

Divisional Court File No. 541/14
Court File No. CV-14-507120

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

FACTUM
OF THE DEFENDANT/MOVING PARTY
BRANDON MOYSE

[MOTION FOR LEAVE TO APPEAL – RULE 62.02]

Date: January 9, 2015

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**ONTARIO
SUPERIOR COURT OF JUSTICE
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BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

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Defendants

**FACTUM OF THE DEFENDANT,
BRANDON MOYSE**

(Motion for Leave to Appeal – Rule 62.02)

PART I - OVERVIEW

1. The Defendant, Brandon Moyse ("Moyse") files this factum in support of his motion for leave to appeal to the Divisional Court from the order of the Honourable Mr. Justice Lederer dated November 10, 2014 (the "Order").
2. Pursuant to his written reasons, Justice Lederer granted the motion of The Catalyst Capital Group Inc. ("Catalyst") and ordered:
 1. An interlocutory injunction enjoining the defendant, Brandon Moyse, or anyone acting on his behalf or at his discretion 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.
 2. A further interlocutory injunction enjoining the defendant, Brandon Moyes (sic), 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, 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.

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 an 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.

3. While Moyse does not take issue with the first aspect of the Order, which simply enforces the confidentiality clause contained in Moyse's contract of employment with Catalyst, Moyse seeks leave to appeal the Order in respect of the balance of the relief granted.

4. Moyse respectfully submits that the Order is contrary to previous decisions by other Judges and Courts in Ontario which set out the well-established principles governing the enforceability of restrictive covenants and the granting of injunctive relief.

5. Furthermore, Moyse submits that there is good reason to doubt the correctness of the Order for the following reasons:

- (a) Justice Lederer erred in upholding a non-competition covenant that is ambiguous and is acknowledged by Catalyst to be broader than is necessary to protect its alleged proprietary interests;
- (b) Justice Lederer misapplied the test for injunctive relief by:
 - (i) requiring that the responding party to a motion for injunctive relief (in this case, Moyse) demonstrate that he would not be irreparably harmed by the granting of an injunction;
 - (ii) holding that the mere disclosure of confidential information to a third party without any evidence that the third party has used such confidential information can give rise to irreparable harm; and
 - (iii) granting injunctive relief notwithstanding that the evidence on the issue of irreparable harm was entirely speculative;
- (c) Justice Lederer improperly granted an interlocutory injunction to prohibit Moyse from competing with Catalyst, not because of the irreparable harm

that would be caused by competition but expressly for the purpose of preventing Moyse from disclosing Catalyst's confidential information to his new employer, despite ordering a separate interlocutory injunction which prohibited Moyse from disclosing Catalyst's confidential information;

- (d) Justice Lederer improperly relied upon the terms of the consent order made by Justice Firestone on July 16, 2014 (the "Consent Order"), which were expressly without prejudice and made with the request that the motion judge not consider or draw any inferences from them; and
- (e) Justice Lederer erred in ordering that the forensic images from Moyse's devices be examined by an independent supervising solicitor based upon speculation the devices could contain further relevant documents and provided insufficient reasons for making that extraordinary order.

6. The issues on this proposed appeal are matters of public importance, as allowing the decision to stand would create significant conflict and uncertainty in the case law in respect of restrictive covenants. Moreover, if leave to appeal is granted, it will be the first occasion for an appellate court in Ontario to consider whether the Court can alter the terms of the original contract between an employer and employee and order that an employer must pay its former employee his or her salary for the duration of the restricted period of a non-competition covenant, notwithstanding that the contract contained no such provision.

PART II - FACTS

(1) BACKGROUND AND ROLE AT CATALYST

7. Moyse was twenty-six years of age at the commencement of this action. Prior to working for Catalyst, he was employed at Credit Suisse in New York and RBC Capital Markets in Toronto as a junior banker on their respective Debt Capital Markets desks.

Reference: Affidavit of Brandon Moyse, sworn July 7, 2014 ("Moyse Affidavit"), para. 3, Moyse's Motion Record ("MMR"), Tab 4G, page 218

8. Moyse commenced employment at Catalyst as an Analyst on or around November 1, 2012, pursuant to a written employment agreement (the "Catalyst Employment Agreement"), dated October 1, 2012.

Reference: Moyse Affidavit, para. 4, MMR, Tab 4G, page 219
Catalyst Employment Agreement, Moyse Affidavit, Exhibit A, MMR, Tab 4G, page 238

9. Moyse held the most junior position at Catalyst. The hierarchy at Catalyst is as follows: Partner, Vice President, Associate, and Analyst. While Moyse was employed at Catalyst, all potential and actual investments were sourced at the Partner level. Analysts were not actively encouraged to generate ideas for the firm and their thoughts and recommendations were routinely disregarded. Notably, as an Analyst, he had no direct input into investment decisions or strategy and did not have substantial autonomy and responsibility, but was instead assigned specific research projects by the Partners.

Reference: Moyse Affidavit, para. 6, MMR, Tab 4G, page 219
Transcript of Cross-Examination of James A. Riley held on July 29, 2014 ("Riley Transcript"), Answers to Questions 20, 25-30, MMR, Tab 6, pages 761-763

10. As an Analyst, Moyse performed financial and qualitative research both on potential investment opportunities and companies already owned by Catalyst. There was nothing confidential or proprietary in the methodology that Moyse used to value certain investment opportunities while he worked at Catalyst. Rather, he used commonly used and well-known valuation methods that he learned at the University of Pennsylvania and his previous employment at Credit Suisse and RBC Capital Markets and could be learned by anyone with a generalist background in finance or mathematics.

Reference: Moyse Affidavit, paras. 5, 15-16, MMR, Tab 4G, pages 219 and 221

11. While at the beginning of his employment with Catalyst, Moyse was more involved with researching potential investments, during the last six months of his employment, he was focused almost entirely on performing operating reviews of Catalyst-owned companies. As

such, it is Moyse's evidence that he has very little knowledge of Catalyst's current prospective investments.

Reference: Moyse Affidavit, para. 7, MMR, Tab 4G, page 219
Riley Transcript, Answers to Questions 55-58, MMR, Tab 6, pages 770-771

12. Moyse is aware of three potential investments, however, he had very limited involvement and no strategic involvement in any of the files. Given the junior nature of his position, Moyse had very little knowledge of Catalyst's potential investments and its strategy for those investments. While Moyse regularly attended Catalyst's Monday meetings, these meetings did not contain in-depth confidential strategy discussions, but normally a very low level update on Catalyst projects. Instead, these strategy discussions primarily took place at Partners only meetings, which Moyse did not attend.

Reference: Moyse Affidavit, paras. 8-13, MMR, Tab 4G, pages 219-221

13. During his cross-examination, James Riley ("Riley"), Chief Operating Officer, admitted that Moyse's knowledge of Catalyst's prospective investments was limited to the three opportunities mentioned in Moyse's affidavit.

Reference: Riley Transcript, Answers to Questions 80-81, MMR, Tab 6, pages 777-778

(2) COMPENSATION AT CATALYST

14. At Catalyst, Moyse earned a base salary of \$100,000 and had the opportunity to earn a bonus of \$80,000.00. His equity compensation did not exceed his base salary and bonus. In fact, the equity compensation he received was negligible. In 2013, Moyse earned \$165,127.00, of which \$90,000 was his salary and \$72,000 was his annual bonus.

Reference: Moyse Affidavit, para. 17, MMR, Tab 4G, page 219
2013 T4 and Notice of Assessment, Moyse Affidavit, Exhibit E, MMR, Tab 4G, pages 255-258
Transcript of Cross-examination of Brandon Moyse held on July 31, 2014 ("Moyse Transcript"), Answers to Questions 756-757, MMR, Tab 7, page 1157

15. Catalyst's "60/40 Scheme" did not provide Moyse with a "partner-like interest" in Catalyst. The compensation earned under the 60/40 Scheme is only paid out after the fund returns all capital to investors, plus the 8% preferred return. Typically, this takes many years. As such, it is extremely rare for any Catalyst Analyst or Associate to receive any money from the 60/40 Scheme. For example, the Catalyst Fund II was raised in 2006 and has yet to trigger payments under the 60/40 Scheme.

Reference: Moyse Affidavit, para. 19, MMR, Tab 4G, page 222
Riley Transcript, Answers to Questions 87-89, MMR, Tab 6, pages 779-780

16. During his cross-examination, Riley acknowledged that despite Moyse's "partner-like interest", Moyse was not invited to partner meetings nor did he have any voting rights.

Reference: Riley Transcript, Answers to Questions 94-95 and 100-102, MMR, Tab 6, pages 781-783

17. Furthermore, while Catalyst allows employees the opportunity to earn options in the company, these options can only be exercised by purchasing shares at their fair market value. As such, it is not correct to consider Catalyst's options as a form of compensation.

Reference: Moyse Affidavit, para. 20, MMR, Tab 4G, page 222

(3) MOYSE SEARCHES FOR NEW EMPLOYMENT

18. Unhappy with the uncomfortable and oppressive financial and work environments at Catalyst and the fact that over approximately the prior six months, operations at several portfolio companies had deteriorated and / or missed their forecasts, which caused him to lose faith in Catalyst and his opportunities there, Moyse began looking for alternative employment in or around December 2013. Despite searching for new employment, he continued, at all times, to perform his duties and responsibilities toward Catalyst in a loyal and dedicated manner, and to the best of his abilities.

Reference: Moyse Affidavit, paras. 26-27, MMR, Tab 4G, page 223

19. As part of his search for new employment, Moyse emailed Thomas Dea ("Dea"), a Partner at West Face on March 14, 2014.

20. Dea and Moyse met for approximately forty-five minutes on March 26, 2014. During that meeting the pair had a general discussion about Moyse's duties at Catalyst, the type of work performed at West Face, and what West Face's potential needs were.

Reference: Moyse Transcript, Answers to Questions 620-623, MMR, Tab 7, pages 1129-1130
Transcript of Cross-Examination of Thomas Dea held on July 31, 2014 ("Dea Transcript"), Answers to Questions 283-288, Tab 8, pages 1268-1269

21. During the meeting, Dea asked Moyse to provide him with research and writing samples to gauge Moyse's research and writing abilities.

Reference: Moyse Transcript, Answer to Question 624, MMR, Tab 7, page 1130
Dea Transcript, Answers to Questions 289-292, MMR, Tab 8, pages 1269-1271

22. As a result, on March 27, 2014, Moyse sent Dea a copy of his CV, a deal sheet, and four investment memos that he had worked on at Catalyst. Three of the research pieces were created using only publically available information. Furthermore, Moyse believed that Catalyst was no longer considering the investments. In the fourth case, Catalyst had already successfully completed its investment and therefore Moyse did not believe that the information was of any value to West Face or detrimental to Catalyst. **For clarity, this one email, sent one day after his first meeting with West Face and nearly two months before his resignation from Catalyst is the only instance Moyse disclosed Catalyst's information to West Face.**

Reference: Moyse Affidavit, paras. 62-65, MMR, Tab 4G, pages 230-231
Email from Brandon Moyse to Thomas Dea, dated March 27, 2014, Affidavit of Thomas Dea, sworn July 7, 2014 ("Dea Affidavit"), Exhibit L, MMR, Tab 4H, pages 499-637

(4) MOYSE ACCEPTS EMPLOYMENT AT WEST FACE; CATALYST COMMENCES LITIGATION

23. On or about May 19, 2014, Moyse was offered a position with West Face as an Associate. As such, on May 24, 2014, he submitted his resignation to Catalyst and gave the

thirty days' notice of his resignation required by the Catalyst Employment Agreement. On May 26, 2014, he was instructed by Riley to remain at home for the balance of his notice period.

Reference: Moyse Affidavit, paras. 28-29, MMR, Tab 4G, page 224
Notice of Resignation, Moyse Affidavit, Exhibit G, MMR, Tab 4G, pages 263-264
Riley Transcript, Answer to Question 123, MMR, Tab 6, page 790

24. Notably, Moyse is the most junior member of West Face's investment team. In his position, Moyse does not receive portfolio summaries, is not a member of the company's investment committee, does not participate in senior management meetings, nor does he have the authority to make any strategic decisions.

Reference: Dea Affidavit, para. 24, MMR, Tab 4H, page 441

25. Moyse's Catalyst Employment Agreement contained, *inter alia*, a confidentiality provision and a non-solicitation provision. It also contained a non-competition clause (the "Non-Competition Clause"), which provided as follows:

8. 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 CCGI or the Fund or any direct Associate of CCGI 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 CCGI'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 CCGI;

Reference: Catalyst Employment Agreement, Moyse Affidavit, Exhibit A, MMR, Tab 4G, page 238

26. Under the terms of his West Face Employment Contract, Moyse agreed that he would not use any property in the course of his employment with West Face that was the confidential or proprietary information of any other person, company, group or organization. In order to underscore the importance of this obligation, Alexander Singh, West Face's General Counsel and Secretary, spoke to Moyse on May 22, 2014 to remind him that he was not, under any circumstances, to disclose or use any confidential or proprietary information belonging to Catalyst.

Reference : Dea Affidavit, paras. 26 and 31, MMR, Tab 4H, pages 442 and 444
Affidavit of Alexander Singh, sworn July 7, 2014, para. 4, MMR, Tab 4I, page 639

27. Throughout May and June 2014, counsel for West Face, Moyse and Catalyst exchanged correspondence and had discussions regarding Moyse's employment with West Face. West Face and Moyse provided Catalyst with assurances that Moyse would abide by the confidentiality obligations he owed to Catalyst in his employment with West Face and West Face advised Catalyst that it had created a confidentiality wall to protect Catalyst's confidential information. Catalyst was not satisfied with these measures and commenced this litigation.

Reference: Dea Affidavit, paras. 33-38, MMR, Tab 4H, pages 444-446

28. On July 16, 2014, the Parties appeared before Justice Firestone to argue Catalyst's motion for interim relief. Rather than proceed with argument, the Parties reached an agreement on interim terms, which resulted in the Consent Order being granted by Justice Firestone. The terms of the Consent Order, which were to remain in effect until the determination of the interlocutory injunction, included, *inter alia*, the following:

- (a) An interim injunction requiring Moyse to comply with the restrictive covenants set forth in the Catalyst Employment Agreement;
- (b) An order that Catalyst pay Moyse his West Face salary through the interim relief period;

- (c) An order that Moyse turn over any personal computer and electronic devices owned by him or within his power or control to a professional firm for the taking of a forensic image stored on the devices, which would then be held by Moyse's counsel pending the outcome of the interlocutory motion; and
- (d) An order that Moyse deliver a sworn affidavit of documents to Catalyst, setting out all documents in his power, possession or control that relate to his employment with Catalyst.

Reference: Order of the Honourable Justice Firestone, dated July 16, 2014, MMR, Tab 4D, pages 79-82

29. These terms were voluntarily agreed to by the Parties on a without prejudice basis. Further, included within the Consent Order was a request from all parties that the Court hearing the interlocutory motion not consider or draw any inference from the terms of the Consent Order.

Reference: Order of the Honourable Justice Firestone, dated July 16, 2014, para. 9, MMR, Tab 4D, page 81

30. By decision dated November 10, 2014, Justice Lederer, granted Catalyst's motion for injunctive relief, and ordered, *inter alia*, that Moyse be enjoined from competing with Catalyst in compliance with the Non-Competition Clause and that Catalyst pay Moyse his West Face salary for the duration of the Non-Competition Clause, notwithstanding that this was not contemplated by the terms of the Non-Competition Clause. He further ordered that an independent supervising solicitor be appointed to review the forensic images taken of Moyse's personal devices.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, MMR, Tab 3, pages 13-42

PART III – QUESTIONS TO BE ANSWERED IF LEAVE IS GRANTED

31. Moyse proposes that the following questions should be answered if leave to appeal is granted:

- 1) Did Justice Lederer err in ordering an interlocutory injunction enjoining Moyse from competing with Catalyst?
- 2) Did Justice Lederer err in ordering that the forensic images taken from Moyse's electronic devices be examined by an independent supervising solicitor?

PART IV – LAW AND ARGUMENT

32. On a motion under Rule 62.02(4), leave to appeal may be granted where either one of the following two tests are satisfied:

- (a) there is a conflicting decision by another judge or court in Ontario 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.

Reference: Rule 62.02(4) of the Rules of Civil Procedure.

33. In this case, Moyse respectfully submits that both tests are satisfied.

(1) **62.02(4)(A) – THE MOTION DECISION CONFLICTS WITH DECISIONS BY OTHER JUDGES OR COURTS IN ONTARIO**

34. In order to satisfy Rule 62.02(4)(a), the moving party must show both (a) a conflicting decision; and (b) the desirability of leave to appeal being granted. A conflicting decision is one in which different legal principles are chosen to decide a comparable legal problem or to guide the exercise of the court's discretion.

Reference: *Mask v. Silvercorp Metals Inc.*, 2014 CarswellOnt 10911 at para. 8 (Div. Ct.), Moyse Book of Authorities ("MBA"), Tab 1

35. Justice Lederer's analysis of the enforceability of the Non-Competition Clause is contrary to the well-established principles that: (i) a party seeking to enforce a restrictive covenant in an employment context must establish its enforceability on a strong *prima facie* basis; (ii) a

restrictive covenant that is overly broad and/or ambiguous with respect to the restricted business and/or geographic scope is not enforceable; and (iii) a non-competition clause is only enforceable where the individual subject to the non-competition covenant is in a special relationship with the employer, such that a non-solicitation clause would not suffice.

36. Additionally, Justice Lederer's holding that Catalyst will suffer irreparable harm if an injunction is not granted is contrary to the basic proposition of law that evidence of irreparable harm must be clear and not speculative and his finding that the balance of convenience favours Catalyst was influenced by improper considerations and contrary to the basic proposition that a motion judge must not rewrite a restrictive covenant but must judge the balance of convenience on the terms as they exist.

(A) THE EVIDENCE BEFORE JUSTICE LEDERER DID NOT ESTABLISH A STRONG *PRIMA FACIE* CASE THAT THE NON-COMPETITION CLAUSE IS ENFORCEABLE

37. Justice Lederer's decision is contrary to the well-established principle that a party seeking to enforce a restrictive covenant in an employment context must meet the elevated standard of a strong *prima facie* case. The reasoning for requiring a strong *prima facie* case is that the remedy will interfere with an individual's ability to earn a living and use their knowledge and skills.

Reference: *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 at para 58 (S.C.J.), MBA, Tab 2

Trapeze Software Inc. v. Bryans, [2007] O.J. No. 276 at paras 30-31 (S.C.J.), MBA, Tab 3

Brown v. First Contact Software Consultants Inc., [2009] O.J. No. 3787 at paras. 24-25 (S.C.J.), MBA, Tab 4

38. An elevated standard of a strong *prima facie* case is also required where, as in this case, the interlocutory motion is, in effect, a final determination of the issue.

Reference: *GDL Solutions Inc. v. Walker*, 2012 CarswellOnt 9889 at para. 27 (S.C.J.), MBA, Tab 5

39. Justice Lederer granted Catalyst's motion for injunctive relief using the standard of a serious issue to be tried. He justified his decision to use the lesser standard by citing the proposition in *GDL Solutions Inc. v. Walker* that:

[W]here a strong prima facie case can be made out, there is no need to give great regard to the second and third parts of 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.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 74, MMR, Tab 3, pages 36-37

40. Justice Lederer held that as he intended to examine the issues of irreparable harm and balance of convenience, it was not necessary to go beyond finding that there was a serious issue to be tried. In doing so, he erred.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 75, MMR, Tab 3, page 37

41. While Justice Lederer correctly stated the proposition in *GDL Solutions Inc. v. Walker*, he misapplied it by reversing the principle and holding, in effect, that where the second and third branches of the test are satisfied, the court can give less regard to the first branch of the test and require a lower standard to be met. Such a view is not supported by case law.

42. In any event, Moyse submits that Catalyst failed to establish the enforceability of the Non-Competition Clause using either standard.

43. In order for a non-competition clause to be enforceable:

- (1) the clause must be clearly worded and not ambiguous;
- (2) the clause must be reasonable and not overly broad with respect to the restricted business and/or geographic scope; and
- (3) there must be a "special relationship" between the parties, such that it is not contrary to the public interest to enforce the clause.

Reference: *H.L. Staebler Co v. Allan*, 2008 CarswellOnt 4650 at paras 33-43 (C.A.), MBA, Tab 6

Shafron v. KRG Insurance Brokers (Western) Inc., [2009] S.C.J. 6 at para. 27, MBA, Tab 7

Lyons v. Multari, 2000 CarswellOnt 3186 at paras. 41-44 (C.A.), MBA, Tab 8

(I) THE NON-COMPETITION CLAUSE IS AMBIGUOUS

44. A party seeking to rely on a restrictive covenant must establish that the restrictive covenant is clearly worded. An ambiguous restrictive covenant is by definition, *prima facie* unreasonable and unenforceable.

Reference: *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. 6 at para. 43, MBA, Tab 7

45. The Non-Competition Clause prohibits Moyse from working for any business of the type conducted by "Catalyst" or "the Fund" or any direct "Associate" of Catalyst within Canada.

Reference: Catalyst Employment Agreement, Moyse Affidavit, Exhibit A, MMR, Tab 4G, page 234

46. Notwithstanding that Moyse is prohibited from working for any business of the type conducted by "the Fund", the Non-Competition Clause does not define the term "Fund" anywhere amongst its terms. Moreover, the meaning of the term "Fund" cannot be determined by context and is clearly ambiguous in the context of the Catalyst Employment Agreement, as there are different references to various funds within the Catalyst Employment Agreement itself, including: "the Fund", "Fund III", "Fund IV" and "these Funds".

Reference: Riley Transcript, Answers to Questions 490-491, MMR, Tab 6, pages 887-888
Catalyst Employment Agreement, Moyse Affidavit, Exhibit A, MMR, Tab 4G, pages 234-242

47. Despite acknowledging that "Fund" is a "very important" and "critical" term, Catalyst's Riley had significant difficulty explaining what was meant by Fund, first taking the position that it meant Fund IV, then taking the position that it meant Funds III and IV, and finally being unable to explain what would have happened in the hypothetical scenario that Moyse's employment outlasted the life of Funds III and IV.

Reference: Riley Transcript, Answers to Questions 488-491 and 672-673, MMR, Tab 6, pages 887-888 and 941-942

48. Later in Riley's cross-examination, Catalyst's counsel took the position that Fund "*could be any one of the funds.*"

Reference: Riley Transcript, Answer to Question 681, MMR, Tab 6, page 945

49. If Catalyst, the party that drafted the agreement, is unable to determine what is meant by "Fund", it is in no position to argue that the term is unambiguous and understood by Moyse. **As candidly acknowledged by Riley during his cross-examination when speaking about the clause, "Someone made a mistake."**

Reference: Riley Transcript, Answer to Question 509, MMR, Tab 6, pages 892-893

50. In addition to being ambiguous because of the undefined word "Fund", Moyse submits that the Non-Competition Clause is unclear because the scope of the prohibited conduct changes over time as Catalyst adds or sells Associates. This was acknowledged during Riley's cross-examination.

Q. So it's also true just by the nature of Catalyst business that the subject matter of this non-compete in terms of the number of associates and who those associates are, **that would change over time from the date Brandon signed the agreement to the date that – some future date that he might leave?**

A. Yes.

Q. **So by extension then Brandon is essentially agreeing not to work for a company when he signs the agreement, he's agreeing, potentially agreeing not to work for a company which at the time Catalyst had absolutely no business relationship with whatsoever?**

A. Yes.

Reference: Riley Transcript, Answers to Questions 582-583, MMR, Tab 6, pages 913-914

51. At the time of the execution of the agreement, it would have been impossible for Moyse to know the extent of the Non-Competition Clause, as he would not know what other businesses Catalyst's Associates might carry on during his employment. The reasonableness of an agreement must be determined as of the date of its execution. As of the date of the execution

of the Catalyst Employment Agreement, the number and kind of businesses in which Moyses may be prohibited from participating was unlimited. This is not a reasonable restriction.

Reference: *Creditel of Canada Ltd. v. Faultless et al.*, [1977] O.J. No. 2474 at para. 25 (H.C.J.), MBA, Tab 9

(II) THE ACTIVITIES RESTRICTED BY THE NON-COMPETITION CLAUSE ARE OVERLY BROAD

52. The Court will not read down an unreasonable covenant to what would be considered reasonable. To be enforceable, a restrictive covenant must be no wider than reasonably required to afford adequate protection to the employer.

Reference: *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. 6 at paras. 17, 27, 36-42, MBA, Tab 7

53. To demonstrate that it is reasonable, the employer must show that:

- (i) The employer has a proprietary interest entitled to protection;
- (ii) The clause is reasonable in terms of duration as well as geographic and business scope; and
- (iii) The restraint is reasonable in terms of the public interest.

Reference: *J.G. Collins Insurance Agencies Ltd. v. Elsley*, 1978 CarswellOnt 1235 at para. 19 (S.C.C.), MBA, Tab 10

54. The Non-Competition Clause prohibits Moyses from working in Ontario in any business operated by, *inter alia*, Catalyst or any of Catalyst's "Associates" in Canada, whether or not he had any involvement with those Associates while at Catalyst, and regardless of whether the "Associate" had any business operations in Ontario.

Reference: Riley Transcript, Answers to Questions 682-699, MMR, Tab 6, pages 945-950

55. Given the definition of "Associate" in the Ontario *Business Corporations Act*, which includes, "*any body corporate of which the person beneficially owns, directly or indirectly, voting securities carrying more than 10 per cent of the voting rights attached to all voting securities of*

the body corporate for the time being outstanding" and the nature of Catalyst's investments, the Non-Competition Clause prohibits Moyse from working in a wide variety of industries and sectors that are completely unrelated to his duties with Catalyst or with Catalyst's primary business.

Reference: *Business Corporations Act*, RSO 1990, c B. 16 at s. 1(1), "Associate"
Moyse Affidavit, paras. 34-35, MMR, Tab 4G, page 225
Affidavit of James A. Riley, sworn July 28, 2014, para. 14, MMR, Tab 4M, page 704

56. As Riley explained during his cross-examination, the breadth of industries in which Catalyst's Associates operate has a profound effect on Moyse's career options and goes well beyond the financial services industry.

Q. So, Mr. Riley, just so I understand the plaintiff's position and interpretation on the non-compete. Is it your evidence that **the non-compete would not prevent Brandon from working at other organizations that may do special situations investments, but would also do other lines of business provided he's also working in those other lines of business?**

MR DIPUCCHIO: No.

A. No.

Q. **He can't work at that organization whatsoever?**

A. No.

...
Q. Now turning back to the seven associates that you've listed in paragraph 14 of your reply affidavit. **You'd agree with me that based on this list, Brandon would be prohibited from working at any company that works, for example in the food retail or restaurant industry?**

A. Mm-hmm.

Q. **The biologics industry?**

A. Yes.

...
Q. **So is it your position that he cannot work for a gambling operation in Ontario?**

A. Yes, it is.

Reference: Riley Transcript, Answers to Questions 578-579, 591-592, and 696, MMR, Tab 6, pages 912, 917, and 949

57. Moyse submits that such a restriction is excessively broad. Indeed, on cross-examination Riley was unable to identify any business interest in restricting Moyse from working for a business located only in Ontario when the business that Catalyst or the Associate is pursuing is not located or operating in Ontario.

Reference: Riley Transcript, Answers to Questions 692-704, MMR, Tab 6, pages 948-953

(III) THE GEOGRAPHIC RESTRICTION IN THE NON-COMPETITION CLAUSE IS OVERLY BROAD

58. The Non-Competition Clause purports to restrict Moyse from competition anywhere "within Ontario". The geographic scope of the Non-Competition Clause is too broad.

Reference: Catalyst Employment Agreement, Moyse Affidavit, Exhibit A, MMR, Tab 4G, page 234

59. Moyse was at all times during his employment employed in Catalyst's offices in Toronto. Catalyst does not, in fact, have any offices outside of Toronto. In the context of Moyse's location of employment, the offices of Catalyst and the overall context of Moyse's employment, a province-wide geographic scope goes far beyond what is reasonable. This was specifically admitted by Riley, where he candidly acknowledged that Catalyst's business was primarily located in Toronto, and that that was the only geographic scope that Catalyst legitimately required.

Reference: Affidavit of James A. Riley, sworn June 26, 2014, paras 32-33, MMR, Tab 4E, pages 91-92

(IV) JUSTICE LEDERER'S CONCLUSION IN RESPECT OF AMBIGUITY AND OVERBREADTH

60. Justice Lederer, after acknowledging all of the concerns with the content of the Non-Competition Clause outlined herein, dismissed these concerns with the following justification:

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.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 59, MMR, Tab 3, page 33

61. Previous case law is clear that Courts should engage in close review of the terms of a restrictive covenant in determining whether it should be enforced. Justice Lederer's approach constitutes a significantly relaxed attitude towards the enforcement of non-competition provisions, and is a stark departure from the Courts' well recognized and consistent approach of scrutinizing such clauses closely in assessing whether they are ambiguous and/or overly broad.

Reference: *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. 6 at paras. 23, MBA, Tab 7

62. The error in Justice Lederer's reasoning is well illustrated in his consideration of the geographic scope of the Non-Competition Clause, in which he stated:

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 [to Moyse] that going to work with a competitor in Toronto would offend the clause.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 64, MMR, Tab 3, page 34

63. In this instance, Justice Lederer erred by misplacing his focus on whether Toronto would have been clearly understood to breach the Non-Competition Clause, rather than focusing on whether the geographic restriction actually in the Non-Competition Clause (i.e. Ontario) was reasonable in the circumstances.

64. Similarly, rather than considering whether the restrictions contained in the Non-Competition Clause were reasonable (such as whether Catalyst had a genuine proprietary interest in preventing Moyse from working in a casino) and whether the scope of the restrictions were ambiguous given their changing scope, Justice Lederer instead focused on the fact that Moyse was aware that West Face was a competitor of Catalyst.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 61, MMR, Tab 3, page 34

65. This reasoning is contrary to decisions by other Judges or Courts in Ontario. The fact that a clause might have been enforceable had it been drafted in narrower terms will not save it. Previous case law is clear that the question is not whether a valid agreement might have been possible had it been drafted differently, but whether the actual agreement made is valid.

Reference: *H.L. Staebler Co v. Allan*, 2008 CarswellOnt 4650 at paras 43 (C.A.), MBA, Tab 6

66. Moyse respectfully submits that in focusing on the actual competitive activities engaged in by Moyse rather than the wording of the Non-Competition Clause in determining reasonableness, Justice Lederer fell into error, as he failed to determine whether the Non-Competition Clause, as drafted, was clear, reasonable and enforceable. By upholding the Non-Competition Clause, Justice Lederer's decision demonstrates a fundamental difference in principle from previous decisions of other Judges and Courts in Ontario.

(V) MOYSE WAS NOT IN A SPECIAL RELATIONSHIP WITH CATALYST

67. It is a well-established principle in decisions by other Courts and Judges in Ontario that a non-competition clause is enforceable only where the individual subject to the non-competition provision is in a special relationship vis-à-vis the employer, such that a non-solicitation clause would not suffice.

Reference: *Lyons v. Multari*, 2000 CarswellOnt 3186 at paras. 41-42 (C.A.), MBA, Tab 8

68. A non-competition clause should only be enforced where the nature of the employment will likely cause customers to perceive an individual employee as the personification of the company or employer.

Reference: *J.G. Collins Insurance Agencies Ltd. v. Elsley*, 1978 CarswellOnt 1235 at paras. 20-22 (S.C.C.), MBA, Tab 10

Lyons v. Multari, 2000 CarswellOnt 3186 at para. 44 (C.A.), MBA, Tab 8

69. Moyse was not in a special relationship with Catalyst, as his position was merely that of an Analyst; Catalyst's entry level position. Moyse only had 4 years of experience in the financial

services industry, only one of which was spent working at a firm that makes investments as a principal as its primary function. At Catalyst, he did not have any employees underneath him in the management hierarchy, did not have any signing authority or official authority to delegate, did not have any autonomy to decide what he would or would not work on, nor was he invited to the weekly partner meetings. Moyse was neither the dominant figure nor the personification of Catalyst. As such, reasonably drafted confidentiality, non-disclosure and non-solicitation clauses would constitute sufficient restrictive covenants in the circumstances to protect Catalyst's interests.

70. Justice Lederer's decision is contrary to the well-established principle that a non-competition provision is only enforceable when the employee plays a special role in the company. By upholding the Non-Competition Clause, Justice Lederer's decision conflicts with decisions of other Judges and Courts in Ontario, as he fails to analyze the nature of Moyse's employment, and whether, given Moyse's role and responsibility with Catalyst, a non-competition covenant was appropriate.

Reference *Lyons v. Multari*, 2000 CarswellOnt 3186 at paras. 41-44 (C.A.), MBA, Tab 8

(B) CATALYST DID NOT PROVIDE SUFFICIENT EVIDENCE TO ESTABLISH IRREPARABLE HARM

71. In dealing with the issue of irreparable harm, Justice Lederer wrote:

I turn now 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...As already noted, among the Catalyst documents accessed by Brandon Moyse on May 13, 2014 were files related to WIND Mobile. 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 ...

In such circumstances, it is not possible to quantify the damage. The harm that may be caused would be irreparable.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, paras. 76 and 78, MMR, Tab 3, pages 37-38

72. Justice Lederer's reliance on Moyse's access of the WIND Mobile documents as the basis for finding that Catalyst had established irreparable harm is problematic for the following reasons:

- (a) While Catalyst had originally alleged that Moyse had improperly accessed the WIND Mobile documents, on cross-examination, Riley admitted that Moyse had accessed the documents for a work-related purpose. Notably, Catalyst dropped its allegations regarding the WIND Mobile documents from its factum;
- (b) There was no evidence that Moyse copied or retained the WIND Mobile documents;
- (c) There was no evidence that Moyse had disclosed any WIND Mobile documents or confidential information to West Face;
- (d) There was no evidentiary basis for Justice Lederer to conclude that the information contained in the chart Moyse was working on was confidential to Catalyst or would be advantageous to West Face, given the documents were not disclosed as part of Catalyst's motion record; and
- (e) At the time the motion was heard, West Face had already successfully acquired WIND Mobile.

Reference: Riley Transcript, Answers to Questions 422-428, MMR, Tab 6, pages 872-874
Riley Transcript, Answers to Questions 147-149, MMR, Tab 6, pages 794-795

73. Evidence of irreparable harm must be clear and not speculative.

Reference: *Trapeze Software Inc. v. Bryan*, 2007 CarswellOnt 364 at para. 52 (S.C.J.), MBA, Tab 3

Consumer Impact Marketing Ltd. v. Shafie, [2010] O.J. No. 2424 at paras 38-41 (S.C.J.), MBA, Tab 11

74. The Ontario Superior Court of Justice has refused to find irreparable harm where the evidence upon which the injunction was brought was speculative, stating:

Trapeze contends that knowledge of its confidential information would provide an invaluable unfair competitive edge in the sales and bidding process and in ongoing service components of its business. Mr. Bacchus

asserts that given the nature of the business, misuse of confidential information by these former Trapeze employees is inevitable. I am not persuaded that that assertion is anything more than speculation.

Trapeze relies upon statements in cases to the effect that irreparable harm has been found to exist where there is evidence that the plaintiff will lose market share if an injunction is not granted. However, this too is speculative.

Reference: *Trapeze Software Inc. v. Bryan*, 2007 CarswellOnt 364 at paras. 53-54 (S.C.J.),
MBA, Tab 3

75. Despite seven months passing between Moyse's disclosure of four Catalyst research memos on March 27, 2014 and the hearing of the motion on October 27, 2014, Catalyst was unable to adduce any evidence whatsoever that it had suffered or would suffer any harm, let alone irreparable harm.

Reference: Riley Transcript, Answers to Questions 152-156 and 617-618, MMR, Tab 6,
pages 796-797 and 923-924

76. Justice Lederer's holding that Catalyst may suffer irreparable harm if an injunction was not granted is based on evidence that is entirely speculative and is therefore contrary to the basic proposition of law that evidence of irreparable harm must be clear and not based on speculation.

(C) JUSTICE LEDERER DISTORTED THE BALANCE OF CONVENIENCE BY CONSIDERING IMPROPER FACTS AND ALTERING THE DEAL BETWEEN THE PARTIES

77. As noted above, Justice Firestone's Consent Order was expressly without prejudice to the positions of the Parties on the interlocutory motion. The Parties further requested that the motion judge not consider or draw any inferences from the Consent Order. Despite Justice Lederer's proclamation at paragraph 81 of his endorsement that "*I draw no inference from this order.*", the remainder of the paragraph makes it clear that he had:

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 Catalyst is required to pay Brandon Moyse while he waits for the period affected by the non-competition clause to wind down.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 81, MMR, Tab 3, page 39

78. Moyse submits that Justice Lederer erred in considering the terms of the Consent Order when assessing the balance of convenience. Further, in ordering Catalyst to pay Moyse for the period of the restriction, a term not found in the Non-Competition Clause, Justice Lederer altered the bargain between the parties, essentially re-writing the clause, and, in doing so, put his thumb on the scale to artificially tilt the balance of convenience in Catalyst's favour.

79. Justice Lederer's decision that the balance of convenience favors Catalyst was based upon improper considerations and contrary to the basic proposition of law that the balance of convenience must be based on the actual terms of the restrictive covenant sought to be upheld.

(D) JUSTICE LEDERER ERRED IN APPOINTING AN INDEPENDENT SUPERVISING SOLICITOR

80. Forensic analysis of another party's computer has been described as "an invasive order" and an "extraordinary remedy".

Reference: *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663, at paras. 48-54 (S.C.J.), MBA, Tab 12

Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve, [2013] O.J. No. 3769 at para. 43 (S.C.J.), MBA, Tab 13

81. Despite the extraordinary nature of this order, Justice Lederer's reasons for granting this remedy are sparse:

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 that is that it is another assurance where those made in the past were not sustained.

Reference: Reasons for Decision of the Honourable Justice Lederer dated November 10, 2014, para. 83, MMR, Tab 3, page 40

82. Justice Lederer's only justification for appointing an independent supervising solicitor to review the forensic images taken from Moyse's personal electronic devices is a vague inference that Moyse would be unwilling or unable to produce documents in accordance with the *Rules of Civil Procedure*. However, Justice Lederer ignored or failed to consider that Moyse had disclosed the existence of the March 27, 2014 email in his very first affidavit. Furthermore, he agreed to the Consent Order requiring him to search his devices for documents relating to his employment to Catalyst and voluntarily produced them prior to the interlocutory motion.

Reference: Moyse Affidavit, paras. 62-66, MMR, Tab 4G, pages 230-231
Affidavit of Documents of Brandon Moyse, sworn July 22, 2014, MMR, Tab 4L, pages 679-700
Supplementary Affidavit of Documents of Brandon Moyse, sworn July 29, 2014, MMR, Tab 4N, pages 739-743

83. Justice Lederer's decision to appoint an independent supervising solicitor is contrary to decisions by other Judges or Courts in Ontario. Previous case law is clear that forensic analysis of a party's personal electronic devices is an extraordinary order that requires strong evidence of misuse or failure to disclose of information. There was no such information in this case.

Reference: *Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve*, [2013] O.J. No. 3769 at para. 43 (S.C.J.), MBA, Tab 13
Brown v. First Contact Software Consultants Inc., [2009] O.J. No. 3787 at para 67 (S.C.J.), MBA, Tab 4

84. In the circumstances, it is desirable that leave to appeal be granted.

(2) 62.02(4)(B) – THERE IS GOOD REASON TO DOUBT THE CORRECTNESS OF THE MOTION DECISION AND THE PROPOSED APPEAL INVOLVES MATTERS OF SUCH IMPORTANCE THAT LEAVE SHOULD BE GRANTED

85. For there to be "good reason to doubt the correctness" of the decision, the judge hearing the leave motion does not need to conclude that the decision was wrong or even probably wrong, only that there is good reason to doubt the correctness of the decision. The court should

ask itself whether the decision, (a) is open to "very serious debate"; and (b) warrants resolution by a higher level of judicial authority.

Reference: *Brownhall v. Canada (Ministry of National Defence)*, 2006 CarswellOnt 995 at para. 30 (S.C.J.), MBA, Tab 14

86. The three-part test for an interim or interlocutory injunction is well-known. The moving party must establish that:

- (1) There is a serious issue to be tried, which is elevated to a strong *prima facie* case in employment matters such as this;
- (2) The moving party would suffer irreparable harm if an injunction was not granted; and
- (3) The balance of convenience favours granting the injunction.

Reference: *RJR-MacDonald Inc. v. Canada*, 1194 CarswellQue 120 at para. 35 (S.C.C.).

87. Justice Lederer misapplied the test for injunctive relief by: (i) requiring that Moyse, the responding party in this case, demonstrate that he would not be irreparably harmed by the granting of an injunction; (ii) holding that the mere disclosure of confidential information to a third party without any evidence that the third party has used such confidential information can give rise to irreparable harm; and (iii) granting injunctive relief notwithstanding that the evidence on the issue of irreparable harm was entirely speculative.

88. Furthermore, in addressing the issue of irreparable harm, Justice Lederer conflated the issues of breach of confidence and competition. In that regard, Justice Lederer did not examine whether Catalyst would suffer irreparable harm if an injunction was denied and Moyse was allowed to compete, but instead only considered whether Catalyst would suffer irreparable harm if Moyse competed unfairly, by divulging confidential information to West Face.

89. In doing so, Justice Lederer improperly granted an interlocutory injunction to prohibit Moyse from competing with Catalyst, not because of the risk of irreparable harm that would be

caused by competition, but expressly for the purpose of preventing Moyse from disclosing Catalyst's confidential information to West Face, despite ordering a separate interlocutory injunction which prohibited Moyse from disclosing Catalyst's confidential information and in spite of an evidentiary record that showed Moyse transferred Catalyst's information to West Face, only once, well prior to accepting employment with the company, not with the intention of providing West Face with a competitive advantage, but only to provide a sample of his research and writing abilities.

90. Justice Lederer's granting of an interlocutory injunction to ensure that Moyse did not "through carelessness, by accident or with intention, communicate information, confidential to Catalyst, to representatives of West Face and, thus create unfair competition" relies, in effect, upon the doctrine of "inevitable disclosure" which has not been accepted by courts in Ontario. It is also not supported by the evidence, which shows

Reference: *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2007] O.J. No. 4834 at para. 69 (S.C.J.), MBA, Tab 15

Aon Reed Stenhouse Inc. v. Marsh Canada Ltd., 2012 CarswellOnt 15598 at para 32 (S.C.J.), MBA, Tab 16

91. Additionally, Justice Lederer erred in upholding a non-competition covenant that is ambiguous and, as acknowledged by Catalyst, broader than is necessary to protect its alleged proprietary interests.

92. The decision to enforce the Non-Competition Clause is an important issue, which is open to very serious debate. It represents a significant departure from years of consistent jurisprudence regarding the enforceability of non-competition covenants in the employment context. Justice Lederer's decision introduces a great deal of uncertainty to this area of law, as the decision does not analyze the enforceability of the covenant with reference to the strict requirements established in the case law applicable to a "mere employee".

93. Moreover, if leave to appeal is granted, this decision will be the first occasion for an appellate court in Ontario to consider whether the Court can alter the terms of the original contract between an employer and an employee and order that an employer must pay its former employee his or her salary for the duration of the restricted period of a non-competition covenant, notwithstanding that the contract contained no such provision. It will also be the first opportunity for an appellate court in Ontario to consider the applicability of the doctrine of "inevitable disclosure" in Ontario.

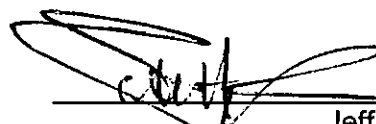
94. The decision to grant this interlocutory injunction is a matter of public importance which transcends the interest of the parties. Since these matters are of fundamental public importance, it is desirable that leave to appeal be granted.

PART V – ORDER REQUESTED

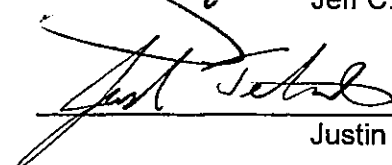
95. Given the foregoing, Moyse respectfully requests:

- (a) an Order granting leave to appeal to the Divisional Court from the Order of the Honourable Justice Lederer dated November 10, 2014;
- (b) his costs of this motion on a substantial indemnity basis;
- (c) such further and other relief as this Honourable Court may deem just.

ALL OF WHICH IS RESPECTFULLY SUBMITTED



Jeff C. Hopkins



Justin Tetreault

Lawyers for the Defendant, Brandon Moyse

SCHEDULE A – LIST OF AUTHORITIES

1. *Mask v. Silvercorp Metals Inc.*, 2014 CarswellOnt 10911 (Div. Ct.)
2. *Sherwood Dash Inc. v. Woodview Products Inc.*, [2005] O.J. No. 5298 (S.C.J.)
3. *Trapeze Software Inc. v. Bryans*, [2007] O.J. No. 276 (S.C.J.)
4. *Brown v. First Contact Software Consultants Inc.*, [2009] O.J. No. 3787 (S.C.J.)
5. *GDL Solutions Inc. v. Walker*, 2012 CarswellOnt 9889 (S.C.J.)
6. *H.L. Staebler Co v. Allan*, 2008 CarswellOnt 4650 (C.A.)
7. *Shafron v. KRG Insurance Brokers (Western) Inc.*, [2009] S.C.J. No. 6
8. *Lyons v. Multari*, 2000 CarswellOnt 3186 (C.A.)
9. *Creditel of Canada Ltd. v. Faultless et al.*, [1977] O.J. No. 2474 (H.C.J.)
10. *J.G. Collins Insurance Agencies Ltd. v. Elsley*, 1978 CarswellOnt 1235 (S.C.C.)
11. *Consumer Impact Marketing Ltd. v. Shafie*, [2010] O.J. No. 2424 (S.C.J.)
12. *Altus Group Ltd. v. Yeoman*, [2012] O.J. No. 3663 (S.C.J.)
13. *Plaza Consulting Inc. (c.o.b. QA Consultants) v. Grieve*, [2013] O.J. No. 3769 (S.C.J.)
14. *Brownhall v. Canada (Ministry of National Defence)*, 2006 CarswellOnt 995 (S.C.J.)
15. *RJR-MacDonald Inc. v. Canada*, 1194 CarswellQue 120 (S.C.C.)
16. *Longyear Canada v. 897173 Ontario Inc. (c.o.b. J.N. Precise)*, [2007] O.J. No. 4834 (S.C.J.)
17. *Aon Reed Stenhouse Inc. v. Marsh Canada Ltd.*, 2012 CarswellOnt 15598 (S.C.J.)

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).

THE CATALYST CAPITAL GROUP INC.

- and -

MOYSE ET AL.

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

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

Proceeding commenced at TORONTO

**FACTUM
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