Divisional Court File No.: 541/14
Divisional Court File No.: 542/14
Superior Court of Justice Court File No.: CV-14-507120

ONTARIO

DIVISIONAL COURT, SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/
Responding Party

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Moving Parties

REPLY FACTUM OF THE DEFENDANT/MOVING PARTY, WEST FACE CAPITAL INC.

[MOTION FOR LEAVE TO APPEAL – RULE 62.02]

Dated: February 13, 2015

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SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

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PART I – OVERVIEW

1. This Reply Factum is provided in response to the Factum served by the Plaintiff/Responding Party, The Catalyst Capital Group Inc. ("**Catalyst**"), dated February 3, 2015 (the "**Catalyst Factum**"), in respect of the interlocutory injunction order of the Honourable Mr. Justice Lederer dated November 10, 2014. The Court ordered that the Defendant, Brandon Moyse ("**Brandon**"), be enjoined from competing with Catalyst in compliance with a non-competition covenant (the "**Non-Competition Clause**")

contained in his employment contract with Catalyst, dated October 1, 2012 (the "**Catalyst Employment Contract**"). He further ordered that Catalyst pay Brandon his West Face Capital Inc. ("**West Face**") salary for the duration of the injunction, despite the fact that such an obligation appeared nowhere in the Catalyst Employment Contract. This amounts to a final determination of the injunction, as the Non-Competition Clause expired on December 22, 2014.

2. The Defendant/Moving Party, West Face, seeks leave to appeal this decision for the reasons set out in the Factum filed by West Face. This Reply Factum responds to certain issues raised in the Catalyst Factum.

Errors in the Facts Relied Upon in the Catalyst Factum

3. At paragraphs 4, 5 and 43-46 of the Catalyst Factum, Catalyst alleges that the Defendants brought this motion for leave to appeal on an "urgent" basis, and yet "delayed" in serving and filing their materials. There is no basis for this allegation. West Face did not allege, anywhere in its materials, that the hearing of the motion for leave to appeal was "urgent" as alleged, but rather asserted that the Court should grant leave to appeal because:

(a) there are conflicting decisions by other courts in Ontario;

(b) there is good reason to doubt the correctness of the order in question; and

(c) the proposed appeal involves matters of such importance that leave to appeal should be granted.

4. Catalyst's position that the timing of filing materials is somehow significant is found nowhere in *Rule* 62.02, which prescribes the test to be met for leave to appeal and the time for filing the notice of motion. The Defendants/Responding Parties fully complied with the times provided for in the *Rules of Civil Procedure*, and have met the test for granting leave. As such, there is no basis for the assertion that the Court hearing this motion for leave to appeal should consider the timing of the filing of the Defendants'/Responding Parties' materials.

5. In short, the Catalyst Factum mischaracterizes the basis on which West Face brings this motion for leave to appeal, and purports to inject a consideration into the test for granting leave that is nowhere found in the *Rules*.

6. At paragraph 18 of the Catalyst Factum, Catalyst asserts that in March 2014, Tom Dea, a principal of West Face ("**Dea**") asked the Defendant Brandon Moyse ("**Moyse**") to send Dea "samples of his work at Catalyst" (emphasis added). In addition at paragraph 22 of the Catalyst Factum, Catalyst asserts that West Face distributed Catalyst's information "throughout the firm". With respect, this was not the evidence. During West Face's interview process, Dea asked Moyse to send writing samples; there is no evidence that Dea requested that Moyse send him "Catalyst" writing samples. Moreover, the evidence was clear from both Dea and Moyse that Dea told Moyse at that time that he could redact any confidential information in the writing samples. Further, the evidence was that Dea distributed the information only to a very narrow set of individuals involved in the decision to hire Moyse, and only for the purpose of deciding whether to make him an offer of employment.

Transcript of Cross-Examination of Brandon Moyse held on July 31, 2014, Answer to Question 624, West Face's Motion Record, Tab 7, Page 1130.

Transcript of Cross-Examination of Thomas Dea held on July 31, 2014, Answer to Questions 289 to 292 and 311 to 313, West Face's Motion Record, Tab 8, Pages 1269 to 1271 and 1274 to 1276.

The Case is not Moot

7. The issues under appeal are not moot as alleged in the Catalyst Factum. This is seen by the level of detail in the Catalyst Factum and the significant resources Catalyst has expended to resist the motion for leave to appeal. Clearly the issue remains of importance to the parties.

8. The expiry of the restrictive covenant is not a basis on which to refuse leave to appeal when there are conflicting decisions by other courts in Ontario, there is good reason to doubt the correctness of the order in question, and the proposed appeal involves matters of such importance that leave to appeal should be granted. To allow the expiry of the restrictive covenant to be a bar to proceeding with the appeal would effectively insulate all employment restrictive covenant cases from appellate scrutiny.

9. In cases involving non-competition covenants, the restrictive covenant at issue will, in almost all cases, have run by the time an appeal is heard. Simply because the term of the interim injunction has expired does not mean that the merits of the injunction should not be considered by a reviewing court.

Abel Computers Ltd. v. Magnus, 1995 CarswellAlta 642 **at para. 5, 169 A.R. 169 (C.A.), West Face's Supplementary Book of Authorities, Tab 1.**

10. Notwithstanding that the issues under appeal are not moot, the Moving Party meets the three *Borowski* factors on moot appeals for the Court to consider:

1. whether there would be an adequate adversarial presentation of the respondent's position;

2. whether to do so would be an appropriate use of finite judicial resources; and

3. whether to assume jurisdiction would exceed the limits of proper judicial function.

***Borowski v. Canada (Attorney General),* [1989] 1 S.C.R. 342, West Face's Supplementary Book of Authorities, Tab 2.**

11. The *Borowski* factors should not be considered mechanically. The presence of one factor must be considered and weighed against the absence or presence of others.

***Payne v. Wilson,* 2002 CarswellOnt 2224 (C.A.) at para. 20, West Face's Supplementary Book of Authorities, Tab 4.**

12. There is a significant adversarial presentation of the respondent's position in the appeal. The litigation between the parties is ongoing, and Catalyst continues to vigorously proceed with the action. Catalyst has scheduled a further injunction motion for March 19, 2015 and in so doing, relies on Justice Lederer's decision in support of its claimed relief. Since filing their factum in this leave for appeal, Catalyst has served an Amended Notice of Motion.

Schedule "C" – Amended Notice of Motion of The Catalyst Capital Group Inc.

13. As noted by the Court of Appeal, even if the temporal limit in a non-competition clause had expired, the issue of the enforceability of a non-competition clause is not moot if the parties are involved in relevant ongoing litigation.

***Mason v. Chem-Trend Ltd. Partnership,* 2011 ONCA 344, 2011 CarswellOnt 2856 at para. 7, West Face's Supplementary Book of Authorities, Tab 3.**

14. Hearing the appeal is also an appropriate use of judicial resources as the approach taken by Justice Lederer's regarding the enforceability of a non-competition covenant on

a mere employee constituted a marked departure from the strict interpretation of non-competition clauses taken by other Courts in Ontario. Prospective litigants will seek guidance from the Court on whether an expansive interpretation to a non-competitive provision will now be adopted, and whether the Court may alter the terms of the original employment contract.

15. The case itself has garnered significant media attention, and therefore is clearly of importance to the general public. The Court must use its judicial resources to clarify the law and decide whether Justice Lederer's decision was correct. The decision under the appeal is hardly academic and is being closely watched by various interested parties.

> **Tim Kiladze, "Bay Street analyst's hiring leads to heated court case", *The Globe and Mail* (19 November 2014) online: <http://www.theglobeandmail.com/report-on-business/streetwise/bay-street-analysts-hiring-leads-to-heated-court-case/article21643816/>, West Face's Supplementary Book of Authorities, Tab 3.**
>
> **Theresa Tedesco, "Wind Mobile ownership under threat as Bay Street hiring tiff spirals into legal brawl", *Postmedia News (Can.)* (4 February 2015) online: <http://business.financialpost.com/2015/02/04/wind-mobile-ownership-under-threat-as-bay-street-hiring-tiff-spirals-into-legal-brawl/>, West Face's Supplementary Book of Authorities, Tab 4.**
>
> **Tim Kiladze, "Bay Street feud over analyst hire escalates in court", *The Globe and Mail* (2 February 2015) online: <http://www.theglobeandmail.com/report-on-business/streetwise/bay-street-feud-over-analyst-hire-escalates-in-court/article22743082/>, West Face's Supplementary Book of Authorities, Tab 5.**

16. Lastly, the Court has full jurisdiction to hear the appeal and it would not exceed the limits of its proper judicial function. A reviewing court's decision will affect the rights of the parties involved in the litigation as Brandon's ability to be actively at work in his field, and the ability of West Face to have him at work, was clearly constrained by the decision of Justice Lederer. There is no risk of the Court intruding into the role of the legislative branch by making a pronouncement on the enforceability of the restrictive covenant.

***Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at para. 40, West Face's Supplementary Book of Authorities, Tab 2.**

17. Therefore, as there remains ongoing litigation between the parties, the determination of the issue remains of significant importance to the parties, there is good reason to doubt the correctness of the decision, there are conflicting decisions of other Courts, and the decision is of general importance to the public, the motion for leave to appeal should be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

February 13, 2015

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

SCHEDULE A – LIST OF AUTHORITIES

1. *Abel Computers Ltd. v. Magnus*, 1995 CarswellAlta 642, 169 A.R. 169 (C.A.).

2. *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342.

3. *Payne v. Wilson*, 2002 CarswellOnt 2224 (C.A.).

4. *Mason v. Chem-Trend Ltd. Partnership*, 2011 ONCA 344, 2011 CarswellOnt 2856.

5. Tim Kiladze, "Bay Street analyst's hiring leads to heated court case", *The Globe and Mail* (19 November 2014) online: <http://www.theglobeandmail.com/report-on-business/streetwise/bay-street-analysts-hiring-leads-to-heated-court-case/article21643816/>.

6. Theresa Tedesco, "Wind Mobile ownership under threat as Bay Street hiring tiff spirals into legal brawl", *Postmedia News (Can.)* (4 February 2015) online: <http://business.financialpost.com/2015/02/04/wind-mobile-ownership-under-threat-as-bay-street-hiring-tiff-spirals-into-legal-brawl/>.

7. Tim Kiladze, "Bay Street feud over analyst hire escalates in court*", The Globe and Mail* (2 February 2015) online: <http://www.theglobeandmail.com/report-on-business/streetwise/bay-street-feud-over-analyst-hire-escalates-in-court/article22743082/>.

SCHEDULE B – LIST OF RULES AND STATUTES

RULES OF CIVIL PROCEDURE

R.R.O. 1990, REGULATION 194

MOTION FOR LEAVE TO APPEAL

Leave to Appeal from Interlocutory Order of a Judge

62.02 (1) Leave to appeal to the Divisional Court under clause 19 (1) (b) of the Act shall be obtained from a judge other than the judge who made the interlocutory order. O. Reg. 171/98, s. 23 (1).

(1.1) If the motion for leave to appeal is properly made in Toronto, the judge shall be a judge of the Divisional Court sitting as a Superior Court of Justice judge. O. Reg. 171/98, s. 23 (1); O. Reg. 292/99, s. 2 (2).

[…]

Grounds on Which Leave May Be Granted

(4) Leave to appeal shall not be granted unless,

(a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal and it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or

(b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question and the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted. R.R.O. 1990, Reg. 194, r. 62.02 (4).

SCHEDULE – C
AMENDED NOTICE OF MOTION OF
THE CATALYST CAPITAL GROUP INC.

Divisional Court File No. 541/14
Divisional Court File No. 542/14
Superior Court of Justice Court File No. CV-14-507120

THE CATALYST CAPITAL GROUP INC. **- and -** BRANDON MOYSE and WEST FACE CAPITAL INC.
Plaintiff **Defendants**

ONTARIO
SUPERIOR COURT OF JUSTICE
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PROCEEDING COMMENCED AT
TORONTO

REPLY FACTUM OF THE DEFENDANT/MOVING PARTY, WEST FACE CAPITAL INC.

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