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