Divisional Court File No. 541/14
Divisional Court File No. 542/14
Superior Court of Justice 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/
Responding Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants/
Moving Parties

FACTUM OF THE RESPONDING PARTY, THE CATALYST CAPITAL GROUP INC. (MOYSE & WEST FACE MOTIONS FOR LEAVE TO APPEAL)

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PART I - SUMMARY OF FACTS

A. Introduction

1. The issue before the Court is narrow and simple – should the Court grant leave to appeal an interlocutory order that is entirely moot? The answer to this question is "no".

2. The Defendants West Face Capital Inc. ("West Face") and Brandon Moyse ("Moyse") seek leave to appeal the November 10, 2014 Order of Justice Lederer (the "Order") which enjoined Moyse from working at West Face for approximately six weeks, until December 21, 2014. This factum responds to both of the Defendants' motions for leave to appeal.

3. The Order also provided for a forensic image of the hard drive on Moyse's personal computer (the "Image") to be examined by an Independent Supervising Solicitor ("ISS") pursuant to a protocol to be agreed upon by the parties or fixed by the Court. The parties agreed to a document review protocol ("DRP") on December 12, 2014, one week before West Face filed its motion materials and four weeks before Moyse filed his materials.[1]

4. Despite having received Justice Lederer's reasons for decision on November 10, the Defendants waited until the last possible day to serve their notices of appeal, and then waited several weeks before they delivered their appeal materials. West Face's materials were filed two days before Moyse was able to resume working at West Face. Even more remarkably, Moyse's materials were filed more than two weeks after Moyse was able to resume working at West Face.

5. The Defendants are represented by sophisticated counsel who one assumes are familiar with the procedure for seeking leave to appeal an Order on an urgent basis. The fact that the

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[1] Endorsement of Justice Lederer dated December 16, 2014, with enclosed Document Review Protocol; Responding Motion Record ("RMR"), Tab 5.

Defendants chose instead to "run out the clock" confirms that their appeals are not of sufficient importance to the parties to merit leave, let alone to the public, as required pursuant to the Rules.

6. The Order was the result of an exercise of judicial discretion: the Plaintiff ("Catalyst") moved for equitable relief in the form of an interlocutory injunction. Equitable relief was granted. Simply put, the impugned paragraphs of the Order are moot and there is no reason for the Divisional Court to grant the Defendants leave to appeal.

B. Industry Background: Special Situations for Control or Influence Investments

7. Catalyst is an investment firm that is considered a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations for control". In a "special situation for control" investment, an investor attempts to acquire a sufficient amount of debt or equity in a situation to gain control or influence at a company in order to provide direction operational and/or strategic guidance.[2]

8. Confidential information is crucial to the successful implementation of an investment plan to capitalize on a special situation. Catalyst spends substantial time studying opportunities and planning its investment strategy before it decides to pursue a particular situation. 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, that competitor can use that information to unfairly compete with Catalyst with respect to the investment opportunity.[3]

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[2] Affidavit of James A. Riley, sworn June 26, 2014 ("Riley June Affidavit"), ¶2-5; Moyse Motion Record ("MR"), Vol. I, Tab 4E, pp. 83-84.
[3] Riley June Affidavit, ¶7-8; MR, Vol. I, Tab 4E, p. 85.

9. There are very few investment firms in Canada that invest in special situations for control or influence. One of Catalyst's competitors is West Face.[4]

C. Catalyst's Staffing Model and Its 60/40 Scheme for Employees

10. Catalyst uses an entrepreneurial staffing model and employs only two investment analysts, who are given a lot of training, autonomy and responsibility as compared to their peers. Moyse was employed as an investment analyst at Catalyst pursuant to an employment agreement dated October 1, 2012 (the "Employment Agreement") until his resignation effective June 22, 2014.

11. In addition to his base salary and annual bonus, Moyse participated in Catalyst's "60/40 Scheme," which gives Catalyst's professionals a partner-like interest in the success of the company. By May 2014, Moyse had accrued over $500,000 in the 60/40 Scheme.[5]

12. The Employment Agreement contains three restrictive covenants: a non-compete clause (the "Non-Compete Covenant"), a non-solicit clause and a confidentiality clause (the "Confidentiality Covenant") (together, the "Restrictive Covenants"). The Non-Compete Covenant was reproduced in full at paragraph 52 of Justice Lederer's Reasons for Decision (the "Reasons"); the Confidentiality Covenant was reproduced in full at paragraph 47 of the Reasons. In order to save space, these covenants are not reproduced in this factum.

D. Moyse Resigns from Catalyst to Work at West Face

13. On March 26, 2014, Moyse had coffee with Tom Dea, a partner at West Face ("Dea"). Over the next two months, Moyse met with and exchanged emails with Dea and others at West

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[4] Reasons of Justice Lederer, dated November 10, 2014 ("Reasons"), at ¶36; MR, Vol. I, Tab 3, pp. 25-26. Exhibit "B" to the Riley June Affidavit; MR, Vol. I, Tab 4E, p. 116.

[5] Riley June Affidavit, ¶11-16; MR, Vol. I, Tab 4E, pp. 86-87. Affidavit of James Riley sworn July 14, 2014 ("Riley July 14 Affidavit"), ¶9; MR, Vol. II, Tab 4J, p. 644. Cross-examination of Brandon Moyse, held July 31, 2014 ("Moyse Cross"), pp. 30-35, qq. 142-67; MR, Vol. IV, Tab 7, pp. 1028-33.

Face relating to Moyse's move from Catalyst to West Face. On May 24, 2014, while he was on vacation, Moyse emailed his resignation to Catalyst, effective June 22, 2014.

14. Catalyst later learned Moyse had resigned to go work at West Face.[6]

15. Moyse's contract with West Face (the "West Face Contract") includes a confidentiality covenant that is almost identical to the Confidentiality Covenant and a non-competition covenant which arguably survives the termination of his employment.[7]

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

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

17. In this exchange of correspondence, counsel for both defendants claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality.[8] In particular, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is [...] baseless."

18. This statement is wrong: as discussed in detail below, in March 2014, Dea expressly asked Moyse to send him samples of his work at Catalyst. Moyse sent Dea four Catalyst investment analysis memos stamped "Confidential" and "For Internal Discussion Purposes Only", which Dea then circulated within West Face without Catalyst's knowledge or permission.

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[6] Affidavit of Thomas Dea, sworn July 7, 2014 ("Dea Affidavit"), ¶20-23; MR, Vol. II, Tab 4H, pp. 440-41. Riley June Affidavit, ¶29, Exhibits "G" and "H"; MR, Vol. I, Tab 4E, pp. 91, 133 and 135.
[7] Dea Affidavit, Exhibit "B"; MR, Vol. II, Tab 4H, p. 454.
[8] Riley June 26 Affidavit, Exhibits "E" and "F"; MR, Vol. I, Tab 4E, pp. 125 and 128.

19. On June 19, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. On June 24, West Face rebuffed Catalyst's final efforts to negotiate a resolution, following which Catalyst commenced this action and brought its motion for injunctive relief.[9]

20. For the first two weeks of Moyse's employment at West Face, he was not assigned any tasks.[10] In other words, the defendants refused to adhere to the *status quo* and dared Catalyst to sue them **even though West Face had no immediate need for Moyse's services.**

21. Catalyst promptly commenced an action and moved with urgency to seek interim relief. On July 16, 2014, at the hearing of Catalyst's interim relief motion, the parties consented to an order (the "Interim Order"), pursuant to which:

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

(b) During the interim period, Catalyst would pay Moyse's West Face salary;

(c) Moyse consented to the creation of a forensic image of his personal computer, iPad and smartphone, to be held in trust by his counsel pending the outcome of the motion for interlocutory relief; and

(d) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[11]

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[9] Paragraph 47 of and Exhibits "M", "N" and "O" to the Riley June 26 Affidavit; MR, Vol. I, Tab 4E, pp. 95, 151, 153 and 156.
[10] Moyse Cross, p. 171, qq. 794-795; MR, Vol. IV, p. 1169.
[11] Order of Justice Firestone dated July 16, 2014; MR, Vol. I, Tab 4D, pp. 79-82.

F. Moyse Transferred Catalyst's Confidential Information to West Face

22. On July 7, 2014, Moyse and Dea swore affidavits which admitted that Moyse had transferred Catalyst's confidential information to West Face, and West Face distributed that confidential information throughout the firm.

23. In response to a request from Dea for writing samples, in March 2014, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contained Moyse's and other Catalyst employees' analyses of investment opportunities and were clearly marked "Confidential" and "For Internal Discussion Purposes Only".[12] Moyse did not consider these markings to have any meaning:

> 664. Q. And it's also marked "confidential", right?
>
> A. Yeah. Part of the template. But yes, that's what it says.
>
> 665. Q. So that's only a template so far as you're concerned. It means nothing.
>
> A. **I never gave it any thought.**[13]

24. Moyse freely acknowledged that one of the memos (the "Homburg Memo") was confidential, but he refused to agree that the other three memos were confidential and admitted he is unable to identify Catalyst's confidential information:

> 426. Q. So at paragraph 64 -- I take it we can also agree with each other on this point, that in paragraph 64 where you say that three of the research pieces did not contain any confidential information or information proprietary to Catalyst, that's wrong?
>
> A. I don't agree.
>
> 427. Q. So you're saying that those analyses that were performed, those research pieces that were performed were not proprietary to Catalyst?

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[12] Dea Affidavit, Exhibit "L"; MR, Vol. II, Tab 4H, pp. 500-637.
[13] Moyse Cross, p. 141, qq. 664-665; MR, Vol. IV, Tab 7, p. 1139.

A. The pieces themselves were. They didn't contain any confidential information.

428. Q. I don't understand the distinction.

A. I mean there's -- in logic a set doesn't contain itself. So the memo can be confidential and not contain any confidential information.

429. Q. So what makes the memo confidential?

A. **I'm not really sure actually.**

430. Q. Well, maybe I can help you out. Is it the fact that the work product that you're performing on behalf of your employer shouldn't be shared with a competitor?

A. I agree with that.

431. 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.

432. 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.

433. 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.

434. Q. You do far more than multiply, Mr. Moyse. 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.

435. Q. Right. Right? It's that level of analysis, that's the work product that's being performed for your employer; you surely understand that.

A. Yes.

436. Q. And that's what makes it confidential.

A. I don't know.

437. Q. Do you disagree with that?

A. I don't know what makes it confidential.[14]

[…]

718. Q. So that conclusion is the product of your work in relation to this analysis?

A. Yes.

719. Q. And those types of analysis – we can sit here for days if you want and go through all the memos, but that type of analysis is contained in every single one of the memos you sent over.

A. It's all based on publicly available information.

720. Q. It may or may not, but we know in one case it wasn't. But I don't care what it was based on. Your analysis is contained in all of those memos.

A. I don't think my analysis is unique to Catalyst.

721. Q. Is it publicly available?

A. No.

722. Q. And therefore do you accept that it's confidential?

A. **I don't know.**

25. While he is seemingly incapable of identifying Catalyst's confidential information, Moyse knew that what he did was wrong, and he deleted the email he sent Dea:

412. Q. Now, you yourself had actually deleted a copy of that March 27th email from your computer system, right?

A. Yes.

413. 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 you having sent that email?

A. Upon further reflection after sending it, yes.

414. 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.[15]

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[14] Moyse Cross, pp. 92-94, qq. 426-37; MR, Vol. IV, Tab 7, pp. 1090-92 [emphasis added].

[15] Moyse Cross, pp. 89-91, qq. 412-414; MR, Vol. IV, Tab 7, pp. 1087-89. Moyse continued to refuse to acknowledge that the information he disclosed to West Face was confidential, even though both Catalyst and West Face agree that this was the case.

26. After four years in the investment industry, the fact that Moyse could not identify his employer's confidential information clearly affected Justice Lederer's exercise of discretion. Justice Lederer's reasons expressly held that Moyse should be enjoined from working at West Face until the Non-Competition Covenant expired "to ensure that [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."[16]

G. West Face Circulated Catalyst's Confidential Information within the Firm

27. Catalyst is adamant that the Investment Memos contain its confidential information.[17] The memos analyze private or publicly available information to create an "investment thesis", which is the theory as to how the firm might potentially profit from an investment in the situation.

28. At his cross-examination, Dea admitted that West Face considered its investment strategies and investment theses to be confidential and that West Face has a proprietary interest in protecting that confidentiality.[18]

29. Dea admitted that after he received the Investment Memos, he reviewed them and saw that they were marked "Confidential". Nevertheless, he circulated the Investment Memos to the other partners and a vice-president at West Face.[19]

30. West Face never informed Catalyst that Moyse had given it copies of Catalyst's confidential information or that the information was widely circulated at West Face. Instead, West Face attached the Investment Memos to its responding motion record and filed them in open court.

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[16] Reasons of Justice Lederer dated November 10, 2014 at ¶83; MR, Vol. I, Tab 3, p. 39.
[17] Riley July 14 Affidavit, ¶12; MR, Vol. II, Tab 4J, pp. 644-45.
[18] Cross-Examination of Thomas Dea, held July 31, 2014 ("Dea Cross"), pp. 61-63, qq. 252-59; MR, Vol. IV, Tab 8, pp. 1262-64.
[19] Dea Cross, pp. 72-77, qq. 305-332; MR, Vol. IV, Tab 8, pp. 1273-78.

West Face did not seek Catalyst's permission to do so or otherwise give Catalyst an opportunity to seal the court file prior to the hearing of the motion for interim relief on July 16.[20]

31. Dea admitted that West Face would not want Moyse to treat its confidential information in a similar fashion:

> 335. 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.
>
> 336. Q. That's going forward you had this expectation, but whatever he did in the past that's in the past; is that your attitude?
>
> A. Well, our view was that he -- it was -- there was nothing in there that we viewed particularly damaging. There was nothing that we were looking at and, you know, we viewed it sort of as a rookie error. And so we felt compelled to convey to him that you don't do this kind of thing. You should stop doing this. Don't do this again. And by the way, if you come and work here the expectation is that you will take this seriously and protect our confidential information.
>
> 337. Q. You protect our confidential information? You're referring to West Face's information, correct?
>
> A. Correct.
>
> 338. Q. So, in other words, what he did here you wouldn't want him to do with your information?
>
> A. Correct.
>
> 339. Q. If he was looking for prospective employment somewhere else your expectation is he wouldn't take your memos and send them to that employer, correct?
>
> A. Yeah, that's right.[21]

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[20] Riley July 14 Affidavit, ¶13; MR, Vol. II, Tab 4J, p. 645.

32. Likewise, West Face's general counsel admitted that if an employee of West Face distributed its internal deal memos to third parties, it would be considered a breach of the employee's confidentiality obligations to West Face.[22]

H. Moyse Reviewed Confidential Information Unrelated to his Work Before he Resigned

33. In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time period when Catalyst was active in an investment in Stelco, in which Catalyst and West Face were in direct competition. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.[23]

34. On April 25, 2014, Moyse reviewed dozens of files related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse would review these documents, which he did in an insufficient amount of time to read the material he was accessing.[24] Moyse admitted during cross-examination that he "routinely" reviewed transaction files from Catalyst's transactions that had nothing to do with his work at Catalyst.[25]

35. At all material times, Moyse had accounts with two Internet-based file-storage services, "Dropbox" and "Box". These services enable users to create a folder on their computer which is synchronized over the Internet so that it files stored in the folder can be viewed from any computer

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[21] Dea Cross, pp. 78-79, qq. 335-39; MR, Vol. IV, Tab 8, pp. 1279-80 [emphasis added].
[22] Cross-examination of Alexander Singh, held July 31, 2014 ("Singh Cross"), p. 19, q. 68; Responding Motion Record ("RMR"), Tab 1.
[23] Riley June 26 Affidavit, ¶55-57 and Exhibit "R"; MR, Vol I, Tab 4E, pp. 97-98 and 164-66.
[24] Riley June 26 Affidavit, ¶58-59 and Exhibit "S"; MR, Vol. I, Tab 4E, pp. 98 and 168-69.
[25] Moyse Cross, pp. 80-82, qq. 370-78; MR, Vol. IV, Tab 7, pp. 1078-80.

with an Internet connection. The services are capable of moving large amounts of data in a relatively brief period of time without leaving a record of the activity.[26]

36. In the opinion of Martin Musters, Catalyst's forensic IT expert ("Musters"), Moyse's conduct of reviewing several documents over a relatively brief period of time was consistent with transferring files to an Internet-based file storage account. Musters' opinion was that Moyse was very likely transferring documents from Catalyst's computers to his Dropbox or Box accounts.[27]

I. Moyse Retained Hundreds of Catalyst Documents after he Left Catalyst

37. In his first affidavit, Moyse's sworn evidence was as follows:

> It is noteworthy that neither Mr. Riley nor Mr. Musters provide any actual evidence that I transferred information, confidential or otherwise, from Catalyst's servers to my Dropbox or Box accounts or other personal devices. Instead, Mr. Riley and Mr. Musters rely solely on unsupported speculation and innuendo.

38. However, the affidavits Moyse swore pursuant to the Interim Order disclosed over **830** Catalyst documents that remained in his possession in July 2014. Just by reviewing the document titles alone, Catalyst identified **245** confidential documents that remained in Moyse's possession, power or control following his commencement of employment at West Face.

39. Moyse admitted that he frequently emailed Catalyst documents to his personal accounts and that he retained those documents on his personal devices. However, Moyse could not say with absolute certainty that his most recent search has been exhaustive, and he admitted that he deleted

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[26] Affidavit of Martin Musters, sworn June 26, 2014 ("Musters Affidavit"), ¶8-10 and Exhibit "B"; MR, Vol. I, Tab 4F, pp. 186 and 209.
[27] Musters Affidavit, ¶17; MR, Vol. I, Tab 4F, p. 187.

documents between March and May 2014, that he did not inform Catalyst that he had its confidential information and that he did not offer to return confidential information to Catalyst.[28]

40. At his cross-examination, Musters was asked by Moyse's counsel to identify the common patterns of employees who take confidential information. Musters confirmed that Mr. Moyse's use of his work computer fit the profile of an employee who took confidential information.[29]

J. Moyse Lacked Credibility

41. The evidence in the motion below confirmed that Moyse is willing to say whatever he feels is necessary to get what he wants. For example:

(a) He admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[30]

(b) He misrepresented his work on the "deal sheet" he sent West Face by claiming group work as his own and claiming to have led a due diligence process that he merely participated in with Catalyst's more senior employees;[31]

(c) Moyse justified the "embellishments" (his term) on his deal sheet because he wanted a job, and it was not a sworn document;

(d) Moyse now claims that he did not understand all of the terms of the Employment Agreement, even though he indicated by signing the contract that he had reviewed, understood and accepted the terms of the offer;[32]

(e) Moyse's evidence at paragraph 18 of his first affidavit was misleading, in that it suggested he was unaware of the compensation he had accrued under the 60/40 Scheme, when in fact he had been told in March 2014 by Catalyst's CFO that he

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[28] Moyse Cross, pp. 71-79, qq. 329-363; MR, Vol. IV, Tab 7, pp. 1069-77.
[29] Cross-examination of Martin Musters, held August 1, 2014, p. 62, q. 183 and pp. 64-66, q. 188; MR, Vol. IV, Tab 9, pp. 1394 and 1396-98.
[30] Moyse Cross, p. 15, qq. 57-62; MR, Vol. IV, Tab 7, p. 1013.
[31] Moyse Cross, pp. 17-20, qq. 69-91; MR, Vol. IV, Tab 7, pp. 1015-18
[32] Moyse Cross, pp. 27-28, qq. 126-130; MR, Vol. IV, Tab 7, pp. 1025-26.

had accrued $500,000 in the 60/40 Scheme, which is entirely consistent with the evidence that Moyse was attempting to undermine in his affidavit;[33]

(f) Paragraph 11 of Moyse's affidavit stated that he performed an "analysis" of private documents provided to Catalyst by WIND Mobile (one of the companies involved in the Telecom Situation), but during his cross-examination he claimed he merely transposed financial information into chart form;[34]

(g) Moyse made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[35]

(h) Moyse admitted that by disclosing the Homburg Memo to West Face, he knowingly caused Catalyst to breach a non-disclosure agreement;[36]

(i) Moyse admitted he wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device;[37]

(j) Moyse incorrectly stated in his affidavit that he earned a base salary of $90,000 and had an opportunity to earn a bonus of $80,000, but in email correspondence with Dea he stated that his base salary was $100,000 and he earned a "minimum" bonus of $80,000;[38] and

(k) Moyse admitted that contrary to his affidavit evidence regarding his "limited" role on the Telecom Situation, he was in fact part of the Catalyst deal team for the situation and received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement.[39]

42. Simply put, Moyse's willingness to say whatever suited his needs, regardless of whether or not it was true, rendered him a discredited witness in relation to matters at issue at the motion and

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[33] Moyse Cross, pp. 31-35, qq. 149-168; MR, Vol. IV, Tab 7, pp. 1029-33.
[34] Moyse Cross, pp. 53-56, qq. 246-266; MR, Vol. IV, Tab 7, pp. 1051-54.
[35] Moyse Cross, pp. 85-86, qq. 394-396; MR, Vol. IV, Tab 7, pp. 1083-84.
[36] Moyse Cross, pp. 96-98, qq. 446-452; MR, Vol. IV, Tab 7, pp. 1094-96.
[37] Moyse Cross, p. 103-106, qq. 473-486; MR, Vol. IV, Tab 7, pp. 1101-104.
[38] Affidavit of Brandon Moyse, sworn July 7, 2014, ¶17; MR, Tab 4G, p. 221. Moyse Cross, p. 159, qq. 753-758; MR, Vol. IV, Tab 7, pp. 1157. Exhibit "1" to the Moyse Cross; RMR, Tab 2.
[39] Moyse Cross, pp. 174-75, qq. 803-809; MR, Vol. IV, Tab 7, pp. 1172-73.

justified Justice Lederer's decision to restrain him from working at West Face until the Non-Competition Covenant expired.

K. Justice Lederer's Decision and the Defendants' Lackadaisical Approach to Their Appeal

43. The interlocutory motion was heard on October 27, 2014. On November 10, 2014, Justice Lederer released his decision. After reviewing the facts in detail, and in particular after making findings regarding the Defendants' failure to come to Court with clean hands, Justice Lederer exercised his discretion to grant Catalyst the interlocutory injunction it sought, albeit on the condition that Catalyst continue to pay Moyse's salary until he was allowed to resume working at West Face.

44. Both Defendants sought leave to appeal – however, they delivered their notices on the last possible day under the *Rules* to do so, and thereafter they waited 30 days (in the case of West Face) and 51 days (in the case of Moyse) to deliver their motion materials.

45. As of the date of this factum, Moyse has returned to work at West Face, the parties agreed to a DRP and the ISS completed its review of the Image of Moyse's computer. The ISS delivered its draft report to Moyse and Catalyst on February 1, 2015, and its final report will be delivered no later than February 11, 2015.

46. Moyse initially brought a motion to stay the ISS process pending the determination of his motion for leave to appeal.[40] On December 23, the day after he was allowed to return to work at West Face, Moyse abandoned his stay motion.[41]

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[40] Notice of Motion dated December 3, 2014; RMR, Tab 3.
[41] Notice of Abandonment dated December 23, 2014; RMR, Tab 4.

PART II - CATALYST'S POSITION ON THE ISSUES RAISED BY THE DEFENDANTS

47. Rule 62.02(4) sets out two possible branches upon which leave may be granted. Both branches involve a two-part test and in each case, both aspects of the two-part test must be met before leave may be granted:

> **62.02(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.[42]

48. The test for leave to appeal an interlocutory order is an onerous one. It is well-settled that leave should not be easily granted.[43] The moving party has to justify the Court's granting of leave.

A. There are no Conflicting Decisions on the Matter Involved in the Appeal

49. Under Rule 62.02(4)(a), the moving party must establish that there is a conflicting decision of another judge or court in Ontario or elsewhere and that it is in the opinion of the judge hearing the motion "desirable that leave to appeal be granted."

50. A "conflicting decision" must be with respect to a matter of principle, not merely a situation in which a different result was reached in respect of particular facts.[44] In particular, this Court has held that exercising discretion in a way that is different from that of other cases is not a difference in principle, as argued by the Defendants – rather, it is merely a difference in the

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[42] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, Rule 62.02(4).
[43] *Lochner v. Toronto Police Services Board*, 2014 ONSC 3563 at ¶4; *Farmers Oil & Gas Inc. v. Ministry of Natural Resources*, 2013 ONSC 1608 at ¶4 ["*Farmers Oil*"].
[44] *Farmers Oil*, *supra* at ¶5.

application of discretion and it is not a difference that will create any confusion in the law requiring a resolution by a full panel of the Divisional Court.[45]

51. The Defendants' argument on the conflicting decisions issue is really an argument that Justice Lederer's decision was incorrect. That issue is addressed in detail below. For the purposes of Rule 62.02(4)(a), it is sufficient to note that Justice Lederer's reasons referred to both of the Supreme Court of Canada cases on restrictive covenants (*Shafron* and *Elsley*) that the Defendants claim were not followed.[46] In fact, Justice Lederer considered all of the principles that the Defendants claim he failed to consider:

(a) Ambiguity: Justice Lederer considered ambiguity at paragraphs 58-63 and determined that the non-competition covenant was not ambiguous;

(b) Breadth: Justice Lederer considered the geographic scope and duration of the non-competition covenant at paragraphs 63-65 and determined that the geographic boundaries and time span of the covenant were not unreasonable;

(c) Scope of Restriction: Justice Lederer considered the scope of the prohibited activities at paragraph 63 and determined that the scope was not unreasonable;

(d) Special Relationship: Justice Lederer considered Moyse's situation of having access to Catalyst's confidential information to be relevant to the restrictive covenant analysis – he was clearly alive to the need for there to be a "special relationship" between Moyse and Catalyst; and

(e) Irreparable harm and balance of convenience: At paragraphs 76-82, Justice Lederer considered both principles, and in particular as they apply to breach of confidence cases, and found that on both counts Catalyst has met the *RJR* test to obtain interlocutory relief.

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[45] See, *e.g.*, *Look Communications Inc. v. Bell Canada Inc.*, 2009 CanLII 14391 (Ont. Div. Ct.).
[46] Reasons, ¶55 and 58.

52. In summary, the manner in which Justice Lederer exercised his discretion does not amount to a "conflicting decision" just because other cases were decided differently on different facts. Justice Lederer's robust reasons (85 single-spaced paragraphs spanning 29 pages) clearly demonstrate an awareness and application of all of the relevant legal principles.

53. The Defendants seek leave to appeal not because Justice Lederer failed to consider the appropriate principles, but because they want a "do-over" to argue the motion before other judges. This does not satisfy the onerous test set out in Rule 62.02(4)(a).

C. There is no Good Reason to Doubt the Correctness of the Appeal

54. Under Rule 62.02(4)(b), the test for leave is not satisfied by a remote possibility or merely some argument that the decision in question is incorrect. The moving party must raise a "substantial doubt" about the correctness of the decision – the decision must be open to "very serious debate".[47]

55. There is no serious debate about the correctness of Justice Lederer's decision. Justice Lederer was aware of the applicable legal test for an interlocutory injunction applicable to non-competition covenants and the factual and legal considerations relevant to the appeal before him. He reviewed the cases the Defendants relied on and he correctly determined that, based on the unique facts of the case before him, he should grant the equitable relief sought by Catalyst.

56. In their written submissions, the Defendants repeat the same points they made before Justice Lederer. Those arguments were rejected based on the unique facts before the Court, including:

(a) Moyse admitted he was unable to identify Catalyst's Confidential Information;

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[47] *Lloyd v. Economical Mutual Insurance Company*, 2008 CanLII 38364 at ¶26 and 31 (Ont. S.C.J.).

(b) Moyse admitted to "embellishing" and mis-stating facts;

(c) Moyse admitted he was unsure if he had disclosed all of Catalyst's Confidential Information residing on his personal computer;

(d) Moyse admitted to deleting files that resided on his computer;

(e) Moyse wiped his Catalyst-issued Blackberry before returning it to Catalyst, thus destroying a source of potentially relevant evidence;

(f) West Face initially professed to be mindful of and compliant with Catalyst's confidentiality concerns, only to later reveal that it had knowingly circulated Catalyst's Confidential Information within the firm and to file that material in open Court without Catalyst's knowledge or permission;

(g) At the time the interlocutory motion was heard, Moyse had already stopped working at West Face for over three months and less than two months remained in the non-Competition Covenant; and

(h) Both Moyse and West Face adduced no evidence that enforcing the Non-Competition Covenant would cause either of them any irreparable harm.

57. In addition or in the alternative, even if there are concerns about aspects of Justice Lederer's reasons, leave should not be granted if the decision is correct. Motions for leave to appeal focus on the correctness of the order or decision sought to be appealed from, not the reasons.[48]

58. In the current case, the decision to enjoin Moyse from working at West Face for the limited remained of the non-competition period – a period of less than six weeks from the date Justice Lederer released his reasons – is not open to serious debate.

59. Likewise, the discretionary decision to order an ISS review of the Image was correct in the circumstances. As Justice Lederer noted, having already acted deceptively in the weeks leading up to the commencement of this Action, it did not lie in Moyse's mouth to argue that he could be trusted to unilaterally perform the equivalent of a forensic review of his own computer.

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[48] *2145850 Ontario Limited v. Student Transportation*, 2014 ONSC 5142 at ¶6.

60. To soften the consequences of the order on the Defendants, Justice Lederer ordered Catalyst to continue paying Moyse's salary. The effect of this order is that it avoided any pecuniary harm to West Face, which was relieved of having to pay Moyse his salary during the non-competition period.[49]

61. The Defendants rely on this term of the Order to justify seeking leave, which is remarkable seeing as the term was granted for West Face's benefit. Moreover, the suggestion that the inclusion of this term is "without precedent" ignores the express wording of s. 101 of the *Courts of Justice Act*, which provides the Court with authority to include in an order granting an interlocutory injunction "such terms as are just".[50] There is no question that Justice Lederer had the statutory authority to grant the order he did.

62. In summary, Catalyst submits that Justice Lederer's reasons are exemplary in their treatment of a difficult case with complicated facts. However, even if parts of those reasons cause this Court concern, Justice Lederer's decision was well within the bounds of the proper exercise of his discretion to order equitable relief and there is no reason to doubt the correctness of that decision.

D. The Proposed Appeal Does not Involve a Matter of Public Importance

63. In addition to satisfying the Court that the correctness of the decision below is open to very serious debate, the Defendants must also satisfy the Court that the proposed appeals involve matters of general public importance, such that an appeal from an expired injunction is warranted.

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[49] There was no evidence in the record from either Defendant to suggest that West Face would not pay Moyse his salary if the Court granted the interlocutory injunction. In the absence of such evidence, it is presumed that West Face would have paid the salary it was contractually obligated to pay to Moyse.

[50] *Courts of Justice Act,* R.S.O. 1990, c. C.43, s. 101(2).

64. The "importance" comprehended by Rule 62.02(4)(b) is one which transcends the interests of the immediate parties to the litigation and contemplates issues of significance that warrant resolution by a higher level of judicial authority.[51]

65. The ultimate issue on this proposed appeal is whether Justice Lederer erred in his discretionary exercise of equitable relief. The answer to this question is of no importance to anyone other than these parties.

66. The Defendants' suggestion that Justice Lederer's decision "introduces uncertainty into the law" is misplaced. "Uncertainty" exists in every motion for an interlocutory injunction to enforce a restrictive covenant, because they are so fact-dependent.

67. Not every interlocutory injunction motion where a restrictive covenant is enforced warrants an appeal to the Divisional Court on that basis alone. Yet that is, in essence, the basis for the Defendants' claim that their proposed appeals concern matters of public importance.

68. Every motion for equitable relief turns on the unique facts of the case before the motion judge. In this case, no "uncertainty" has been introduced into the law because future cases will be decided on their own unique sets of facts. Ultimately, this motion is only of importance to the parties, and even then, that importance expired on December 22, 2014, when Moyse was no longer enjoined from working at West Face. That part of the dispute between the parties is concluded.

69. The Defendants' argument requires this Court to conclude that every appeal from an interlocutory order in which a restrictive covenant is upheld should automatically be heard by this Court if there is very serious debate as to the correctness of the motion judge's decision. Such a

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[51] *Lloyd v. Economical Mutual Insurance Co.*, *supra*, at ¶29.

conclusion would eliminate the second part of the test set out in Rule 62.02(4)(b) by creating a special category of cases where public importance is assumed based on the outcome of the motion below. That is not what is intended by Rule 62.02(4)(b), which requires a case-by-case determination of public importance.

E. Conclusion

70. Catalyst asks that the Defendants' motions for leave to appeal be dismissed with costs on a partial indemnity basis, payable within 30 days.

PART III - ADDITIONAL ISSUES

71. As explained in detail above, the Defendants have failed to demonstrate that they satisfied either test for leave. However, as a threshold issue, this Court must first determine whether these motions should be dismissed on the grounds that the intended appeals are moot. If the appeals are moot, the motions for leave should be dismissed on that basis alone.

72. The doctrine of mootness is an aspect of the general policy or practice that a court may decline a case which raises a hypothetical or abstract question. The doctrine applies when the decision of the Court will not have the effect of resolving a controversy which affects the rights of the parties. If the decision of the Court will have no practical effect on the parties, the Court will decline to decide the case.[52]

73. In *Borowski*, the Supreme Court lists several scenarios where an issue is rendered moot by the disappearance of the controversy between the parties. In those scenarios concerning appeals, as in this case, the issue is rendered moot by a change of facts that occurs between the making of the

[52] *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at ¶15 ["*Borowski*"] [emphasis added].

Order under appeal and the hearing of the appeal (or motion for leave to appeal) so that the underlying issue is no longer a live controversy.

74. In the current case, the Defendants implicitly acknowledge that the proposed appeals are now moot: the period during which Moyse was enjoined from working at West Face expired last month, so nothing is to be gained by the Defendants if their appeal succeeded. This is a classic case of a moot appeal.

75. Likewise, since the ISS has already issued a draft report, which will be finalized in early February. By the time an appeal is heard, that issue will also be moot.

76. In extremely limited circumstances, the Court may exercise its discretion to hear an appeal, even if it is moot. But, as this Court has held, the onus is on the party seeking to have a moot matter heard to demonstrate why the Court should depart from its usual practice of refusing to hear moot matters.[53]

77. In the current case, the Defendants have not met the burden of demonstrating why a moot appeal concerning a legal issue that already has a robust body of appellate case law to guide the Superior Court needs to be heard.

78. In their factums, the Defendants refer to several appellate-level cases in support of their argument that Justice Lederer's decision conflicts with existing case law.

79. The merits of that argument are dealt with above. On the issue of mootness, the appellate case law referred to by the Defendants undermines the need for leave to decide yet another

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[53] *Stewart v. Office of the Independent Police Review Director*, 2013 ONSC 7907 at ¶28 (Div. Ct.).

restrictive covenant case, especially in circumstances where the covenant has expired and the proposed appeal is moot.

80. In deciding whether to depart from the usual practice not to hear moot appeal, the Court applies three factors:

(a) The presence of an adversarial context;

(b) The concern for judicial economy; and

(c) The need for the Court to be sensitive to its role as the adjudicative branch in our political framework.[54]

81. The requirement of an adversarial context may be satisfied if there are collateral consequences of the outcome of the proposed appeal. In this case, there are no such consequences. In July 2014, the Defendants consented, albeit on a without prejudice basis, to an interim order enjoining Moyse from working at West Face. That order was in force up until the release of Justice Lederer's decision, less than six weeks before the non-competition covenant expired. The parties remain opposed in interest on other issues, but not on the issue of whether Moyse may continue to work at West Face – that injunction is now spent and there are no collateral consequences relating to the proposed appeal on that issue.

82. Likewise, in the absence of a stay pending appeal, which was intentionally abandoned by Moyse, there are no collateral consequences to the ISS process, which will be completed before this motion is decided.

83. The judicial economy factor recognizes the need to ration scarce judicial resources among competing claimants. Moot appeals only merit an expenditure of judicial resources if it is

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[54] *Borowski*, *supra* at ¶26-42.

necessary to determine an important question which might otherwise evade appellate review. However, it is preferable to wait and determine a point in a context where the dispute has not disappeared.[55]

84. As noted above, the Defendants have demonstrated through their factums that there already exists a substantial body of case law on the issue of restrictive covenants in the employment context. This is not an area of law that requires expenditure of scarce judicial resources to hear an appeal of a spent non-compete period.

85. Finally, Courts must be sensitive to their role as the adjudicative branch, and should avoid, where possible, pronouncing judgments in the absence of a dispute affecting the rights of the parties.[56] This third factor also weighs against granting leave to hear the Defendants' appeals.

86. Taken together, the three factors do not support a departure from the usual rule that moot appeals should be dismissed and not decided on the merits. The parties, and more importantly, the public at large, gain nothing from arguing over a non-competition covenant that expired in December 2014, thereby making this motion for leave to appeal academic in nature.

87. On this basis alone, the motions for leave to appeal should be dismissed, with costs to Catalyst payable within 30 days.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of February, 2015.

Rocco DiPucchio

Andrew Winton

[55] *Borowski, supra* at ¶36.
[56] *Borowski, supra* at ¶40.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *Lochner v. Toronto Police Services Board*, 2014 ONSC 3563.

2. *Farmers Oil & Gas Inc. v. Ministry of Natural Resources*, 2013 ONSC 1608.

3. *Look Communications Inc. v. Bell Canada Inc.*, 2009 CanLII 14391 (Ont. Div. Ct.).

4. *Lloyd v. Economical Mutual Insurance Company*, 2008 CanLII 38364 (Ont. S.C.J.).

5. *2145850 Ontario Limited v. Student Transportation*, 2014 ONSC 5142.

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

7. *Stewart v. Office of the Independent Police Review Director*, 2013 ONSC 7907 (Div. Ct.).

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

1. *Courts of Justice Act*, R.S.O. 1990, Chapter C.43

101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

Terms

(2) An order under subsection (1) may include such terms as are considered just.

2. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

62.02(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.

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

PROCEEDING COMMENCED AT
TORONTO

RESPONDING FACTUM
(DEFENDANTS' MOTIONS FOR LEAVE TO APPEAL)

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