Court File No. C60799/M45378

ONTARIO
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 Party)

RESPONDING MOTION RECORD
(MOTION TO QUASH RETURNABLE NOVEMBER 5, 2015)

October 23, 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/Responding Party

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

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TAB 1

Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

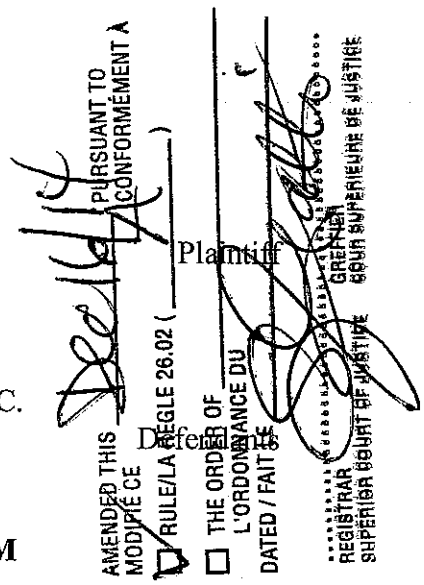
THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants



<u>AMENDED</u> <u>AMENDED</u> STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed

by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's Claim and $400.00 for costs and have the costs assessed by the Court.

Date June 25/14 ~~June 25, 2014~~ ~~October 9, 2014~~ ~~December 16, 2014~~ Issued by N. Mohammad

Local Registrar

Address of court office: 393 University Avenue
10th Floor
Toronto, Ontario
M5G 1E6

TO: Brandon Moyse
23 Brant Street, Apt. 509
Toronto ON M5V2L5

AND TO: West Face Capital Inc.
2 Bloor Street East, Suite 3000
Toronto, ON M4W 1A8

CLAIM

1. The Plaintiff claims:

(a) An interim, interlocutory and/or permanent injunction restraining the defendant Brandon Moyse ("Moyse"), his agents or any persons acting on his direction or on his behalf, and 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) Soliciting or attempting to solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised or sponsored by Catalyst or the Catalyst Fund Limited Partnership IV (the "Fund") as at June 25, 2014, until June 25, 2015;

(ii) Interfering with the Plaintiff's relationships with its employees which, without limiting the generality of the foregoing, shall include any attempt to induce employees of the Plaintiff to leave their employment with the Plaintiff; and

(iii) Using or disclosing the Plaintiff's confidential and proprietary information (including, without limitation, (i) the identity or contact information of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of the Fund, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund (iv)

investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about Catalyst and employees of Catalyst (collectively, the "Confidential Information") in any way, including in relation to any present- and future-related business;

(b) An order requiring the defendants to immediately return to Catalyst (or its counsel) all Confidential Information in their possession or control;

(c) An order prohibiting any of the defendants from, in any way, deleting, modifying or in any way interfering with any of their electronic equipment, including computers, servers and mobile devices, until further Order of this Honourable Court;

(d) An interim, interlocutory and permanent injunction prohibiting the defendant Brandon Moyse ("Moyse") from commencing or continuing employment at the defendant West Face Capital Inc. ("West Face") until December 25, 2014;

(d.1) An interim, interlocutory and permanent injunction prohibiting West Face from voting its interest in Data and Audio Visual Enterprises Wireless Inc. in any proposed transaction involving Wind Mobile;

(d.2) General damages as against West Face in an amount to be particularized prior to trial;

(d.3) A constructive trust over all property, including, but not limited to, securities, security interests, debts and other financial instruments, acquired by West Face, its officers, directors, employees, agents or any persons acting under its direction or on its behalf, as a result of its misuse of the Confidential Information;

(d.4) In addition or in the alternative to the relief sought in paragraph 1(d.3), an accounting of all profits earned by West Face, its officers, directors, employees, agents, any persons acting under its direction or on its behalf, as a result of its misuse of the Confidential Information;

(e) Punitive damages in the amount of $300,000, as against West Face, and $50,000, as against Moyse;

(f) Postjudgment interest in accordance with section 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(g) The plaintiff's costs of this action on a substantial indemnity basis, plus the applicable H.S.T.; and

(h) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

3. Catalyst uses a "flat" entrepreneurial staffing model whereby its analysts are given substantial training, autonomy and responsibility at a relatively early stage in their career as compared to its competitors in the special situations investments for control industry.

4. Moreover, Catalyst uses a unique compensation scheme to compensate its employees – in addition to their base salary and annual bonus, employees participate in a "60/40 Scheme" whereby the "carried interest" of each Fund is allocated sixty per cent to the deal team and forty per cent to Catalyst. The carried interest refers to the twenty per cent profit participation Catalyst may enjoy, subject to certain conditions.

5. Points in each deal that forms part of the sixty per cent are allocated on a deal-by-deal basis. At all material times, Catalyst employed only two investment analysts, and the deal teams on which Moyse participated involved only three or four Catalyst professionals. The 60/40 Scheme granted Catalyst's employees a partner-like interest in the success of the company.

The Defendants

6. 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 for control industry.

7. Moyse is a resident of Toronto. Pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement"), Moyse was hired as an investment analyst by Catalyst effective November 1, 2012. Moyse 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.

The Special Situation Investment Market in Canada

8. The Canadian market for special situations investing is very competitive. A small number of Canadian firms seek opportunities to invest in situations where a corporation is distressed or undervalued, or face events that can have a significant effect on the company's operations, such as proxy battles, takeovers, executive changes and board shake-ups.

9. In these special situations, an investment firm's strategic plans and investment models are crucial to successfully executing an investment plan. Confidentiality is paramount: if a competitor has access to a firm's plans and modelling for a particular special situation, the competitor can "scoop" the opportunity, or it can take an adverse investment position which make the firm's plans either too costly to execute or, depending on the timing of the adverse action, can cause the plan to incur significant losses after it is past the point of no return.

10. Depending on how advanced a firm is in executing its investment strategy, a competitor's adverse position can have disastrous, immeasurable effects on the firm's goodwill and/or will cause a firm to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

11. Within the special situations investment industry, "investment for control or influence" is a sub-industry with unique characteristics. "Investment for control or influence" refers to acquiring controlling or influential equity or debt positions in distressed companies in order to add value through operational involvement in an investment target by, among other things:

(a) Appointing a representative as interim CEO and other senior management;

(b) Replacing or augmenting management;

(c) Providing strategic direction and industry contacts;

(d) Establishing and executing turnaround plans;

(e) Managing costs through a rigorous working capital approval process; and

(f) Identifying potential add-on acquisitions.

12. The "investment for control or influence" sub-industry within the distressed investment industry has unique needs, including the need to ensure that employees are unable to resign and begin working for a competitor for a reasonable period of time in order to ensure that the competitor is unable to take advantage of the former employee's knowledge of the firm's strategic plans and models.

13. In the special situations for control industry, information is critical. The ability to collect and analyze information and to prepare confidential plans for complex investment opportunities is the difference between a plan's success or failure. For this reason, it is commonplace for firms specializing in the special situations for control or influence industry to require its employees to agree to a non-competition covenant prior to commencing employment. Likewise, when a competitor hires directly from a firm within the industry, it is commonplace for the competitor to respect the other firm's non-competition covenant by not directly employing a lateral hire in the same market as they worked for the competitor during the term of the non-competition covenant.

The Employment Agreement

14. Under the Employment Agreement, Moyse was paid an initial salary of $90,000 and an annual bonus of $80,000. Moyse was also granted options on equity in Catalyst and participated

in the 60/40 Scheme. Moyse's equity compensation (options and the 60/40 Scheme) was equal to or exceeded his base salary and annual bonus.

15. The Employment Agreement also included the following non-competition, non-solicitation and confidential information covenants (together, the "Restrictive Covenants"):

> Non-Competition
>
> You agree that while you are employed by the Employer and for a period of six months thereafter, if you leave of your own volition or are dismissed for cause and three months under any other circumstances, you shall not, directly or indirectly within Ontario:
>
> (i) engage in or become a party with an economic interest in any business or undertaking of the type conducted by [Catalyst] or the Fund or any direct Associate of [Catalyst] within Canada, as the term Associate is defined in the *Ontario Business Corporations Act* (collectively the "protected entities"), or attempt to solicit any opportunities of the type for which the protected entities or any of them had a reasonable likelihood of completing an offering while you were under [Catalyst]'s employ; and
>
> (ii) render any services of the type outlined in subparagraph (i) above, unless such services are rendered as an employee of or consultant to [Catalyst];
>
> Non-Solicitation
>
> You agree that while you are employed by the Employer and for a period of one year after your employment ends, regardless of the reason, you shall not, directly or indirectly:
>
> (i) hire or attempt to hire or assist anyone else to hire employees of any of the protected entities who were so employed as at the date you cease to be an employee of [Catalyst] or persons who were so employed during the 12 months prior to your ceasing to be an employee of [Catalyst] or induce or attempt to induce any such employees of any of the protected entities to leave their employment; or
>
> (ii) solicit equity or other forms of capital for any partnership, investment fund, pooled fund or other form of investment vehicle managed, advised and/or sponsored by any of the protected entities as at the date you ceased to be an employee of [Catalyst] or during

the 12 months prior to your ceasing to be an employee of [Catalyst].

Confidential Information

You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of same, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such-partnership of or any such partnership or fund, (iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio, (ix) prospective dispositions from any such portfolio, and (x) personal information about [Catalyst] and employees of [Catalyst] and the like (collectively "Confidential Information"). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute "Confidential Information".

You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.

After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular' businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].

16. Moyse agreed that the Restrictive Covenants were reasonable and necessary and reflected a mutual desire of Moyse and Catalyst that the Restrictive Covenants would be upheld in their entirety and be given full force and effect. In addition, Moyse acknowledged that if he breached the terms of the Restrictive Covenants, it would cause Catalyst irreparable harm and that Catalyst

would be entitled to injunctive relief to prevent him from continuing to breach the Restrictive Covenants.

17. Under the Employment Agreement, Moyse was required to give Catalyst a minimum of thirty days' written notice of his intention to terminate his employment.

18. Moyse executed the Employment Agreement on October 3, 2012. In so doing, he acknowledged that he reviewed, understood and accepted the terms of the Employment Agreement, and that he had an adequate opportunity to seek and receive independent legal advice prior to executing the Employment Agreement.

Moyse Breaches the Employment Agreement

19. On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to begin working for West Face.

20. Through its counsel, Catalyst communicated its intention to enforce the Restrictive Covenants. Through their counsel, the Defendants responded by communicating their intention to breach the Restrictive Covenants, in particular the non-competition covenant.

21. Moreover, on our about June 18, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face on June 23, 2014, prior to the expiry of the thirty-day notice period provided for in the Employment Agreement.

22. Catalyst continued to pay Moyse his salary until June 20, 2014, when it became clear to Catalyst that Moyse intended to breach the Employment Agreement.

The Misappropriation and Conversion of Catalyst's Confidential Information

23. As part of his deal screening/analysis responsibilities, Moyse performed valuations of companies using methodologies that are proprietary and unique to Catalyst in order to identify new investment opportunities for Catalyst.

24. Moyse received the Confidential Information in his capacity as an analyst at Catalyst, as acknowledged in the Employment Agreement.

25. In breach of his duty of confidence, Moyse forwarded the Confidential Information from his work email address – which is controlled by Catalyst – to his personal email address and to his personal Internet file storage accounts – which he alone controls – without Catalyst's knowledge or approval. The Confidential Information Moyse forwarded to his personal control includes information concerning projects Moyse was working on immediately prior to his resignation from Catalyst, including, but not limited to:

(a) Catalyst Weekly Reports – this document contains a summary of all existing investments and contemplated investment opportunities;

(b) Quarterly letters reporting on results of Catalyst's activities;

(c) Internal research reports;

(d) Internal presentations and supporting spreadsheets; and

(e) Internal discussions regarding the operations of companies in which Catalyst has made investments.

26. There was no legitimate business reason for Moyse to deal with the Confidential Information in this manner.

27. Moyse has wrongfully and unlawfully taken Catalyst's Confidential Information to advance his own business interests, and the interests of West Face, to the detriment of Catalyst. The Confidential Information was imparted to Moyse in confidence during the course of his employment with Catalyst and the unauthorized use of such information by the Defendants constitutes a breach of confidence.

West Face Induced Moyse to Breach the Employment Agreement

28. West Face and Moyse engaged in prolonged discussions regarding Moyse's resignation from Catalyst and immediate employment at West Face thereafter. During the course of these discussions, the parties discussed Moyse's contractual obligations to Catalyst.

29. Prior to Moyse's resignation from Catalyst, West Face was aware of the terms of the Employment Agreement and Moyse's duties and obligations to Catalyst, including the Restrictive Covenants. Nevertheless, West Face unlawfully induced Moyse to breach the Employment Agreement with, and his obligations owed to, Catalyst, including, but not limited to the Restrictive Covenants.

30. Moyse and West Face knew that Catalyst intended to promote Moyse to the position of "associate" in 2014. But for West Face's inducement to Moyse to resign from Catalyst and commence employment at West Face before the end of the six-month non-competition period, Moyse would still be employed at, and would continue to honour his contractual obligations to, Catalyst.

Catalyst Will Suffer Irreparable Harm

31. Catalyst will suffer irreparable harm as a result of West Face's unlawful inducement of Moyse to breach the Employment Agreement. In particular, without limiting the generality of the foregoing, Catalyst risks losing its strategic advantage with respect to distress for control investments it has been planning for several months of which Moyse, in his role as analyst at Catalyst, is aware.

32. If Moyse is permitted to commence employment at West Face, a direct competitor to Catalyst, before the expiry of the six-month non-competition period, West Face will gain an unfair advantage in the small distressed investing for control industry by learning about investment opportunities Catalyst was studying and Catalyst's plans for taking advantage of those opportunities.

33. These opportunities and strategies are unique to Catalyst and are crucial to its success – if those plans are compromised, Catalyst will suffer a loss that cannot be measured in mere damages. The damage will include damage to Catalyst's reputation as a leading distress for control investor and to its ability to solicit additional investments in its funds.

34. Moreover, by using the Confidential Information for their personal benefit and to Catalyst's detriment, Moyse and West Face will cause Catalyst to incur large financial losses that are difficult to accurately quantify given the unpredictable range of possible outcomes for a given investment.

West Face Misused Catalyst's Confidential Information Concerning the Wind Opportunity

34.1 One of the special situations that Catalyst was studying before Moyse terminated his employment with Catalyst concerned Wind Mobile ("Wind"), a Canadian wireless

telecommunications company. Moyse was a member of Catalyst's investment team studying the Wind opportunity and was privy to Catalyst's Confidential Information concerning its plans concerning Wind opportunity, which included a potential acquisition of Wind.

34.2 In June 2014, Catalyst brought a motion for interim and interlocutory relief seeking, among other things, the return of any and all Confidential Information from West Face and Moyse. In particular, Catalyst was concerned about the potential communication of its Confidential Information relating to the Wind opportunity.

34.3 Catalyst's motion for interim relief was heard on July 16, 2014 and settled on consent.

34.4 Catalyst's motion for interlocutory relief was scheduled to be heard on August 7, 2014 but was adjourned to October 10, 2014. As a result, the motion for interim relief has not yet been determined.

34.5 On or about September 16, 2014, West Face publicly announced that it was leading a consortium of investors to purchase Wind. This was the very outcome Catalyst was concerned about when it learned that Moyse, a participant on Catalyst's Wind team, was joining West Face.

34.6 West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyse, to obtain an unfair advantage over Catalyst in its negotiations with Wind. But for the transmission of Confidential Information concerning Wind from Moyse to West Face, West Face would not have successfully negotiated a purchase of Wind.

34.7 As a result of West Face's misuse of Catalyst's Confidential Information, Catalyst has suffered damages, particulars of which will be provided prior to trial.

Through Moyse, West Face has Catalyst's Confidential Information Concerning Mobilicity

34.8 On September 29, 2013, Data & Audio-Visual Enterprises Holdings Inc. ("Holdings") and its wholly owned subsidiaries, Data & Audio-Visual Enterprises Wireless Inc. ("Wireless") and 8440522 Canada Inc. (collectively with Wireless and Holdings, the "Applicants" or "Mobilicity") filed an application for an Initial Order under the *Companies' Creditors Arrangement Act* (Canada) ("CCAA") in order to restructure their business and affairs or complete a sale of their business and assets.

34.9 Catalyst owns over $60 million in First Lien Notes issued by Wireless pursuant to a First Lien Indenture dated April 20, 2011 (the "First Lien Notes").

34.10 West Face owns approximately $3 million in First Lien Notes.

34.11 For several months, both before and after Mobilicity applied for CCAA protection, Catalyst studied Mobilicity as a special situation. Moyse was a member of Catalyst's investment team in the Mobilicity situation. In that respect, Moyse was privy to Catalyst's confidential information concerning its analysis of the Mobilicity situation.

34.12 West Face has wrongfully used Catalyst's Confidential Information concerning the Mobilicity opportunity to obtain an unfair advantage over Catalyst with respect to that opportunity. If West Face is able to vote its interest in Mobilicity with the benefit of its wrongful possession of Catalyst's Confidential Information, Catalyst will suffer irreparable harm.

Unjust Enrichment

34.13 As a result of the foregoing, West Face has been enriched by its wrongful conduct. It has managed to acquire property, including, but not limited to, securities, secured debt and other

financial instruments, that it would not have been able to acquire but for its misuse of Catalyst's Confidential Information.

34.14 Catalyst suffered a deprivation that corresponds to West Face's enrichment. But for West Face's conduct, Catalyst would have acquired the property that West Face acquired through its misuse of Catalyst's Confidential Information.

34.15 There is no juristic reason for West Face's enrichment and it would be unjust for West Face to retain the property it acquired through its wrongful conduct. Catalyst is entitled to a constructive trust over all property acquired by West Face to remedy West Face's unjust enrichment resulting from its misuse of Catalyst's Confidential Information.

34.16 In addition or in the alternative, if a constructive trust is unavailable because West Face has sold the property it wrongfully acquired or for any other reason, Catalyst is entitled to an accounting of all profits earned by West Face as a result of its misuse of Catalyst's Confidential Information and payment of those profits to Catalyst.

Punitive Damages

35. Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's rights and interests so as to entitle ~~Execaire~~ Catalyst to a substantial award of punitive, aggravated and exemplary damages.

36. Accordingly, the Defendants are liable, on a joint and several basis, to the Plaintiff for punitive damages as described in subparagraph 1(e) above.

37. Catalyst proposes that this action be tried at Toronto.

~~June 25, 2014~~
October 9, 2014

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

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

STATEMENT OF CLAIM

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

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

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

Fax: (416) 598-3730

Lawyers for the Plaintiff

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TAB 2

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 22 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 3

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

ONTARIO

SUPERIOR COURT OF JUSTICE

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

LEDERER J.:

INTRODUCTION

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

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

BACKGROUND

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

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

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

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

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

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

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

MARCH 27, 2014 E-MAIL AND THE INVESTMENT MEMOS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

and:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE AFFIDAVIT OF DOCUMENTS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

THE PERSONAL COMPUTER OF BRANDON MOYSE

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

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

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

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

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

- on March 28, 2014, over an eleven-minute period, Brandon Moyse accessed a series of files from an 'Investors Letters' directory;[57]

- on April 25, 2014, over a seventy-minute period, Brandon Moyse accessed several files which contain the word 'Stelco' in the file directory or in the file name; [58]

- on May 13, 2014, over a sixty-one-minute period, Brandon Moyse accessed several files through his Dropbox account which had the name 'Masonite' in the file name;[59]

- also, on May 13, 2014, over a twenty-four-minute period, Brandon Moyse accessed several files from a '2014 Potential Investment' directory.[60]

- on May 26, 2014, at 12:31 p.m., Brandon Moyse accessed a document entitled '14-05-26 Notes' from a directory entitled 'Monday Meeting'.[61]

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

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

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

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

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

THE MOTION

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

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

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

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

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

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

[43] As matters have developed:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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[75] *Omega Digital Data Inc. v. Airos Technology Inc.*, 32 O.R. (3d) 21, [1996] O.J. No. No 5382 (Gen, Div.), at para. 10.

[76] *Ibid*, quoting *Matrox Electronic Systems Ltd. v. Godrow*, [1993] R.J.Q. 2249 (S.C.), at p. 2246.

[77] *Notice of Motion*, dated June 26, 2014, at para. (f).

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

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

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

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

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

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

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

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

[79] *Ibid.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

  and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(iii) Where does the balance of convenience lie?

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

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

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

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

[82] The balance of convenience favours Catalyst.

CONCLUSION

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

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

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

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

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

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

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

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

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

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

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

COSTS

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

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

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

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

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

LEDERER J.

Released: 20141110

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

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

JUDGMENT

LEDERER J.

Released: 20141110

TAB 4

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.

GLUSTEIN J.

Date: 20150707

TAB 5

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 6

Court of Appeal File No. C60799
Court File No. CV-14-507120

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Appellant

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Respondents

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.

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.

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

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

TAB 7

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 Party)

AFFIDAVIT OF JESSICA ZHI

I, Jessica Zhi, of the City of Toronto, MAKE OATH AND SAY:

1. I am a Law Clerk with the law firm of LAX O'SULLIVAN SCOTT LISUS LLP, the lawyers for the Appellant, and, as such, have knowledge of the matters contained in this affidavit. Where my knowledge is based on information, I identify the source of that information and do verily believe it to be true.

2. Attached as Exhibit "A" to this affidavit is a letter dated August 14, 2015 from Robert Centa, counsel for Brandon Moyse, to Justice Glustein.

3. In this letter, Mr. Centa wrote,

> The only issue before the court on this motion with respect to Mr. Moyse was whether or not he was in contempt of the order of Justice Firestone. Your Honour held that the Catalyst had not met its burden of proving that Mr. Moyse had breached the order. That issue will not be before the court again.

4. I swear this affidavit in relation to Mr. Moyse's motion to quash the Appellant's appeal and for no other or improper purpose.

SWORN BEFORE ME at the City of Toronto, in the Province of Ontario on October 15th, 2015,

Commissioner for Taking Affidavits, etc.

ANDREW WINTON

JESSICA ZHI

This is Exhibit "A" referred to in the Affidavit of
Jessica Zhi sworn October 15, 2015

Commissioner for Taking Affidavits (or as may be)

ANDREW WINTON

PALIARE ROLAND
BARRISTERS

Robert A. Centa
T 416.646.4314 Asst 416.646.7418
F 416.646.4301
E robert.centa@paliareroland.com
www.paliareroland.com

File 23622

August 14, 2015

VIA PDF EMAIL & PROCESS SERVER

Justice Benjamin Glustein
361 University Avenue, Room 170
Toronto, Ontario M5G 1T3

Your Honour:

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

The responding party, Brandon Moyse, adopts and supports West Face's reply costs submissions dated August 11, 2015. In particular, Mr. Moyse adopts West Face's submissions in response to Catalyst's argument that the responding parties' costs of this motion should be made payable in the event of the cause because "[m]ost of the matters at issue ... will ultimately be determined at trial".[1]

Mr. Moyse disagrees. The only issue before the court on this motion with respect to Mr. Moyse was whether or not he was in contempt of the order of Justice Firestone. Your Honour held that the Catalyst had not met its burden of proving that Mr. Moyse had breached the order. That issue will not be before the court again. Contrary to Catalyst's submission that "[m]ost if not all of the evidence produced by the parties [on the motion] will form part of the trial record",[2] none of the evidence led by Mr. Moyse is likely to form part of the trial record. In particular, the extensive forensic evidence will have no relevance at trial.

Mr. Moyse requests an order awarding him his costs against Catalyst on a partial indemnity scale in the amount of $110,000.00, inclusive of HST, plus disbursements.

Yours very truly,
PALIARE ROLAND ROSENBERG ROTHSTEIN LLP

Robert A. Centa
RAC:d

c: B. Moyse
Matthew Milne-Smith / Andrew Carlson @ Davies Ward Phillips & Vineberg LLP
Rocco DiPucchio / Andrew Winton @ Lax O'Sullivan Scott Lisus LLP

Doc 1578059 v1

[1] Catalyst costs submissions, dated August 4, 2015, para. 2.
[2] Catalyst costs submissions, dated August 4, 2015, para. 8.

THE CATALYST CAPITAL GROUP INC.
Plaintiff/Appellant (Responding Party)

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants/Respondents (Moving Party)

Court File No. C60799/M45378

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

AFFIDAVIT OF JESSICA ZHI

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

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

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

Fax: (416) 598-3730

Lawyers for the Appellant/Responding Party,
The Catalyst Capital Group Inc.

THE CATALYST CAPITAL GROUP INC.
Appellant/Responding Party

-and-

BRANDON MOYSE et al.
Respondents/Moving Party

Court File No. C60799/M45378

ONTARIO
COURT OF APPEAL

PROCEEDING COMMENCED AT
TORONTO

RESPONDING MOTION RECORD
(MOTION TO QUASH RETURNABLE
NOVEMBER 5, 2015)

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/Responding Party