order"); and

(iii) an order that Mr. Moyse was in contempt of an interim consent order of Firestone J., dated July 16, 2014 (the "Contempt Order");

(b) On July 7, 2015, Justice Glustein dismissed the plaintiff's motion in its entirety;

(c) The order dismissing the motion for the Voting Injunction, the Imaging Order and the Contempt Order is an interlocutory order;

(d) The Court of Appeal for Ontario does not have jurisdiction to hear appeals from an interlocutory order of a judge of the Superior Court of Justice;

(e) An appeal from an interlocutory order of a judge of the Superior Court of Justice lies only to the Divisional Court, and only with leave of that court;

(f) Pursuant to the practice direction of the Court of Appeal for Ontario:

(i) motions to quash appeals are heard by a panel of the court; and

(ii) where the basis for the motion to quash is that the court lacks jurisdiction to hear the appeal, the motion will be scheduled at an early date.

(g) Sections 6(1)(b), 7(3), 19(1)(b) and 134(3) of the *Courts of Justice Act*, RSO 1990, c C.43;

(h) Rules 37, 61.16 and 62.02 of the *Rules of Civil Procedure*, RRO 1990, Reg 194.

(i) Practice Direction Concerning Civil Appeals in the Court of Appeal, October 7, 2003, Part 5.

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

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

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

August 4, 2015

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
robert.centa@paliareroland.com

Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com

Lawyers for the Defendant,
Brandon Moyse

TO: **Lax O'Sullivan Scott Lisus LLP**
Barristers and Solicitors
145 King Street West
Suite 1920
Toronto, ON M5H 1J8
Tel: 416.598.1744
Fax: 416.598.3730

Rocco Di Pucchio
Tel: 416.598.2268

Andrew Winton
Tel: 416.644.5342

Lawyers for the Plaintiff

AND TO: **Davies Ward Phillips & Vineberg LLP**
Barristers and Solicitors
1 First Canadian Place
44th Floor
Toronto, ON M5X 1B1
Tel: 416.863.0900
Fax: 416.863.0871

Matthew Milne-Smith
Tel: 416.863.5595

Andrew Carlson
Tel: 416.367.7437

Lawyers for the Defendant,
West Face Capital Inc.

Court File No. C60799

THE CATALYST CAPITAL GROUP INC.
Plaintiff
(Appellant)

-and-

BRANDON MOYSE et al.
Defendants
(Respondents)

M45378

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
robert.centa@paliareroland.com
Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com

Lawyers for the Defendant (Respondent),
Brandon Moyse

6

TAB 2

7

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

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

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

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

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

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

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

(Signature of Judge)

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

330 UNIVERSITY AVE.
7TH FLOOR
TORONTO, ONTARIO
M5G 1R7

330 AVE. UNIVERSITY
7E ÉTAGE
TORONTO, ONTARIO
M5G 1R7

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

AUG 2 6 2015

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

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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

Rocco DiPucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: (416) 644-5342

Fax: (416) 598-3730

Lawyers for the Plaintiff

TAB 3

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

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

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

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

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

HEARD: July 2, 2015

ENDORSEMENT

Nature of motion and overview

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

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

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

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

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

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

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

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

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

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

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

The Voting Injunction

a) The failure to provide an undertaking

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Imaging Order

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

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

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

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

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

[47] Under Rule 30.06, the principle remains that a party has an obligation under the *Rules* to produce relevant documents, and the court will only order further and better production if there is good reason to believe that the responding party has not complied with its production obligations. I agree that the same approach should apply to a request that a responding party image computer servers and electronic devices.

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

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

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

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

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

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

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

[54] West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer.

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

[56] Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

[57] For the above reasons, I find that Catalyst has not met its burden to establish that West Face has engaged in any destruction of evidence or in any conduct "designed to hide or delete electronic or other information". Consequently, I dismiss the motion for an Imaging Order.

Contempt Order

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

[59] I summarize the relevant legal principles below:

(i) The contempt power rests on the power of the court to uphold its dignity and process. It is necessary to maintain the rule of law (*Carey v. Laiken*, 2015 SCC 17 ("*Carey*"), at para. 30);

(ii) There are three elements which must be established beyond a reasonable doubt before a court may make a finding of civil contempt:

(a) The order that was breached must state clearly and unequivocally what should and should not be done;

(b) The party alleged to have breached the order must have had actual knowledge of it; and

(c) The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey*, at paras. 31-35);

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

(iv) The contempt power is discretionary and courts should discourage its routine use to obtain compliance with court orders. The contempt power should be used "cautiously and with great restraint" and as "an enforcement power of last rather than first resort" (*Carey*, at para. 36); and

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

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

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

a) The relevant evidence

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

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

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

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

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

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

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

b) Deleting personal browsing history

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

[70] The Consent Order only requires Moyse to preserve and maintain records "that relate to Catalyst", "relate to their activities since March 27, 2014" or "are relevant to any of the matters raised in this action".

[71] If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.

[72] Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

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

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

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

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

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

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

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

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

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

c) Use of the Secure Delete program

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

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

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

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

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

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

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

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

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

Order and costs

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

Brown J.

GLUSTEIN J.

Date: 20150707

TAB 4

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Party

NOTICE OF MOTION

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

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] orally.

THE MOTION IS FOR

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

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

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

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

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

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

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

(1) who authored the email;

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

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

(4) the subject line of the email;

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

(6) the contents of the email; and

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

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

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

THE GROUNDS FOR THE MOTION ARE

The Parties to this Action

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

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

(c) The defendant Brandon Moyse ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014. Moyse was one of only two analysts and

had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

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

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

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

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

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

(h) As discussed in detail below, this statement is wrong: in March 2014, Tom Dea, a Partner at West Face ("Dea"), expressly asked Moyse to send him samples of his

work at Catalyst, and Moyse sent Dea four Catalyst investment analysis memos stamped "Confidential" and "For Internal Discussion Purposes Only".

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

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

The Interim Injunction

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

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

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

(iii) 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

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

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

Moyse Communicated Catalyst's Confidential Information to West Face

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

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

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

(p) In response to this request, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contain Moyse's and other Catalyst employees' analyses of investment opportunities and were marked "Confidential" and "For Internal Discussion Purposes Only".

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

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

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

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

Moyse Reviewed Confidential Information Unrelated to his Work before he Resigned

(u) In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time period when Catalyst was active in an investment in Stelco. Catalyst and West Face were in direct competition with respect to the Stelco situation. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.

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

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

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

Moyse Retained Hundreds of Catalyst Documents After He Left Catalyst

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

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

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

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

West Face's Porous Confidential Wall

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

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

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

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

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

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

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

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

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

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

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

West Face Purchased Wind Using Catalyst's Confidential Information

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

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

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

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

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

The Interlocutory Injunction and the ISS

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

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

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

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

(i) West Face: 5,360;

(ii) Callidus: 132;

(iii) Wind: 26,118;

(iv) Mobilicity: 768;

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

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

(vii) Dea: 4,013;

(viii) Auction: 6,489;

(ix) Spectrum: 3,852.

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

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

The Callidus Report

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

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

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

(ww) The identity of Callidus's borrowers is, in large part, not public information. If West Face had access to information about Callidus's borrowers, it obtained that information through improper means, likely from Moyse, who had no involvement with Callidus and yet who had 132 Callidus "hits" on his personal computer.

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

The Upcoming Spectrum Auction

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

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

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

Irreparable Harm

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

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

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

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

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

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

(a) The pleadings in this action;

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

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

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

January 13, 2015

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

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

TO: **DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Jeff Mitchell
Tel: (416) 863-4660

Andy Pushalik
Tel: (416) 862-3468

Fax: (416) 863-4592

Lawyers for the Defendant, West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF MOTION

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

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff/Moving Party

TAB 5

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Responding Party

AMENDED NOTICE OF MOTION

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

PROPOSED METHOD OF HEARING: The Motion is to be heard

[X] orally.

THE MOTION IS FOR

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

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

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

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

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

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

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

(1) who authored the email;

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

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

(4) the subject line of the email;

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

(6) the contents of the email; and

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

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

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

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

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

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

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

THE GROUNDS FOR THE MOTION ARE

The Parties to this Action

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

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

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

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

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

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

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

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

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

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

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

The Interim Injunction

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

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

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

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

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

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

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

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

Moyse Communicated Catalyst's Confidential Information to West Face

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

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

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

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

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

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

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

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

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

Moyse Reviewed Confidential Information Unrelated to his Work before he Resigned

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

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

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

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

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

Moyse Retained Hundreds of Catalyst Documents After He Left Catalyst

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

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

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

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

West Face's Porous Confidential Wall

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

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

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

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

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

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

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

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

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

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

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

West Face Purchased Wind Using Catalyst's Confidential Information

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

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

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

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

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

The Interlocutory Injunction and the ISS

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

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

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

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

(i) West Face: 5,360;

(ii) Callidus: 132;

(iii) Wind: 26,118;

(iv) Mobilicity: 768;

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

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

(vii) Dea: 4,013;

(viii) Auction: 6,489;

(ix) Spectrum: 3,852.

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

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

Moyse's Contempt

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

54

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The Callidus Report

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

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

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

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

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

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

The Upcoming Spectrum Auction

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

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

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

Irreparable Harm

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

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

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

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

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

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

(a) The pleadings in this action;

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

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

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

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

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

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

Rocco Di Pucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff

TO: **DENTONS CANADA LLP**
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto ON M5K 0A1

Jeff Mitchell
Tel: (416) 863-4660

Andy Pushalik
Tel: (416) 862-3468

Fax: (416) 863-4592

Lawyers for the Defendant, West Face Capital Inc.

AND TO: **GROSMAN GROSMAN & GALE LLP**
Barristers and Solicitors
390 Bay Street
Suite 1100
Toronto ON M5H 2Y2

Jeff C. Hopkins
Tel: (416) 364-9599
Fax: (416) 364-2490

Justin Tetreault
Tel: (416) 364-9599
Fax: (416) 364-249

Lawyers for the Defendant,
Brandon Moyse

TAB 6

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE 16TH
	)	
MR. JUSTICE JUSTICE FIRESTONE	)	DAY OF JULY, 2014

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

ORDER

THIS MOTION, made by the Plaintiff for interim relief, was heard this day at the court house, 393 University Avenue, Toronto, Ontario, M5G 1E6.

On being advised of the consent of the parties to the following interim terms up to and including August 7, 2014, the hearing of the Plaintiff's motion for injunctive relief,

1. THIS COURT ORDERS that pending a determination of an interlocutory injunction or until varied by further Order of this Court, the defendant Brandon Moyse ("Moyse"), or anyone acting on his behalf or at his direction, is enjoined 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. ("Catalyst") and all confidential information and/or proprietary third party information provided to Catalyst.

2. THIS COURT FURTHER ORDERS that until an interlocutory injunction is determined or until varied by further Order of this Court, Moyse is enjoined from engaging in activities competitive to Catalyst and shall fully comply with the restrictive covenants set forth in his Employment Agreement dated October 1, 2012.

3. THIS COURT FURTHER ORDERS that Catalyst shall pay Moyse his West Face Capital Inc. ("West Face") salary throughout this period.

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

5. 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, Grosman, Grosman and Gale LLP ("GGG") for the taking of a forensic image of the data stored on the Devices (the "Forensic Image"), to be conducted by a professional firm as agreed to between the parties.

6. THIS COURT FURTHER ORDERS that the costs of the Forensic Image shall be sent to and borne by Catalyst.

7. THIS COURT FURTHER ORDERS that the Forensic Image shall be held in trust by GGG pending the outcome of the interlocutory motion.

8. THIS COURT FURTHER ORDERS that prior to the return of the 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.

9. 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.

10. THIS COURT FURTHER ORDERS that the Court File in this matter (Court File No. CV-14-507120) shall be sealed pending the outcome of the interlocutory relief motion.

11. THIS COURT FURTHER ORDERS that costs of this interim relief motion shall be reserved to the judge hearing the interlocutory relief motion.

ENTERED AT / INSCRIT À TORONTO
ON / BOOK NO:
LE / DANS LE REGISTRE NO.:
JUL 2 2 2014
PER / PAR:

Justice Firestone

Justice Stephen E. Firestone

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

ORDER

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

Rocco DiPucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: (416) 644-5342
Fax: (416) 598-3730

Lawyers for the Plaintiff

TAB 7

65

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

NOTICE OF APPEAL

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

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

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

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

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

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

i. who authored the email;

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

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

iv. the subject line of the email;

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

vi. the contents of the email; and

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

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

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

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

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

67

THE GROUNDS OF APPEAL are as follows:

A. Background to this Action

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

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

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

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

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

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

68

B. The Interim Order

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

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

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

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

C. Moyse's Contempt of the Interim Order

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

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

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

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

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

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

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

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

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

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

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

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

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

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

D. Appeal of the Contempt Decision

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

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

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

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

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

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

E. Appeal of the ISS Decision

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

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

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

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

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

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

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

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

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

4. Leave to appeal is not required.

July 22, 2015

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

Rocco DiPucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Plaintiff/Appellant

TO:

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
Barristers and Solicitors
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1

Chris G. Paliare LSUC#: 13367P
Tel: (416) 646-4318
Fax: 416-646-4301
Robert A. Centa LSUC#: 44298M
Tel: (416) 646-4314
Fax: 416-646-4301
Kristian Borg-Olivier LSUC#: 53041R
Tel: (416) 646-7490
Fax: 416-646-4301

Lawyers for the Defendant/Respondent,
Brandon Moyse

74

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
Barristers and Solicitors
40th Floor - 155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith LSUC#: 44266P
Tel: (416) 863-0900
Fax: (416) 863-0871
Andrew Carlson LSUC#: 58850N
Tel: (416) 863-0900
Fax: 416-863-0871

Lawyers for the Defendant/Respondent,
West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

BRANDON MOYSE et al.
Defendants (Respondents)

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

NOTICE OF APPEAL

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

Rocco DiPucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: (416) 644-5342

Fax: (416) 598-3730

Lawyers for the Plaintiff/Appellant

75

76

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

COURT OF APPEAL FOR ONTARIO

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

APPELLANT'S CERTIFICATE

The Appellant certifies that the following evidence is required for the Appeal, in the Appellant's opinion:

1. Motion Record;
2. Supplementary Motion Record;
3. Second Supplementary Motion Record;
4. Responding Motion Record of the Defendant West Face Capital Inc. (4 volumes);
5. Supplementary Motion Record of the Defendant West Face Capital Inc.;
6. Responding Motion Record of the Defendant Brandon Moyse;
7. Supplementary Responding Motion Record of the Defendant Brandon Moyse; and
8. Joint Supplementary Responding Motion Record.

77

July 22, 2015

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

Rocco DiPucchio LSUC#: 38185I
Tel: (416) 598-2268
rdipucchio@counsel-toronto.com

Andrew Winton LSUC#: 54473I
Tel: (416) 644-5342
awinton@counsel-toronto.com

Fax: (416) 598-3730

Lawyers for the Appellant

TO:

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
Barristers and Solicitors
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1

Chris G. Paliare LSUC#: 13367P
Tel: (416) 646-4318
Fax: 416-646-4301
Robert A. Centa LSUC#: 44298M
Tel: (416) 646-4314
Fax: 416-646-4301
Kristian Borg-Olivier LSUC#: 53041R
Tel: (416) 646-7490
Fax: 416-646-4301

Lawyers for the Respondent,
Brandon Moyse

AND TO: **DAVIES WARD PHILLIPS & VINEBERG LLP**
Barristers and Solicitors
40th Floor - 155 Wellington Street West
Toronto ON M5V 3J7

Matthew Milne-Smith LSUC#: 44266P
Tel: (416) 863-0900
Fax: (416) 863-0871
Andrew Carlson LSUC#: 58850N
Tel: (416) 863-0900
Fax: 416-863-0871

Lawyers for the Respondent,
West Face Capital Inc.

THE CATALYST CAPITAL GROUP INC.
Appellant

-and-

BRANDON MOYSE et al.
Respondents

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

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

APPELLANT'S CERTIFICATE

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

Rocco DiPucchio LSUC#: 38185I
rdipucchio@counsel-toronto.com
Tel: (416) 598-2268

Andrew Winton LSUC#: 54473I
awinton@counsel-toronto.com
Tel: (416) 644-5342

Fax: (416) 598-3730

Lawyers for the Appellant

TAB 8

Court File No. C60799/M45378

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant/Responding Party)

and

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

Defendants
(Respondents/Moving Parties)

AFFIDAVIT OF JANICE PATTERSON

I, Janice Patterson, of the City of Mississauga, MAKE OATH AND SAY:

1. I am a legal assistant to Denise Cooney at Paliare Roland Rosenberg Rothstein LLP ("Paliare Roland"), the lawyers for the respondent and moving party, Brandon Moyse, and, as such, have knowledge of the matters contained in this affidavit.

2. I attach a copy of the letter sent by Kris Borg-Olivier of Paliare Roland to Andrew Winton of Lax O'Sullivan Scott Lisus LLP, lawyers for the appellant and responding party The Catalyst Capital Group Inc., dated July 24, 2015, as **Exhibit "A"** to my affidavit.

3. I make this affidavit in support of and for no other purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on September 9, 2015

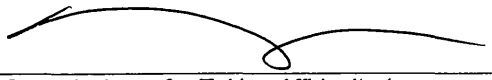
Commissioner for Taking Affidavits
(or as may be)

Denise Cooney

Janice Patterson

TAB A

This is Exhibit "A" referred to in the Affidavit of Janice Patterson sworn September 9, 2015



Commissioner for Taking Affidavits (or as may be)

Denise Cooney

PALIARE ROLAND
BARRISTERS

Kris Borg-Olivier
T 416.646.7490 Asst 416.646.7435
F 416.646.4301
E kris.borg-olivier@paliareroland.com
www.paliareroland.com

File 23622

July 24, 2015

VIA EMAIL

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

Dear Mr. Winton:

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

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

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

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

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

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

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Kris Borg-Olivier

Encl.

c: Matthew Milne-Smith / Andrew Carlson

Case Name:

Simmonds v. Simmonds

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

[2013] O.J. No. 4680

2013 ONCA 479

117 O.R. (3d) 479

Docket: C56555

Ontario Court of Appeal
Toronto, Ontario

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

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

(6 paras.)

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

Appeal From:

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

Counsel:

Peter M. Callahan, for the appellant.

Orlando da Silva Santos, for the respondent.

ENDORSEMENT

The judgment of the Court was delivered by

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

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

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

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

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

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

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

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

Court File No. C60799/M45378

THE CATALYST CAPITAL GROUP INC. Plaintiff (Appellant/Responding Party)	-and-	BRANDON MOYSE et al. Defendants (Respondents/Moving Parties)

COURT OF APPEAL FOR ONTARIO

AFFIDAVIT OF JANICE PATTERSON

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
robert.centa@paliareroland.com
Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com
Denise Cooney (LSUC# 64358R)
Tel: 416.646.74908
denise.cooney@paliareroland.com

Lawyers for the Defendant (Respondent/Moving Party), Brandon Moyse

Court File No. C60799/M45378

THE CATALYST CAPITAL GROUP INC. Plaintiff (Appellant/Responding Party)	-and-	BRANDON MOYSE et al. Defendants (Respondents/Moving Parties)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

MOTION RECORD
(Motion to quash appeal)

Paliare Roland Rosenberg Rothstein LLP
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1
Tel: 416.646.4300
Fax: 416.646.4301

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
robert.centa@paliareroland.com
Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
kris.borg-olivier@paliareroland.com
Denise Cooney (LSUC# 64358R)
Tel: 416.646.74908
denise.cooney@paliareroland.com

Lawyers for the Defendant (Respondent/Moving Party),
Brandon Moyse