Court File No. CV-16-11272-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

CLOSING WRITTEN SUBMISSIONS OF THE DEFENDANT BRANDON MOYSE

June 14, 2016

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PART I. OVERVIEW

1. The plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), has led no direct evidence that Brandon Moyse provided Catalyst confidential information about WIND to West Face Capital Inc. ("West Face"), or that West Face used such information to obtain an unfair advantage over Catalyst in its negotiations to acquire WIND Mobile Canada ("WIND").[1]

2. The uncontradicted evidence of Mr. Moyse and the West Face witnesses is that he did not provide any such information and, therefore, that West Face did not misuse information that it never had.

3. Catalyst attempts to excuse its failure to provide any direct evidence in support of the central allegation in this case by alleging that Mr. Moyse must have destroyed the evidence that he passed on Catalyst's confidential information about WIND.[2] Mr. Moyse's evidence, corroborated by the forensic evidence, is that he did not. Catalyst has led no evidence otherwise. Catalyst relies on adverbs and overblown rhetoric rather than evidence.

4. Despite Catalyst's increasingly desperate attempts to depict Mr. Moyse as a highly sophisticated technical genius with animus towards Catalyst, in reality, Mr. Moyse was simply a young man unhappy with his work at Catalyst, a place he described as lacking in common decency. Mr. Moyse applied for, and ultimately secured, a job at his first choice of employers, West Face. There was nothing unusual about his recruitment

[1] Amended Amended Amended Statement of Claim ("Amended Claim"), para. 34.6.
[2] Amended Claim, paras. 34.17-34.20.

at West Face, though he readily admits that he made a series of mistakes during the recruitment and departure periods.

5. Catalyst has now pinned its case on these mistakes, and asks the court to infer from them that Mr. Moyse is the kind of person who would, could, and did sabotage Catalyst's chances to close a very profitable transaction, and then destroy the evidence he had done so.

6. In assessing whether Catalyst should succeed in its claim against Mr. Moyse, it is important to recall the enormous body of evidence led by West Face, from which it is apparent that even if Mr. Moyse did pass along any confidential information, this information played no part in West Face's success in the WIND transaction. Mr. Moyse adopts West Face's submissions, and will not repeat them. However, West Face's evidence and submissions cannot be ignored in considering the claim against Mr. Moyse.

7. There is no evidence to support Catalyst's claims against Mr. Moyse. They should be dismissed.

PART II. ASSESSING THE EVIDENCE

8. Mr. Moyse submits that where his evidence conflicts with the evidence of Catalyst's fact witnesses, Newton Glassman, Gabriel De Alba, or James Riley, the court should prefer the evidence of Mr. Moyse. The court should also find the evidence of Mr. Glassman, Mr. De Alba, and Mr. Riley to be unreliable and untrustworthy in all material respects. Similarly, where the evidence of Mr. Moyse's expert, Kevin Lo, conflicts with the evidence of Catalyst's expert, Martin Musters, Mr. Lo's evidence should be

preferred. This court should find that Mr. Musters' evidence is wholly unreliable, as he acted as an advocate for Catalyst's position, and failed in his duty to give objective, impartial evidence.

A. Credibility: general principles

9. In this case, where the evidence in chief for all fact witnesses was put in by way of affidavit, cross-examination is of particular importance in discerning the strength of the evidence of each of these witnesses.

10. Assessing witnesses' credibility involves not only a determination of their truthfulness, but also of their reliability, that is, a determination of whether their recollections are accurate, regardless of the sincerity of their beliefs.[3]

11. There is an overarching and common sense principle in making credibility assessments, articulated long ago by the British Columbia Court of Appeal in *Faryna v. Chorny*, and regularly cited since then, that:

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.[4] [emphasis added][5]

12. In this case, there is a significant volume of contemporaneous documents (and, equally importantly, which are of considerable importance in considering what took

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[3] *Pitts v Ontario (Director of Family Benefits, Ministry of Community and Social Services)*, [1985] OJ No 2578 (SC); *Adams v. Ginsberg*, 1994 CarswellOnt 3710, at para 13 (Ont Ct J [Gen Div]).

[4] See *Atlantic Financial Corp v. Henderson*, [2007] OJ No 1743, at para 27 (Sup Ct J).

[5] *Faryna v Chorny*, [1951] BCJ No 152, at para 10.

place, and in assessing the credibility of assertions made by Catalyst's witnesses on the one hand, and Mr. Moyse on the other. Similarly, there is a significant absence of contemporaneous documents where one would expect to see them, if the evidence given by Catalyst's witnesses was accurate and true.

B. Mr. Moyse's evidence is credible and should be preferred

13. Mr. Moyse testified on his own behalf. He testified carefully and thoughtfully. He did not attempt to evade questions on cross-examination, but fairly answered the questions which were put to him, qualifying them where necessary and appropriate.

14. He did not, in stark contrast to Catalyst's witnesses, exaggerate his evidence. Critically, he conceded the mistakes he had made since March, 2014. He fairly conceded the limits of his memory, knowledge, and recollections. His evidence was cogent, coherent, and credible. Perhaps most importantly, his evidence was consistent with the documentary record.

15. The fact that Mr. Moyse's evidence of his involvement in the events at issue in this action has evolved since his initial affidavits is entirely understandable. At the time Mr. Moyse swore his initial affidavits in this proceeding in July 2014, he did not have the benefit of the significant documentary productions. As a former Catalyst employee he did not have the ability to review his files, notes, e-mails, or calendar to refresh his memory. It is to Mr. Moyse's credit that he acknowledged errors and mischaracterizations in his previous evidence. It is not fair to conclude that he attempted to mislead the court in his earlier affidavits.

16. Importantly, Mr. Moyse's evidence overlapped with the evidence of West Face's witnesses with respect to the key question of whether he passed on confidential Catalyst information with respect to WIND Mobile to West Face. Each of Mr. Moyse and the West Face witnesses testified that he did not.

C. Catalyst's evidence is not reliable or credible

17. In contrast, two of Catalyst's fact witnesses, Mr. Glassman and Mr. De Alba, were wholly unreliable. Its third fact witness, Mr. Riley, was somewhat more forthcoming than his partners in his trial evidence, but his affidavit evidence was replete with misleading evidence and half-truths.

1. Evidence with respect to Catalyst's workplace culture should not be believed

18. Both Mr. De Alba's and Mr. Glassman's description of Catalyst's work culture as non-hierarchical and empowering was particularly overblown and self-aggrandizing, and should not be credited.

19. Their evidence was also completely unsupported by any documentary evidence. For example, in response to an undertaking to produce all documents demonstrating the mentorship and training which Catalyst alleges Mr. Moyse received, Catalyst advised that it had produced all relevant documents.[6] As there were no such documents produced, all that remains is Mr. De Alba's and Mr. Glassman's self-serving evidence, corroborated only by one another.

[6] Answer to undertakings given at Gabriel De Alba Examination for Discovery, Q. 4.

20. Notably, Mr. De Alba's and Mr. Glassman's accounts of the level of communication and "dialogue" which occurred amongst all levels of investment professionals at Catalyst, and of Mr. Moyse's level of involvement in Catalyst's telecommunications team, is unsupported by any contemporaneous documents. Mr. De Alba and Mr. Glassman both gave evidence that agendas existed for Catalyst's Monday morning meetings on which Catalyst placed tremendous significance, but none were produced.[7] Mr. Glassman's remarkable evidence was that Catalyst had spent $14 million on software which generated packages for these meetings.[8] Yet Catalyst produced not a single such document. Mr. Glassman had no explanation for this, but, as he often did when the evidence did not accord with his testimony, he blamed counsel for any failures in Catalyst's productions.[9]

2. Mr. De Alba's evidence is unreliable and not credible

21. Mr. De Alba's evidence was evasive, unresponsive, and clearly given with a view to ensuring that there was sufficient evidence before the court to ground its claim against Mr. Moyse. Mr. De Alba had difficulty giving simple answers to what should have been uncontroversial points. For example:

(a) When cross-examined on his evidence that Catalyst looked to empower the younger members of the team so that they could develop a career path

[7] Cross-Examination of Gabriel De Alba ("De Alba Cross-Examination") by Mr. Centa, 175:5-176:10.
[8] Examination-in-Chief of Newton Glassman ("Glassman Examination-in-Chief"), 314:15-315:15.
[9] Cross-Examination of Newton Glassman ("Glassman Cross-Examination") by Mr. Thomson, 356:10-357:6.

towards partnership,[10] Mr. De Alba gave an answer which was evasive and unresponsive:

> Q. Sir, in 14 years at Catalyst, how many of your associates have become partners?
>
> A. We usually have associates that -- well, they have more experience that they will have when they receive the title, we basically build them up to gain that expertise to what is the Catalyst process. So at the moment we have made no promotion to partners. The two partners are basically from the firm from the get-go and Mr. Riley joined later. But we have made multiple promotions from analyst to associates, I will tell you probably more than half a dozen, and we have also made several promotions from associates to VP on the path to partnership. The path to partnership is also discussed every year on the year end reviews.
>
> Q. Your evidence was most likely to build a career path and become partners at Catalyst. In the 14 years that Catalyst has been in operation, not a single associate has been promoted to become a partner, correct?
>
> A. Not yet.
>
> Q. Not ever?
>
> A. Not in the past. It doesn't mean that's not the path in the future, sir.

Put simply, Catalyst has never promoted any of its analysts, associates, or VPs to partner. This evidence also undermines Mr. De Alba's evidence of the culture of "empowerment" at Catalyst.

(b) Mr. De Alba claimed that all members of the Catalyst telecommunications deal team were integral to the team (despite the fact he was a partner who had extensive international telecommunications experience, and other junior members had no previous experience). On cross-examination, he initially refused to admit that his own role was "more integral" than the junior

[10] Examination-in-Chief of Gabriel De Alba ("De Alba Examination-in-Chief"), 138:7-23.

members, answering instead that "people play different roles but everybody is part of the same information flow and discussion of strategy."[11]

(c) Mr. De Alba's evidence even during his in examination-in-chief was frequently unresponsive to the questions asked, and clearly given with a view to ensuring that he gave evidence helpful to Catalyst's position, even if it was not prompted by counsel's question. When asked how he would respond to the suggestion that Mr. Moyse was unaware of discussions between WIND and Catalyst before he joined the team (which in any event is a misleading characterization of Mr. Moyse's evidence on this point), Mr. De Alba's response was that "[i]n this case, West Face is a clear competitor", an answer he then explained at length, for no other purpose than to get this evidence before the court.[12]

22. Mr. De Alba made repeated overstatements, generalized, and spoke in absolutes. For example, his evidence was that Catalyst's analysts are always part of strategic dialogue,[13] despite the ample evidence that they were not.[14]

23. He refused to concede points for which there was no evidence to support his rampant speculation. For example, he refused to concede that there was no evidence that anyone at Catalyst had discussed a draft of a share purchase agreement with Mr. Moyse, even though there was no documentary evidence of such, because he

[11] De Alba Cross-Examination by Mr. Centa, 181:21-23.
[12] De Alba Examination-in-Chief, 144:11–145:7.
[13] Affidavit of Gabriel De Alba, sworn May 26, 2016 ("De Alba Affidavit"), p. 12, para. 46.
[14] For example, neither Lorne Creighton nor Zach Michaud, members of Catalyst's core telecommunications deal team, were included on communications as Catalyst's deal was falling apart in August 2014. Glassman Cross-Examination by Mr. Thomson, 535:16-536:19.

"suspect[ed] [Mr. Moyse] was part of the discussions",[15] and even though at that point Mr. Moyse had been on vacation in southeast Asia for a week and had only sent a single work-related email during that period, in response to a specific request.

3. Mr. Glassman's evidence is unreliable and not credible

24. Mr. Glassman was an extraordinary witness. He was given to repeated overstatement; he was frequently unresponsive, argumentative, and even combative; he was frequently self-aggrandizing. Simply put, he was more often advocate than witness.

25. This was most clearly evident when confronted with the opinions of others, which were inconsistent with his own. For instance:

(a) he dismissed a legal opinion given by his own lawyers on the WIND transaction, Fasken Martineau, on the basis that he had more experience than them;[16]

(b) he dismissed the opinion of Bruce Drysdale, Catalyst's trusted government relations consultant, on the basis that he was more knowledgeable than Mr. Drysdale;[17]

(c) he refused to concede the possibility that the government may not grant Catalyst the concessions it sought, even after the government had expressly

[15] De Alba Cross-Examination by Mr. Milne-Smith, 263:21-264:7.
[16] Glassman Cross-Examination by Mr. Thomson, 471:1-472:6, 472:18-473:3.
[17] Glassman Cross-Examination by Mr. Thomson, 476:7-22.

told Catalyst it would not, because "[n]o one over the age of 15 with any kind of experience in negotiation would do that."[18]

26. Mr. Glassman's advocacy was manifest throughout his testimony: he repeatedly argued his case, he refused to acknowledge facts or documents that did not support his position or to concede that there could be a competing point of view on issues of principle. For example, Mr. Glassman refused to answer even simple questions regarding what documents had been appended to his affidavit, and instead used these as an opportunity to argue Catalyst's case:

> Q. You have not attached to your affidavit even one document in which Mr. Moyse conveyed to West Face the confidential information of Catalyst concerning either Wind Mobile or VimpelCom; correct?
>
> A. No, but we have evidence of other confidential information that he passed on and conveniently wiped electronic devices, contrary to a Court order. I'm allowed to make an inference from that.
>
> Q. No, will you come back and answer my question.
>
> A. I think I did.
>
> Q. Let me put it to you again simply. Just try to follow the questions. You have not attached to your affidavit a single document in which Mr. Moyse conveyed to West Face confidential information of Catalyst concerning either Wind Mobile or VimpelCom? That was the question.
>
> A. We believe he has destroyed that evidence.
>
> Q. I'm going to put it to you for the third time. Mr. Glassman, this is your last chance. You have not attached to your affidavit a single document in which Mr. Moyse conveys to West Face confidential information of Catalyst concerning either Wind Mobile or VimpelCom, have you?
>
> A. I stand by my answers.[19]

27. Mr. Glassman was argumentative in all respects, at times even going so far as to challenge and dispute the contents of his own affidavit sworn a week and a half before

[18] Glassman Cross-Examination by Mr. Thomson, 486:6-25.
[19] Glassman Examination-in-Chief, 354:10-355:13.

giving his *viva voce* evidence, and the contents of which he had adopted at the outset of his examination.[20] In response to a question arising out of his affidavit evidence that Mr. Moyse was responsible for creating the PowerPoint slide deck based in part on "notes given to him by me, Riley, and De Alba", Mr. Glassman gave the following evidence:

> Q. I took it from that statement in your affidavit that he prepared this based at least in part on notes given to him by you, by Riley and by de Alba?
>
> A. Or it could also be read by notes from one of or more of me, Riley and/or de Alba.
>
> Q. You don't say and/or, you say notes given to him by me, Riley and de Alba?
>
> A. I don't remember providing notes. I may have. I know for a fact that de Alba for sure would have given him notes and I know for a fact that I participated in discussions and providing direction.
>
> Q. And, Mr. Glassman, where are the notes? Did Catalyst destroy those notes too?
>
> A. If we had the notes, we would have provided them, and if I wrote notes, I would have provided them.
>
> Q. I take it the notes were destroyed by Catalyst?
>
> A. Only if I had notes. I may not have provided personal notes, as I have already said prior to this.[21]

28. Similarly, when asked on cross-examination whether a concession was "crucial", instead of agreeing, Mr. Glassman's answer was that he did not "know what [counsel] mean[t] by 'crucial.' Very, very important." When counsel read him the part of his affidavit in which used the very language counsel had put to him, Mr. Glassman responded that "Crucial in the context of, yes, in my use of the word 'crucial,' yes. As I said earlier, I don't know what you mean by 'crucial.'"[22]

[20] Glassman Examination-in-Chief, 311:7-9.
[21] Glassman Cross-Examination by Mr. Thomson, 382:17-383:14.
[22] Glassman Cross-Examination by Mr. Thomson, 412:17-413:18.

4. Mr. Riley's evidence is unreliable and not credible

29. While Mr. Riley, in contrast, was a more straightforward witness, his evidence lacks any credibility given the concessions he was compelled to make at trial. Mr. Riley admitted that many aspects of his previous evidence in this proceeding, evidence on which Catalyst obtained an interlocutory injunction against Mr. Moyse and West Face in November 2014, and evidence which he adopted at the outset of his examination-in-chief without correction,[23] was simply wrong, or misleading. For example:

(a) he conceded that while a heading used in his initial affidavit in this proceeding stated that Mr. Moyse had "Removed [Catalyst's] confidential information",[24] in fact Catalyst only had evidence that Mr. Moyse had accessed, and was capable of transferring the evidence. Catalyst had no evidence that Mr. Moyse had in fact removed confidential information as identified to the court in that affidavit;[25]

(b) having identified that Mr. Moyse accessed a series of files "outside of office hours" at Catalyst,[26] as part of "alarming" conduct by Mr. Moyse,[27] Mr. Riley admitted there was nothing unusual about the fact that Mr. Moyse was in the office reviewing files between 6:28 p.m. and 6:39 p.m.;[28]

(c) Mr. Riley's evidence was that there was "no legitimate reason" why Mr. Moyse would copy files relating to Masonite into his Dropbox. Mr. Riley

[23] Examination-in-Chief of James Riley ("Riley Examination-in-Chief"), 567:2-4.
[24] Affidavit of James Riley, sworn June 26, 2014, ("Riley June 2014 Affidavit"), para. 48.
[25] Riley Cross-Examination by Mr. Borg-Olivier, 619:17-23, 621:2-10.
[26] Riley June 2014 Affidavit, para. 57.
[27] Riley June 2014 Affidavit, para. 51.
[28] Riley Cross-Examination by Mr. Borg-Olivier, 628:24-629:17.

suggested this was improper as these files related to an opportunity which Catalyst had been studying.[29] On cross-examination, Mr. Riley conceded that Catalyst had last analyzed Masonite in 2008, so it would have been more accurate to describe Masonite as an opportunity Catalyst had looked at six years before;[30]

(d) Mr. Riley identified the fact Mr. Moyse had accessed files relating to the WIND deal as being suspect, but did not include in his affidavit the indisputably relevant fact that Mr. Moyse was on the WIND deal team, and hard at work on due diligence, at the time he accessed those files;[31] and

(e) none of the evidence Mr. Riley presented with respect to Mr. Moyse's access of files relating to the WIND deal suggested any inappropriate actions on Mr. Moyse's part.[32]

30. Mr. Riley's evidence also reveals Catalyst's disturbing preference to speculate instead of investigating to learn the true state of affairs. Having identified in his initial affidavit a pattern of conduct he described as "alarming", Mr. Riley took no steps to verify the explanations provided by Mr. Moyse in a responding affidavit explaining this "conduct":

(a) Mr. Riley had identified Mr. Moyse's accessing of files relating to its Stelco investment as another part of his "alarming" conduct, yet Mr. Riley neither

[29] Riley June 2014 Affidavit, para. 60.
[30] Riley Cross-Examination by Mr. Borg-Olivier, 635:23-636:23.
[31] Riley Cross-Examination by Mr. Borg-Olivier, 646:4-647:10.
[32] Riley Cross-Examination by Mr. Borg-Olivier, 647:18-648:2.

reviewed the files which Mr. Moyse had accessed, nor produced these documents in the litigation;[33]

(b) Mr. Moyse explained in his affidavit that the Masonite files in his Dropbox were public documents used for a case study which he had not sourced from Catalyst,[34] yet Mr. Riley took no steps to determine whether there was any merit to this explanation,[35] and took no steps to cross-reference the Masonite documents Mr. Moyse appended to his affidavit to the Masonite documents on Catalyst's system;[36] and

(c) Mr. Moyse explained that he did not attend the "Monday morning meeting" on May 26, 2014, which occurred after Mr. Riley had sent him home, and that the notes referred to in Mr. Riley's affidavit were notes created by Mr. Moyse in advance of the meeting, not notes <u>of</u> the meeting. Mr. Riley took no steps to verify or dispute the credibility of Mr. Moyse's explanation, even though he could easily have accessed and reviewed the notes in question and confirmed whether or not Mr. Moyse in fact attended the meeting.[37]

31. Mr. Riley's failure to take any steps to investigate Mr. Moyse's explanations is even more troubling considering that Mr. Riley repeatedly reaffirmed his initial affidavit evidence, including at the outset of his evidence in chief at trial. In addition this speculation continued to provide the very shaky foundation of Mr. Musters' opinion.

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[33] Riley Cross-Examination by Mr. Borg-Olivier, 634:25-635:18.
[34] Affidavit of Brandon Moyse, sworn July 4, 2014 ("Moyse July 4, 2014 Affidavit"), paras. 49-52.
[35] Riley Cross-Examination by Mr. Borg-Olivier, 638:17-23.
[36] Riley Cross-Examination by Mr. Borg-Olivier, 639:12-640:1.
[37] Riley Cross-Examination by Mr. Borg-Olivier, 645:21-646:9.

5. Contradictions in Catalyst's witnesses' evidence

32. There were a number of examples of contradictory evidence between Catalyst's witnesses that should give the court pause prior to accepting their evidence. One clear example is their dramatically different evidence with respect to the PowerPoint slide decks and work product related to presentations that Catalyst made to Industry Canada in March and May 2014. Their inability to tell a consistent story with respect to this critical event seriously undermines the credibility of Catalyst's evidence as a whole.

33. This presentation, made to the federal government, generally set out Catalyst's regulatory strategy. Mr. De Alba and Mr. Glassman assigned particular significance to the presentation in establishing that Mr. Moyse had a highly sophisticated understanding of Catalyst's regulatory strategy. They repeatedly gave evidence that Mr. Moyse "led" this PowerPoint presentation. Incredibly, Mr. De Alba went so far as to say that Mr. Moyse developed the various regulatory options presented in it.[38]

34. Until it produced the PowerPoint slides in advance of the trial, Catalyst had repeatedly advised that all records pertaining to the presentation, including the slides themselves, had been destroyed. Mr. Riley and Mr. De Alba on the one hand, and Mr. Glassman on the other, gave markedly different evidence to explain the manner in which these documents were treated following the presentation.

35. At his cross-examination on May 13, 2015, Mr. Riley testified that the PowerPoint presentation had been destroyed shortly after it was given, and no records had been

[38] De Alba Cross-Examination by Mr. Centa, 220:5-220:19.

maintained.[39] During his evidence-in-chief at trial, Mr. Riley's evidence was that he had asked all of the people who had copies of the presentation to destroy or delete them, as, given the sensitivity of the information enclosed, it was best to not have maintained copies.[40]

36. Mr. De Alba's evidence on examination for discovery was that as the information was "critical", "it was advised" that the presentations were destroyed so that the information would not be "floating around".[41] In his affidavit, Mr. De Alba's evidence was that Catalyst went to "extreme measures to ensure that the contents of the presentation would not be leaded [*sic – presumably should be "leaked"*]", and that it was Mr. Riley who had instructed all of the Catalyst team members to destroy all copies of the presentation, including notes and drafts.[42]

37. Catalyst's counsel advised at Mr. De Alba's examination for discovery that his understanding, which Mr. De Alba at no time corrected, was that after the presentation Catalyst requested copies of the PowerPoint back from the government officials who had attended the meeting, and took them back and destroyed them. According to counsel, an order went out from either Mr. Glassman, Mr. De Alba, or Mr. Riley to destroy the presentation and all copies from their records as well.[43]

38. Mr. Glassman's evidence at trial was that it was in fact Industry Canada who asked Catalyst to destroy its work product and any earlier drafts. He could not, however,

[39] Cross-Examination of James Riley, May 13, 2015 ("Riley 2015 Cross-Examination"), Qs. 329-335.
[40] Examination-in-Chief of James Riley, 574:12-575:1.
[41] Examination for Discovery of Gabriel De Alba ("De Alba Examination for Discovery"), Q. 139.
[42] De Alba Affidavit, para. 63.
[43] De Alba Examination for Discovery, Q. 140-142.

identify who at the Government of Canada had asked Catalyst to destroy its work product. According to Mr. Glassman, Catalyst then destroyed its drafts and notes. Industry Canada representatives, however, had no problem with Catalyst keeping a final copy of the presentation on file.[44] Mr. Glassman's evidence was that Catalyst's intention was to destroy "any copies in the hands of junior people."[45]

PART III. FACTS

A. Mr. Moyse and his background

39. Mr. Moyse is currently 28 years old, and at the time of the events giving rise to this action, he was 26 years old. He was born in Montreal, and currently lives in Toronto with his fiancée. He earned his Bachelor of Arts degree in Mathematics from the University of Pennsylvania.[46]

40. Prior to working for Catalyst, Mr. Moyse 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. [47]

41. Moyse resigned his employment at Catalyst on May 24, 2014, and worked briefly at West Face for three weeks in June and July 2014. As a result of this litigation, Mr. Moyse was off work at West Face from July 16, 2014, until he resigned on August 31, 2015.[48]

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[44] Glassman Examination-in-Chief, 323:2-324:12; Glassman Cross-Examination by Mr. Thomson, 383:21-384:22, 385:4-13, 448:18-450:8, 454:16-25.
[45] Glassman Cross-Examination by Mr. Thomson 451:3-8.
[46] Affidavit of Brandon Moyse, affirmed June 2, 2016 ("Moyse 2016 Affidavit"), p. 4, para. 10.
[47] Moyse 2016 Affidavit, p. 4, para. 11.
[48] Moyse 2016 Affidavit, p. 4, para. 12.

42. Mr. Moyse had significant difficulties securing a new job, as this litigation is well known in the Toronto investment community and many of the firms he interviewed with expressed concerns that Catalyst would commence further litigation against them. He eventually secured a position in December 2015 as an investment analyst at Stornoway Portfolio Management Inc. in Toronto.[49]

B. Mr. Moyse's employment at Catalyst

43. In order for an inference to be drawn that Mr. Moyse communicated Catalyst's confidential information with respect to WIND to West Face, Catalyst must first establish as fact that Mr. Moyse knew certain specified information, and had a sufficient understanding of it to be able to communicate it. To this end, Catalyst has led voluminous evidence about its workplace, and Mr. Moyse's role within it, intended to ground such a finding. Catalyst's evidence is self-serving, unsupported by documentary evidence, and not credible. Mr. Moyse's evidence, which is consistent both with the documentary evidence and common sense, is that he simply did not participate in the development of Catalyst's regulatory strategy or understand it in the manner described by Mr. Glassman and Mr. De Alba.

1. Mr. Moyse's analyst role within the Catalyst hierarchy

44. Mr. Moyse commenced work as an analyst at Catalyst on November 1, 2012, pursuant to a written employment agreement dated October 1, 2012.[50] Mr. Moyse resigned on May 24, 2014, and pursuant to the terms of his employment agreement, his employment ended on June 22, 2014.

[49] Moyse 2016 Affidavit, p. 4, para. 12.
[50] Exhibit 14 to the Moyse 2016 Affidavit.

45. While Mr. De Alba and Mr. Glassman both gave self-serving evidence describing the Catalyst work environment as “non-hierarchical”, the evidence demonstrates that Catalyst was in fact a workplace in which decision-making power rested with its partners, and in which its junior employees played little part in high-level decisions. They appear, at a minimum to have conflated “small” and “flat”.

46. Analysts are the lowest level of investment professionals at Catalyst.[51] The investment professionals employed at Catalyst, and the hierarchy amongst them during the relevant period, was as follows:

(a) partners: Mr. Glassman, Mr. De Alba, and Mr. Riley;

(b) vice-president: Zach Michaud;

(c) associate: Andrew Yeh, through early March 2014; and

(d) analysts: Mr. Moyse and Lorne Creighton.[52]

47. As an analyst, Mr. Moyse performed financial and qualitative research both on Catalyst’s potential investment opportunities, and on portfolio companies already owned by Catalyst.[53] During his last six months at Catalyst, Mr. Moyse spent the majority of his time working on two Catalyst portfolio companies. His responsibilities on these portfolio companies required him to spend a significant amount of time outside the office, and he spent approximately half his time travelling throughout the United States.[54]

[51] Moyse 2016 Affidavit, p. 5, para. 14.
[52] Moyse 2016 Affidavit, p. 5, para. 14.
[53] Moyse 2016 Affidavit, p. 5, para. 15.
[54] Moyse 2016 Affidavit, p. 6, para. 16, p. 7, para. 21.

48. Mr. Moyse's evidence was that, contrary to Mr. Glassman and Mr. De Alba's evidence, Catalyst was a profoundly hierarchical workplace in which his role was to follow instructions given to him by the partners or vice-presidents. Mr. Moyse acknowledged that through his work as an analyst, he was generally aware of the firm's priorities and goals, but he was not engaged in, let alone privy to, the specific strategic discussions described by Mr. Glassman and Mr. De Alba in their evidence. During his time at Catalyst, analysts were not actively encouraged to generate ideas, and their thoughts and recommendations were routinely disregarded. As an analyst, Mr. Moyse had no direct input into Catalyst's investment decisions or strategy, but was instead assigned specific research projects by the partners and vice-president(s).[55] Even when he was involved in Catalyst portfolio companies on a day-to-day basis, he had no real power or responsibility when he was working directly with them.[56]

49. It was clear from Mr. De Alba's cross-examination that despite his evidence that all investment professionals' input was equally valued, key decisions rested at the partnership level, and specifically with Mr. Glassman.[57]

50. Indeed, it accords with common sense that the ultimate decision-making would rest with the partners, who have extensive experience in industry, and not with junior employees. Even discounting his inexplicable obsession with NextWave, Mr. Glassman's experience in the telecommunications industry dated back to before his

[55] Moyse 2016 Affidavit, p. 6, para. 17. Mr. Moyse's evidence of the flow of work is consistent with the documentary evidence showing how flow was assigned on the WIND deal: see e.g. Exhibit 40 to the Moyse 2016 Affidavit, in which Mr. De Alba, a partner, assigned Mr. Michaud, a vice president, a particular task, which Mr. Michaud would then delegate to Mr. Creighton or Mr. Moyse, analysts.
[56] Examination-in-Chief of Brandon Moyse ("Moyse Examination-in-Chief"), 1362:8-21.
[57] Glassman Cross-Examination by Mr. Thomson, 347:2-7.

time at Catalyst,[58] and he was primarily responsible for Catalyst's negotiations with Industry Canada.[59] Mr. De Alba had participated in multiple restructurings in the telecommunications industry prior to working at Catalyst.[60]

51. Mr. De Alba's evidence that Catalyst's analysts were privy to all decision-making because they had a long-term interest in the firm was not credible. Mr. De Alba boasted that Catalyst prides itself on the fact it "empowered" its investment professionals and included them in all aspects of decision-making, and offered all of its members a career path to partnership,[61] yet he grudgingly acknowledged in cross-examination that in its fifteen years Catalyst has not promoted a single new partner from amongst its ranks.[62] Indeed, Mr. Moyse's evidence was that Mr. De Alba's evidence did not accurately describe the career prospects of Catalyst's junior employees.[63]

2. Analysts were not routinely involved in strategic "dialogue"

52. Of particular significance for its case against Mr. Moyse, Mr. Glassman and Mr. De Alba suggested that there was constant dialogue amongst all levels of its investment professionals about all of Catalyst's investments. Catalyst asks the court to infer, as it has no direct evidence on this point, that Mr. Moyse, despite his junior position, would have been privy to ongoing discussions with respect to "Catalyst's goals, priorities and strategies" concerning the telecommunications industry.[64]

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[58] Glassman Examination-in-Chief, 50:16-17.
[59] Glassman Cross-Examination by Mr. Thomson, 359:22-25.
[60] De Alba Examination-in-Chief, 135:11-15, 141:21-18; Glassman Examination-in-Chief, 50:13-16.
[61] De Alba Examination-in-Chief, 138:7-23.
[62] De Alba Cross-Examination by Mr. Centa, 170:10-171:17.
[63] Moyse Examination-in-Chief, 1364:25-1365:12.
[64] De Alba Affidavit, p. 3, para. 8; De Alba Examination-in-Chief, 139:10-140:5.

53. When pressed on the specifics of Catalyst's purportedly transparent communications model, it was clear that Catalyst's witnesses' evidence was exaggerated. For example, Mr. De Alba refused to agree with the simple proposition that when he specifically removed Mr. Moyse from an email communication chain about an important development in the telecommunications market, this was not the way to foster fully transparent communications on its core deal team.[65]

54. Similarly, the contemporaneous emails with respect to the WIND deal show that Mr. Glassman deliberately chose not to include Mr. Creighton or Mr. Michaud on many aspects of the deal, even though they were members of the core deal team.[66]

55. Catalyst relies particularly heavily on the discussions which took place at its "Monday morning meetings" in an attempt to pin specific knowledge on Mr. Moyse with respect to its telecommunications strategy.[67] According to Catalyst's witnesses, these meetings, and the discussions which took place outside and surrounding those meetings, were part of Catalyst's ethos of transparency with all team members across the key elements of all deals it was pursuing, including its plans of how to execute that opportunity.[68]

56. Mr. Moyse's evidence is that these meetings were spent primarily discussing domestic and international economic issues, Catalyst's portfolio companies, and less often, would discuss the deals Catalyst was actively pursuing.[69] Mr. Moyse

[65] De Alba Cross-Examination by Mr. Centa, 197:8-21.
[66] Glassman Cross-Examination by Mr. Thomson, 535:16-536:19.
[67] De Alba Examination-in-Chief, 144:11-145:7.
[68] De Alba Examination-in-Chief, 144:11-145:7.
[69] Moyse Examination-in-Chief, 1397:21-1398:14; Moyse 2016 Affidavit, p. 6, para. 18.

acknowledged that these meetings did feature discussion of Catalyst's investment strategies, however, it was clear to him that these discussions were premised on larger discussions which were taking place amongst the partners outside of the meeting, and he lacked the context necessary to understand them fully, and in any event, he was not engaged in those discussions or analyses.[70]

57. Critically, and despite the fact it relies so heavily on these meetings, Catalyst has not produced a single agenda, set of notes, minutes, or any other document with respect to these Monday meetings, let alone any document which substantiates its evidence, which Mr. Moyse disputes, that high-level strategic discussions with respect to WIND took place at those meetings. Mr. De Alba's evidence on cross-examination was that these documents would have referred to transactions under discussion, like WIND.[71] Mr. De Alba largely conceded that there were no contemporaneous documents describing Catalyst's internal discussions with WIND,[72] which discussions he and Mr. Glassman rely on almost entirely.

58. Mr. Moyse does not dispute that the telecommunications file was discussed at Catalyst, and he acknowledges that he was generally aware of Catalyst's interest in the industry.[73] It is quite possible that Mr. Glassman and Mr. De Alba on the one hand, and Mr. Moyse on the other, perceived differently the very same discussions. Mr. Glassman and Mr. De Alba had far more context for these discussions than Mr. Moyse, and accordingly may well have taken far more from them. They both had, as described

[70] Moyse Examination-in-Chief, 1397:21-1398:14; Moyse 2016 Affidavit, p. 7, para. 19.
[71] De Alba Cross-Examination by Mr. Centa, 175:5-176:10.
[72] De Alba Cross-Examination by Mr. Centa, 177:12-23.
[73] Moyse 2016 Affidavit, para. 25.

above, extensive experience in the telecommunications industry, and as described in greater detail below, were on Catalyst's telecommunications deal team well before Mr. Moyse.

59. It is, however, disingenuous for Catalyst to impute to Mr. Moyse the same level of knowledge and understanding as Mr. De Alba and Mr. Glassman, both of whom had far more extensive experience in both investment and telecommunications than did Mr. Moyse, and were involved in all of the conversations that took place.

C. Moyse's work on the telecommunications file at Catalyst

60. Mr. Moyse's involvement in the telecommunications at Catalyst file covers three periods:

(a) the period prior to early March 2014, during which Mr. Moyse was only generally aware of Catalyst's telecommunications strategy by virtue of media reports and working at the firm;

(b) between early March 2014 and May 6, 2014, when he was assigned to the telecommunications deal team, but did very little work specific to the team; and

(c) between May 6, 2014 and May 24, 2014, during which time Catalyst was actively pursuing the WIND deal. He was out of the country on unrelated Catalyst business until May 9.[74] For the next seven days of this period, he worked on Catalyst's initial due diligence, and assisted in the preparation of

[74] Moyse Examination-in-Chief, 1408:16-1409:23.

the PowerPoint presentation to the federal government. For the balance of this period, Mr. Moyse was on vacation, and was not actively engaged in Catalyst's work.

61. The record is replete with examples of Catalyst exaggerating Mr. Moyse's involvement in the telecommunications file. For example, Mr. De Alba gave evidence that Mr. Moyse was on the telecommunications team prior to January 2014, but he then admitted that he was drawing a distinction between Catalyst's telecommunications team (of which he considered all Catalyst investment professionals to be members), and its "core" telecommunications deal team, to which Mr. Moyse was assigned in late February or early March 2014.[75]

1. The pre-March 2014 period

62. Mr. Moyse became a member of Catalyst's "core" telecommunications deal team in March 2014.[76] Before that, the "core" telecommunications deal team consisted of Mr. De Alba, Mr. Michaud, and Mr. Yeh.[77]

63. Before being specifically assigned to the core telecommunications deal team in late February or early March, Mr. Moyse had a general knowledge about Catalyst's interest in the telecommunications industry simply by virtue of being a member of the firm. He was aware that Catalyst had an interest in Mobilicity, that Catalyst was considering the possibility of building out a fourth wireless carrier, and that this plan may

[75] De Alba Cross-Examination by Mr. Centa, 181:3-182:19.
[76] De Alba Cross-Examination by Mr. Centa, 182:20-183:6.
[77] De Alba Examination-in-Chief, 142:22-143:7.

involve WIND. These topics were also the subject of media discussion, and Catalyst's interest in merging WIND and Mobilicity was known publicly by 2013.[78]

64. Though it has admitted that Mr. Moyse only became a member of the core team in March, Catalyst nevertheless persisted in attempting to describe Mr. Moyse as a "keen and proactive" member of Catalyst's telecommunications deal team (which, according to Mr. De Alba, included all members of the firm) as early as January 2014.[79]

65. Mr. De Alba's characterization of Mr. Moyse's involvement in the telecommunications file prior to March was particularly exaggerated. It appears that Catalyst's understanding of what constitutes "analysis of the telecommunications industry" merely required Mr. Moyse to be aware that Catalyst had an interest in the industry. For example:

(a) To demonstrate how keen Mr. Moyse was, Mr. De Alba relied on an email which Mr. Moyse had sent to Mr. Michaud and Mr. Yeh, in which he had forwarded a newspaper article with respect to WIND's withdrawal from the government's spectrum auction in January 2014.[80] After receiving that email, Mr. Michaud forwarded that email to a number of other individuals within Catalyst, but that list did not include Mr. Moyse.[81] To the extent that this article spawned any further analysis at Catalyst, Mr. Moyse was not involved in it. Mr. De Alba nevertheless persisted in describing that the act of sending

[78] Moyse Examination-in-Chief, 1403:17-1403:24; Moyse 2016 Affidavit, pp. 9-10, para. 25; De Alba Cross-Examination by Mr. Milne-Smith, 235:8-12.
[79] De Alba Affidavit, p. 12, paras. 46-47; De Alba Cross-Examination by Mr. Centa, 183:12-20.
[80] De Alba Affidavit, p. 12, paras. 46-47; Exhibit 16 to the Moyse 2016 Affidavit; Tab 5 to De Alba Cross-Examination by Mr. Centa.
[81] Tab 6 to Paliare Roland De Alba Cross-Examination Brief.

a newspaper article without any further commentary as analysis of the wireless market,[82] and suggested, based on Mr. Moyse's initial email, that he had knowledge of analysis taking place at Catalyst with respect to a WIND/Mobilicity combination model, even though the contemporaneous documentary evidence makes clear that it was Mr. Yeh who was involved in that work.[83]

(b) Mr. De Alba refused to acknowledge that Mr. Moyse was not working with Mr. Michaud on the WIND/Mobilicity combination model, even when presented with an email from Mr. Michaud saying he was working on it with Mr. Yeh.[84]

(c) Mr. De Alba maintained in cross-examination that an email which Mr. Michaud sent to Mr. Moyse and Mr. Yeh, requesting that one of them circulate a news article, and which Mr. Yeh subsequently circulated without including Mr. Moyse on the distribution list, was evidence that Mr. Moyse was "analyzing the wireless market at Catalyst,"[85] even though there is no evidence Mr. Moyse responded to Mr. Michaud's request.

(d) When Mr. Moyse sent Mr. De Alba an article in early March 2014 with respect to VimpelCom writing down its investment in WIND, which Mr. De Alba accepted was a significant development, Mr. De Alba then forwarded

[82] De Alba Cross-Examination by Mr. Centa, 185:19-186:10.
[83] De Alba Cross-Examination by Mr. Centa, 186:11-21.
[84] De Alba Cross-Examination by Mr. Centa, 186:11- 188:13; Tab 8 to Paliare Roland De Alba Cross-Examination Brief.
[85] De Alba Cross-Examination by Mr. Centa, 190:22-192:17.

the email, with his comments, to a distribution group, but he did not include Mr. Moyse on that list.[86] Mr. De Alba refused to admit that his conduct suggested Mr. Moyse was not an integral member of the telecommunications core deal team at that time, because "the outcome is likely to have shared amongst all members verbally". His answer is unresponsive, and makes no sense.[87] If Mr. De Alba wanted the outcome to be shared among all members of the group, all he had to do was hit reply-all rather than remove Mr. Moyse.

2. The March 2014-May 6, 2014 period

66. In late February or early March 2014, Mr. Moyse was assigned to Catalyst's "core" telecommunications deal team, as a result of Mr. Yeh's departure from Catalyst. However, despite being assigned to the team, he did very little active work on Catalyst's telecommunications file until May 6, 2014, as there was simply not much work to be done and he was busy on other files.[88]

67. Mr. Moyse's only active work during this period was contributing to a *pro-forma* showing a combined WIND and Mobilicity entity, and providing essentially administrative support in the creation of a slide deck for a presentation Catalyst made to Industry Canada. He also was copied on a small number of emails. Mr. Moyse was not, as Catalyst's witnesses suggest, "intimately aware of, and involved in [Catalyst's] internal analyses concerning the telecommunications industry".[89] There is no evidence,

[86] Tabs 13, 14 of Paliare Roland De Alba Cross-Examination Brief.
[87] De Alba Cross-Examination by Mr. Centa, 196:25-197:7.
[88] Moyse 2016 Affidavit, para. 29.
[89] De Alba Affidavit, para. 45.

other than Mr. De Alba's and Mr. Glassman's self-serving evidence, to substantiate that he was "intimately" aware of these analyses, let alone involved in them.

(a) The pro-forma

68. On March 7 and 8, 2014, Mr. Moyse prepared a combined *pro-forma* of WIND and Mobilicity under Mr. Michaud's supervision.[90] Mr. De Alba agreed, consistent with Mr. Moyse's evidence, that this combined *pro-forma* collected data which was either publicly available or known to Catalyst, and then performed basic arithmetic to yield the final product.[91] Mr. Michaud identified the specific data inputs he wanted to assess for the combined entity (i.e. network value, spectrum value, subscribers).

69. Mr. De Alba nevertheless refused to acknowledge that no knowledge of Catalyst's plans or strategy was required for Mr. Moyse to complete this assignment, in which Mr. Moyse plugged readily available numbers (to which Mr. Michaud had directed him) into a table, and then added and subtracted them.[92]

70. Similarly, Mr. De Alba's evidence distorted an email exchange between Mr. Michaud and Mr. Moyse beyond recognition. In the email, Mr. Michaud instructed Mr. Moyse to "Go off of the latest VimpelCom filings for Wind subscribers and financials where possible. Put in [190,000 subscribers] to help the division of economics", to which Mr. Moyse replied, ten minutes later, "Sure", and provided an updated chart.[93] Mr. De Alba's evidence was that this exchange really meant the following:

[90] Exhibit 22 to the Moyse 2016 Affidavit.
[91] Moyse 2016 Affidavit, p. 13-16, paras. 34-38; De Alba Cross-Examination by Mr. Centa, 206:2-211:3.
[92] De Alba Cross-Examination by Mr. Centa, 211:15-23.
[93] Tab 22 to Paliare Roland De Alba Cross-Examination Brief.

> Q. And would you agree with me, sir, that no knowledge of the telecommunications industry was required to prepare this particular pro forma?
>
> A. I would disagree. Even again the debate related to what subscriber number to use is important and Brandon went through the exercise of even looking at the fact to bring that point even though that was a footnote. In addition to that, the three main metrics again are the key valuation metrics for the companies.
>
> Q. And no knowledge of Catalyst strategy or plans was required to complete this assignment?
>
> A. That's not correct. The fact that again the discussion happened about which number to utilize as the subscribers implied that there was a negotiation going on in which Catalyst was talking to Wind and wanted to present a value allocation of a combined company to Wind.
>
> Q. Sir, the exchange between Mr. Michaud and Mr. Moyse says nothing of that sort, does it?
>
> A. It does. When you -- in the question when you asked me about 190 and what was the composition of value, if I recall correctly, that was the set-up for a negotiation with Wind. If you own, for example, 31 percent of the spectrum value versus 68.9 percent or that's the allocation of spectrum value, one versus the other one, when you are sitting down with Wind you will tell them, listen the spectrum value at the time when the option took place, ours is worth 31.1, yours is 68.9, a fair allocation of a combined business would be 31.1 to 68.9. There were implicit discussions about valuation in relationship to the combination.[94]

71. It is deeply disingenuous to try to impute any specialized knowledge to Mr. Moyse based on his email exchange with Mr. Michaud, in which Mr. Moyse simply took instruction from Mr. Michaud as to which number to insert into a particular column in a chart.

72. Mr. De Alba's evidence is that this *pro-forma* was "critical" to its subsequent analysis: it was Catalyst's reference for the value in its bids to VimpelCom, and its discussions with the federal government.[95] Even if it was, which is not admitted, this does not somehow elevate Mr. Moyse's status on the team, given the relative simplicity

[94] De Alba Cross-Examination by Mr. Centa, 211:4-212:15.
[95] De Alba Examination-in-Chief, 146:22-147:20.

of, and complete lack of analysis in, the underlying document. In any event, the ultimate purchase price was one set by VimpelCom as early as May 6, 2014.[96]

(b) The March 26, 2014 PowerPoint presentation to Industry Canada

73. Mr. Moyse's second contribution to Catalyst's telecommunications file during this period occurred on March 26, 2014. On that single day, in the afternoon and late into the night, Catalyst prepared a PowerPoint slide deck for a presentation to be made to Industry Canada the following day.[97]

74. According to Mr. Glassman, the PowerPoint outlined the existing regulatory environment and a number of options available to the government, and the concessions that Catalyst believed would be required.[98] Generally, the presentation set out three strategic options for the creation of a fourth national wireless carrier:

(a) Option 1: a carrier focused on the retail market;

(b) Option 2: a carrier focused on the wholesale market; and

(c) Option 3: a litigation option.

75. Catalyst's witnesses and Mr. Moyse give differing accounts over Mr. Moyse's role in the creation of the presentation itself:

(a) Mr. Moyse's evidence was that his role was largely administrative: Mr. De Alba, Mr. Riley, and Mr. Michaud generated the content and analysis which was contained in this presentation, and Mr. Moyse's contributions involved

[96] Exhibit 21 to the De Alba Affidavit.
[97] Exhibits 27 and 28 to the Moyse 2016 Affidavit.
[98] Glassman Cross-Examination by Mr. Thomson, 387:4-14.

layout and data input, and the creation of two tables based on publicly available information (one of which was the *pro-forma* described above). Given that the presentation was prepared in a single day, the pace at which it was created was frenetic. [99]

(b) Mr. De Alba's and Mr. Glassman's evidence, in contrast, was that Mr. Moyse "led" the creation of the PowerPoint presentation. They suggested he was involved in developing the substantive content and analysis contained in that presentation, and understood Catalyst's strategic approach.[100]

76. At times Mr. Glassman's evidence, perhaps inadvertently, resembled Mr. Moyse's account:

> Brandon, as the most junior person on the team, would have been given the task of accumulating the information, putting it in a form. He would have done multiple drafts. Those drafts, not all of them reviewed by me. I probably reviewed the first and last, but the VP would have done every version. The VP would have been given instructions from me and Gabriel and possibly Jim on some of the legal issues about what to fix, what not to fix. Brandon would have been involved in discussions as to why decisions were being made to insert some things and remove others. And the process would culminate after many versions, a final presentation which we took with us to Ottawa.[101]

77. The suggestion that Mr. Moyse played any greater role than this in the PowerPoint's creation is simply not credible.

78. According to Mr. Glassman, the "lead-up work [for the presentation] would have been months, if not years" with a "final push at the very end to get the final version."[102] There have been no productions to substantiate this. However, Mr. Moyse fairly

[99] Moyse Examination-in-Chief, 1406:10-1406:22; Moyse 2016 Affidavit, paras. 39-41.
[100] Glassman Affidavit, para. 18; De Alba Affidavit, para. 60.
[101] Glassman Examination-in-Chief, 320:23-321:16.
[102] Glassman Examination-in-Chief, 321:17-322:4.

acknowledged that there may have been lead-up work to this presentation, but that if there was, he was not involved in it.[103]

79. Mr. Moyse's evidence of his role in the creation of the slide deck is consistent with the surrounding circumstances, the documentary evidence, and common sense. Mr. De Alba agreed on cross-examination that:

(a) Mr. De Alba, Mr. Glassman, and Mr. Riley all had much greater experience in the telecommunications file than Mr. Moyse did;[104]

(b) Mr. Moyse did not attend the presentation in Ottawa, which one would have expected had he "led" its creation;[105]

(c) there are no emails or other documents assigning him any research tasks with respect to the PowerPoint;

(d) there are no documents reflecting work performed by Mr. Moyse, other than the *pro-forma,* which got incorporated into the PowerPoint;[106]

80. It is highly improbable that Mr. Moyse would have been able to contribute any meaningful analysis to the creation of the PowerPoint, given the tremendously short period of time over which it was created, Mr. Moyse's general level of knowledge on the file at that point, as demonstrated above, and his limited ongoing involvement in the telecommunications file. At the time it was created, Mr. Moyse had been a member of

[103] Moyse Examination-in-Chief, 1405:1-1406:9.
[104] De Alba Cross-Examination by Mr. Centa, 216:11-24.
[105] De Alba Cross-Examination by Mr. Centa, 215:2-7.
[106] De Alba Cross-Examination by Mr. Centa, 215:8-216:4.

the “core” deal team for a matter of weeks, and his lone contribution was the *pro-forma* described above. It is far more likely that the other four individuals directly involved in the creation of presentation and with previous involvement in the file, Mr. Glassman, Mr. De Alba, Mr. Riley, and Mr. Michaud, generated the ideas in the presentation.

81. In yet another example of Mr. De Alba’s exaggeration of Mr. Moyse’s role, he testified that Mr. Moyse (who, it must be recalled, had only just joined the telecommunications team) was involved in the creation of the three options which Catalyst presented to the federal government regarding its strategy for developing a viable fourth national telecommunications carrier:[107]

> Q. [Mr. De Alba, Mr. Riley, and Mr. Michaud] came up with option 1, 2 and 3 and told them to him, correct?
>
> A. No.
>
> Q. Mr. Moyse came up with option 1, 2 and 3?
>
> A. The team together came up with the options. The team together came up with the presentation and he was the person responsible for putting it together into a single presentation.
>
> Q. Mr. de Alba, are you suggesting that the documents we've looked at that show Mr. Moyse's involvement from January 2014 to March 26th, 2014 that he was involved in the creation of options 1, 2 and 3?
>
> A. Yes.[108]

82. In contrast, Mr. Glassman’s evidence on cross-examination was far more honest, perhaps because anything else would have required him to minimize his own role in developing the strategy set out in the presentation. Mr. Glassman agreed that Mr. Moyse was not the architect of Catalyst’s strategy in dealing with the federal

[107] Paliare Roland De Alba Cross-Examination Brief, Tab 35, pp. 7, 8, 9.
[108] De Alba Cross-Examination by Mr. Centa, 220:5-19.

government, but that he, Mr. Glassman, was the chief architect, and the other architects were Mr. De Alba and Mr. Riley.[109]

83. Prior to this presentation, Mr. Moyse did not know any details of Catalyst's strategy.[110] He was forthright in his evidence that, as a result of his involvement in the presentation, he gained greater knowledge of that strategy. However, Mr. De Alba and Mr. Glassman overstate the extent to which Mr. Moyse understood the presentation, the options to the government presented in it, and how they related to Catalyst's genuine view of its strategy for building out a fourth national carrier.

84. Mr. Moyse had little context for the presentation, and prepared it in a hurried manner. In the circumstances, he simply put very little thought into the items as he transposed them into the presentation.[111] Given that he destroyed it after it was prepared, as he was instructed to do,[112] he did not have an opportunity to refer back to it.

85. Critically, given his limited prior involvement in the presentation, Mr. Moyse would have been unable to discern from this document how much of the information in the PowerPoint was fact, how much of it represented Catalyst's genuine views and regulatory strategy, and how much of it represented Catalyst's negotiating position with

[109] Glassman Cross-Examination by Mr. Thomson, 385:25-386:13.
[110] Moyse 2016 Affidavit, para. 40.
[111] Moyse 2016 Affidavit, para. 45.
[112] Moyse 2016 Affidavit, para. 54.

the government.[113] Indeed, Mr. Glassman's evidence is that he would manipulate and manage his deal team, including Mr. De Alba, to get the outcome he wanted.[114]

3. May 6 and May 24, 2014 period

86. Mr. Moyse did not perform any further analysis in the telecommunications industry prior to May 6, 2014. Though Mr. Glassman's and Mr. De Alba's evidence was that Mr. Moyse was kept "intimately apprised of Catalyst's strategy" during this period, this is completely inconsistent with the documentary evidence. The only Catalyst documents from this period involving Mr. Moyse are a series of emails on which Mr. Moyse was copied involving a proposed transaction between Telus and Mobilicity.[115]

87. Mr. Moyse's work on Catalyst's telecommunications team was (with the exception of the March PowerPoint) limited to a three week period in May, 2014. During this time, he assisted in the preparation of a second presentation to Industry Canada, substantially similar to the presentation created in March, 2014, and assisted in Catalyst's initial work on the WIND file.

(a) Work on Catalyst's regulatory strategy

88. While Catalyst's work was beginning on the WIND deal in early May, 2014, described below, Catalyst was also preparing for a further meeting with Industry Canada with respect to regulatory concessions it was seeking, to take place on May 12, 2014.

[113] Moyse 2016 Affidavit, p. 19-21, paras. 46-52.
[114] Glassman Cross-Examination by Mr. Thomson, 528:12 - 528:15.
[115] Glassman Cross-Examination by Mr. Thomson 528:3-529:1.

(i) May 6-7 email exchange

89. Approximately a week before this presentation, Mr. Moyse was one of several recipients on a series of emails between Mr. Glassman and De Alba with respect to the WIND deal, and the government's approach.[116] Through this series of emails, Mr. Moyse was aware of Catalyst's position, and the status of its discussions with the government. Mr. Glassman identified that the government was, at the time, refusing to give Catalyst in writing, the right to sell spectrum in five years, and that Catalyst would now only be willing to build a "wholesale/leasing" business with the incumbents (i.e. Bell, Telus, or Rogers).[117] Mr. Glassman's evidence is that, from this email exchange, Mr. Moyse would have understood that:

(a) Catalyst had knowledge that the federal government and Industry Canada's posture was "softening" and they were concerned about the retroactive treatment of the 2008 spectrum licenses;

(b) it was Catalyst's strategy to deliver to Industry Canada and the federal government a "dream deal" of merging Mobilicity and WIND;

(c) Catalyst intended to put the federal government in a position of having no choice but to provide the regulatory approvals requested by Catalyst for its options 1 or 2; and

[116] Moyse 2016 Affidavit, p. 27-29, paras. 73-78.
[117] Exhibit 34 to the Moyse 2016 Affidavit, CCG0009482.

(d) Catalyst believed the government's position that it would not provide Industry Canada with a written agreement to sell spectrum licenses in five years to be a negotiation posture. [118]

90. Mr. Moyse's evidence that he simply did not take this from Mr. Glassman's email is credible. Mr. Moyse's exposure to Catalyst's regulatory strategy remained limited. This is only the second document to which Mr. Moyse would have been privy which set out, in any level of detail, Catalyst's regulatory strategy. Mr. Moyse candidly acknowledges that this email increased his understanding of Catalyst's strategy,[119] however, that does not mean that he suddenly possessed the same level of sophistication and understanding as Mr. Glassman and Mr. De Alba.

(ii) The second PowerPoint presentation

91. A few days after being copied on this chain of emails, on May 11, 2014, Mr. Moyse assisted in the creation of the slide deck for a second presentation to the federal government.[120] Catalyst's second slide deck was substantially similar to the one created a month and a half previously.

92. As with the first presentation to Industry Canada, Mr. Moyse and Catalyst's witnesses disagree with Mr. Moyse's role. Mr. Moyse's evidence is that he once again performed a largely administrative function in the creation of the slide deck, inputting handwritten changes made by Mr. De Alba, Mr. Michaud, or Mr. Riley. Again, he had a

[118] Glassman Affidavit, paras. 33-34.
[119] Moyse 2016 Affidavit, para. 77.
[120] Moyse 2016 Affidavit, p. 29, para. 79; Exhibit 36 to the Moyse 2016 Affidavit.

limited understanding of the contents of the presentation given his limited knowledge of Catalyst's regulatory priorities and the hurried manner in which it was created.[121]

93. Catalyst's witnesses' evidence was that Mr. Moyse again led the creation of this second PowerPoint presentation. To justify their assertions that Mr. Moyse "led" the creation of this particular presentation, Mr. De Alba and Mr. Glassman rely on the following specific points:

(a) Mr. Moyse "had the most knowledge of the [telecommunications] file,"[122] even though Mr. Glassman also described himself as the chief architect of Catalyst's strategy, and Mr. De Alba and Mr. Riley were also the architects of that strategy.[123]

(b) Mr. Moyse was "the last person to basically provide the presentation directly to the parties."[124] In other words, he was the person who emailed it to the Catalyst team. The fact that Mr. Moyse emailed the presentation is not probative of whether or not he took a leadership position. An administrative assistant could have done so;

(c) According to Mr. De Alba, Mr. Moyse's evidence is simply not consistent with the way that Catalyst interacts with its professionals, and it "will have been important … for [Mr. Moyse] to fully bring his thinking into it."[125]

[121] Moyse 2016 Affidavit, paras. 84-85.
[122] Glassman Examination-in-Chief, 340:12-341:2.
[123] Glassman Cross-Examination by Mr. Thomson, 385:25-386:13.
[124] De Alba Examination-in-Chief, 149:22 – 150:5.
[125] De Alba Examination-in-Chief, 149:22 – 150:18; see also 161:12.

94. Mr. Moyse's account should be preferred. As with the first PowerPoint presentation, there is no contemporaneous documentation assigning any tasks to Mr. Moyse or suggesting that he played any role in formulating the research or analysis, other than the contributors which he acknowledged.

95. Moreover, the few contemporaneous documents with respect to this presentation make clear that Catalyst expressly did not consider Mr. Moyse to be the "team lead". On May 12, 2014, when he was seeking a copy of the presentation in advance of the meeting, Mr. Glassman did not email Mr. Moyse asking for a copy of it, but a series of other Catalyst professionals and advisors involved in the telecommunications file.[126] It defies logic that he would not have emailed the person who was "leading" the presentation to ask where it was. Mr. De Alba's explanation as to why Mr. Glassman would not have emailed Mr. Moyse was preposterous, having observed Mr. Glassman's aggressive demeanour in court:

> Q. I put it to you that's because you and Mr. Michaud and Mr. Riley were copied on that email, had much more responsibility for the creation of the second PowerPoint presentation than did Mr. Moyse?
>
> A. He might have not -- Mr. Glassman might not have wanted to overwhelm Mr. Moyse with more pressure at that point in time.
>
> Q. Was Mr. Glassman often that considerate of his analysts' time?
>
> A. Absolutely.
>
> Q. He wanted to make sure they weren't put under too much pressure?
>
> A. Absolutely.
>
> Q. He wanted to make sure they had sufficient time to do their jobs?
>
> A. Absolutely.

[126] Paliare Roland De Alba Cross-Examination Brief, Tab 48; De Alba Cross-Examination by Mr. Centa, 224:21-225:13.

> Q. And he would not have wanted to burden Mr. Moyse by sending him an email asking him where the presentation was?
>
> A. Yes.
>
> Q. And that's consistent with your non-hierarchical approach at Catalyst?
>
> A. When somebody is meeting a deadline the last thing you want to do is overwhelm that person with more pressure.

This is a remarkable story, which is entirely made up. It is inconsistent even with Mr. Glassman's self-description as an instigator of pressure.

(b) Work on the WIND Deal

96. On May 6, 2014, Catalyst was invited to the WIND deal. The initial pace of work was frantic, and Catalyst heavily staffed the team. Catalyst's WIND deal team was staffed with almost all its investment professionals at the time – Mr. De Alba, Mr. Michaud, Mr. Creighton, and Mr. Moyse, and supported by a large team of legal and financial advisors to assist with the work and diligence.[127]

97. Mr. Moyse's active work on the WIND file was limited to a ten day period between May 9, 2014, and May 16, 2014, at which point he left for south-east Asia. During that time, Mr. Moyse's active involvement focused on business due diligence, and was limited to the following:

(a) attending two due diligence meetings with WIND management and Catalyst's internal and external advisors,[128]

[127] Moyse 2016 Affidavit, p. 24, para. 62.
[128] Moyse 2016 Affidavit, p. 32-33, paras. 89-91.

(b) assisting with crafting Catalyst's due diligence requests, which were based on information available in the WIND data room and otherwise publicly available;[129]

(c) briefly working on Catalyst's operating model, before the task was outsourced to Morgan Stanley and then providing comments on an early model developed by Morgan Stanley;[130] and

(d) assisting Mr. Creighton with several discrete tasks on the initial draft of Catalyst's investment memorandum, which was still not complete at the time of Mr. Moyse's resignation, let alone at the time he left for vacation.[131]

98. While Catalyst's witnesses and Mr. Moyse agree that these were the specific tasks to which he was assigned, they disagree over whether Mr. Moyse was privy to high level strategic discussions, or "kept abreast of the deal process and [Catalyst's] strategic thinking behind the WIND transaction." Mr. De Alba and Mr. Glassman had primary responsibility for those discussions, and there is virtually no contemporaneous evidence of them sharing any details of those discussions with Mr. Moyse.

99. In contrast to the regulatory concerns which Catalyst has put before the court in its evidence, the only regulatory issues of which Mr. Moyse was aware were:

(a) whether or not the federal government would allow a new wireless entrant to sell its spectrum and/or be purchased by an incumbent, which he learned

[129] Moyse 2016 Affidavit, p. 31-33, paras. 86-91.
[130] Moyse 2016 Affidavit, p. 35, paras. 95-97.
[131] Moyse 2016 Affidavit, p. 33-35, paras. 92-94; Exhibit 45 to the Moyse 2016 Affidavit CCG0010041.

through extensive media coverage, and which he also understood was an issue for Catalyst; and

(b) the requirement for government approval of a sale of WIND, which anyone with even a passing familiarity with the Canadian regulatory framework would have understood was an issue.[132]

100. Mr. Moyse left for vacation on May 16, 2014, and while on vacation he had almost no involvement in the file, despite being copied on emails in his absence. On one occasion, Mr. Moyse provided comments on Morgan Stanley's operating model in response to a specific request from Mr. Michaud.[133] There is no evidence that Mr. Moyse had any further direct involvement in the file while on vacation.

101. Mr. Moyse did ask his fellow analyst, Mr. Creighton, for updates on the status of the WIND deal on two occasions during his vacation. Tellingly, Mr. Creighton, who was in the office and working on the deal on a daily basis, did not have any real sense of what was going on with the deal.[134] It defies logic that Mr. Moyse would have had any better understanding than Mr. Creighton of Catalyst's position at the time of his departure. Indeed, this is persuasive evidence Mr. Moyse had little knowledge of the deal and Catalyst's direction at the time he resigned.

[132] Moyse 2016 Affidavit, pp. 26-27, para. 70.
[133] Exhibit 49 to the Moyse 2016 Affidavit.
[134] Moyse 2016 Affidavit, p. 37, paras. 102-103; Exhibit 50 to the Moyse 2016 Affidavit (as corrected).

4. Mr. Moyse's resignation from Catalyst

102. Mr. Moyse resigned by email from Catalyst on May 24, 2014, the second to last day of his vacation.[135] Catalyst alleges that Mr. Moyse deliberately did not advise Mr. De Alba that he was going to work for West Face. At the time he sent this email, Mr. Moyse did not have a signed offer with West Face. Mr. Moyse made no effort to conceal the fact he was going to be working at West Face once the offer was finalized, and told Mr. De Alba where he was going to work when they met in person on May 26, 2014.[136]

103. Catalyst alleges that Mr. Moyse deliberately withheld that he was going to West Face because he knew that West Face was also pursuing the WIND deal.

104. Mr. De Alba's own evidence on discovery was that even he did not know, as of June 4, whether West Face was a bidder for WIND.[137] At trial, in contrast, Mr. De Alba testified that it would have been discussed at Catalyst that West Face was a competitor within the wireless sector,[138] and that Mr. Moyse knew this. The inference sought is that Mr. Moyse deliberately concealed the fact he was going to West Face.

105. Mr. De Alba's testimony is not consistent with the events surrounding Mr. Moyse's departure. If in fact Mr. De Alba's evidence that there were "continuous discussions about West Face's involvement in Wind and in Mobilicity" at Catalyst is correct,[139] then not only Mr. Moyse but all investment professionals, including Mr. Michaud and Mr. Creighton, would have been aware that Catalyst considered West

[135] Moyse 2016 Affidavit, p. 38, para. 104; Exhibit 52 to the Moyse 2016 Affidavit, CCG0018691.
[136] Moyse 2016 Affidavit, para. 106.
[137] De Alba Examination for Discovery, Q. 403
[138] De Alba Examination-in-Chief, 144:11 –145:7, 163:13 – 164:4.
[139] De Alba Examination-in-Chief, 163:18 - 164:4.

Face to be a clear competitor in the telecommunications industry. Mr. Moyse told both Mr. Michaud and Mr. Creighton on May 16, 2014, that he had received an offer from West Face.[140] If Mr. Moyse actually knew that West Face was also pursuing the WIND transaction and the fourth wireless carrier strategy, it is unlikely he would have voluntarily disclosed to Mr. Michaud and Mr. Creighton that he had received the offer.

106. Moreover, neither Mr. Michaud nor Mr. Creighton expressed any kind of concern about the fact he was going to work for West Face. Mr. Michaud, to whom Mr. Moyse reported, not only continued to copy Mr. Moyse on Catalyst's emails with respect to the WIND deal, but further specifically asked for his comments on Morgan Stanley's operating model.[141] If Catalyst really did consider West Face to be a competitor for WIND, then Mr. Michaud, a Vice President, certainly should have and would have expressed some indication of this.

107. Mr. Riley ultimately sent Mr. Moyse home on May 26, 2014, and he did no further Catalyst work after this date. Catalyst contacted its IT provider to revoke Mr. Moyse's access to Catalyst's servers.[142] After this date, it is undisputed that Catalyst and its advisors did not keep Mr. Moyse advised of Catalyst's discussions with VimpelCom or the federal government.[143]

108. Prior to turning in his company-issued Blackberry, Mr. Moyse wiped it. He did so in an effort to delete any personal text messages and photographs that he did not want to hand over to Catalyst, and in the belief that his Catalyst emails, the only email

[140] Moyse Examination-in-Chief, 1382:12-1386:22.
[141] Moyse 2016 Affidavit, p. 36, paras. 99-101; Exhibit 49 to the Moyse 2016 Affidavit, CCG0011275.
[142] Cross-Examination by Mr. Thomson, 577:22-578:2.
[143] Glassman Cross-Examination by Mr. Thomson, 360:9-25.

account set up on the Blackberry, would remain on the Catalyst server (which they did).[144] Mr. Moyse candidly acknowledged that wiping the Blackberry was a poor decision, a mistake, and there was another way of handling his concerns.[145]

5. Allegations of other impropriety

109. On its initial motion for injunctive relief, Catalyst alleged Mr. Moyse improperly transferred confidential information. Catalyst continues to rely on this evidence at trial, though it has been discredited. On June 21, 2014, Catalyst's forensic experts created a forensic image of Mr. Moyse's desktop computer and then conducted an analysis of that image. As a result of that image, Catalyst has had access to:

(a) all of the files Mr. Moyse had accessed in his Dropbox account on that computer prior to that date;[146] and

(b) a record of Mr. Moyse accessing Dropbox using his Catalyst computer, which shows that that computer accessed Mr. Moyse's Dropbox through the Internet only once on February 10, 2014, before he resigned on May 24, 2014.[147]

[144] Answers to Undertakings given at Riley 2015 Cross-Examination, No. 1.
[145] Moyse Examination-in-Chief, 1390:17-1391:14.
[146] Exhibit "E" to the Musters June 2014 Affidavit.
[147] Exhibit "B" to the Musters June 2014 Affidavit. The second time was on June 20, 2014 (almost a month after his last day in the office), which could not have indicated Mr. Moyse using the office computer for anything.

110. Catalyst led evidence through Mr. Riley and Mr. Musters of five incidents in which Mr. Moyse allegedly improperly accessed documents in the months prior to his departure from Catalyst.[148]

111. Catalyst has never produced any of the actual documents referred to in Mr. Musters' and Mr. Riley's affidavits, which would permit Mr. Moyse to test Mr. Riley's assertions, and the court to verify the accuracy of Mr. Riley's evidence, that these documents were highly confidential, and that Mr. Moyse reviewed these materials for some nefarious purpose.[149]

112. In any event, there is no evidence of impropriety in relation to Mr. Moyse's access to those files, let alone any conduct on which the court could infer Mr. Moyse was collecting Catalyst confidential information for the purpose of transmitting it to West Face, as Catalyst suggests.

113. First, on March 28, 2014, over an eleven-minute period, Mr. Moyse accessed a series of Catalyst's letters to its investors.[150] Mr. Moyse's evidence is that he reviewed those letters around the time he intended to leave Catalyst, and was looking at the letters to see whether they contained negative statements about others who had left the firm. He skimmed the letters quickly to review the personnel updates, in which he was interested.[151] Mr. Riley conceded on cross-examination that:

(a) the investor letters dated back a number of years;

[148] Riley June 2014 Affidavit, paras. 52-54.
[149] Riley June 2014 Affidavit, paras. 52, 54.
[150] Musters June 2014 Affidavit, para. 12; Riley 2014 Affidavit, para. 28.
[151] Moyse 2016 Affidavit, p. 54, para. 156(a).

(b) the investor letters generally did not contain any information about prospective investments, and did not include sensitive information that could be used against Catalyst; and

(c) there was no formal policy at Catalyst with respect to accessing investor letters, and no firewall in place to limit electronic access.[152]

114. The second series of documents Mr. Moyse accessed related to Catalyst's investment in Stelco, which dated back almost a decade and had long ceased to be active.[153] Mr. Moyse accessed these files on April 25, 2014, over a 75-minute period.[154] Mr. Moyse's evidence is that he often reviewed transaction files out of personal curiosity, and that was the reason he reviewed these documents. On opening the Stelco files, however, he found they were very complex, and did not spend long trying to read them.[155]

115. The third series of documents which Mr. Moyse accessed, on the evening of May 13, 2014, related to Masonite.[156] Mr. Riley's affidavit evidence was that Masonite was an opportunity that Catalyst had been studying, but which Mr. Moyse was not working on. Mr. Riley's evidence suggested that the presence of Masonite files in his personal Dropbox account was somehow improper.[157] Mr. Moyse's evidence was that none of the Masonite documents were Catalyst documents, that he was not aware that Catalyst had been studying an opportunity involving Masonite, and that he had documents in his

[152] Riley Cross-Examination by Mr. Borg-Olivier, 632:20-633:21.
[153] Riley June 2014 Affidavit, para. 58; Riley Cross-Examination by Mr. Borg-Olivier, 634:25-27.
[154] Riley June 2014 Affidavit, para. 58.
[155] Moyse 2016 Affidavit, p. 54, para. 156(b).
[156] Riley June 2014 Affidavit, para. 60.
[157] Riley June 2014 Affidavit, para. 60.

Dropbox account related to Masonite because as part of his interview at another firm, Mr. Moyse had been asked to use Masonite as a case study.[158]

116. Mr. Riley conceded on cross-examination that Catalyst had looked at Masonite some six years earlier, and that he made no effort to confirm or deny the veracity of Mr. Moyse's evidence regarding whether the documents in his Dropbox account were Catalyst documents.[159] The fact that Catalyst and its expert, Mr. Musters, continue to rely on this allegation despite their failure to investigate is troubling.

117. The fourth series of documents related to the WIND file. On the evening of May 13, 2014, Mr. Moyse accessed several files related to the transaction.[160] These documents were downloaded from the WIND data room at the beginning of Catalyst's due diligence review.[161] Mr. Riley, however, omitted from his affidavit evidence that Mr. Moyse was in fact working on the WIND transaction at the time, and without this important context, his description of the WIND file as a "very sensitive and confidential opportunity" suggested inappropriate action, though there was no evidence of this.[162]

118. It is respectfully submitted that Mr. Riley's evidence in this regard was especially troubling and misleading: he had to know (and had to intend) that the court reviewing Catalyst's request for an injunction (which was the context in which this initial affidavit was prepared) would be troubled to learn that Mr. Moyse had apparently surreptitiously accessed files relating to a sensitive and confidential opportunity. He also had to know

[158] Moyse July 4, 2014 Affidavit, paras. 49-52.
[159] Riley Cross-Examination, 644:25-645:9
[160] Riley June 2014 Affidavit, paras. 61-63.
[161] Moyse 2016 Affidavit, p. 55, para. 156(c).
[162] Riley June 2014 Affidavit, para. 61; Riley Cross-Examination by Mr. Borg-Olivier, 646:4-648:2.

that the court would be significantly less troubled if it understood that the file in question was one on which Mr. Moyse was a member of the core team, and that he accessed the documents in question in the normal course of his duties. It is equally problematic that Mr. Riley failed to correct this evidence, and in fact adopted and reaffirmed it in subsequent affidavits, and indeed at trial.

119. The last allegedly suspicious documents identified by Mr. Riley were Mr. Moyse's notes for the "Monday morning meeting" which took place on his last day in Catalyst's office, May 26, 2014. Mr. Riley's evidence was that Mr. Moyse accessed the notes at a time which appeared to be after the meeting had ended, and there was no reason why Mr. Moyse would be making notes from a meeting he attended after he resigned.[163] In fact, these were the notes Mr. Moyse made in anticipation of attending the meeting that day, which he never did.[164] Mr. Riley gave this evidence even though he must have known that Mr. Moyse did not attend the meeting in question, since it was he who sent Mr. Moyse home that day, and in any event, he conceded that it would have been very easy to establish whether or not Mr. Moyse had been in attendance.

120. Mr. Musters' opinion was that the conduct of accessing several documents from the same directory over a brief period of time was consistent with transferring the files to a cloud-based storage service. Mr. Musters provided no forensic evidence to support this conclusion. The only potential connection between Mr. Moyse's access of these files and a transfer to a file-sharing website is the fact that Mr. Moyse had access to

[163] Riley June 2014 Affidavit, paras. 64-65.
[164] Moyse July 4, 2014 Affidavit, paras. 58-60.

Dropbox and Box accounts, the latter of which was set up for work-related reasons and accessible by several Catalyst employees.[165]

121. Even if there was anything suspicious about the documents in question which, as described above, there was not, the mere fact that Mr. Moyse had access to common file-sharing accounts, and that he accessed the documents in the manner described in Mr. Musters' affidavit, cannot ground a finding that Mr. Moyse transferred them in the absence of forensic evidence or a factual foundation on which such an inference can reasonably be drawn.

122. In fact, the documents appended to Mr. Musters' affidavit demonstrate that Mr. Moyse did not access Box or Dropbox from his Catalyst computer on any of the dates or at any of the times on which Mr. Moyse accessed the specific files on his Catalyst computer.[166]

D. Mr. Moyse's recruitment and brief period at West Face

123. Catalyst asks this court to infer that Mr. Moyse passed on Catalyst confidential information regarding WIND to West Face between March 26, 2014 and June 4, 2014.

124. Mr. Moyse's evidence is that he never, either in writing or verbally, provide any confidential Catalyst information regarding

(a) WIND

[165] Musters June 2014 Affidavit, para. 8

[166] There is no nexus between the dates on which Mr. Moyse's desktop computer accessed Dropbox (February 10, 2014 and June 20, 2014), and the times at which Mr. Moyse accessed particular documents (March 28, 2014, April 25, 2014, May 13, 2014 and May 26, 2014): Musters June 2014 Affidavit, paras. 12-15; Exhibit B to the Musters June 2014 Affidavit.

(b) Mobilicity

(c) Catalyst regulatory strategy; or

(d) its telecommunications strategy

to anyone at West Face, or the consortium of successful bidders for WIND.[167]

125. There is no evidence that he did so, and the evidence before the court of his scant communications with West Face does not support such an inference.

1. Recruitment by West Face

126. The evidence before the court supports a finding that there was nothing unusual about Mr. Moyse's recruitment by West Face, and that at no time during that process did Mr. Moyse and West Face discuss Catalyst confidential information. The contacts between them were not "near constant", as alleged by Catalyst, but were in fact sporadic, and entirely consistent with the recruitment of a junior employee.

127. By late 2013, Mr. Moyse seriously started thinking about leaving Catalyst because he was not getting the learning opportunities he had set out to achieve when he joined the firm, and because he found the work environment to be oppressive, and lacking in common decency or respect for the individuals working there.[168]

128. Mr. Moyse began to look in earnest for alternate employment in early 2014. Though he contacted a number of employers, his top choice throughout the process was West Face. There were a number of delays in West Face's recruitment process,

[167] Moyse Examination-in-Chief, 1358:1-1359:23.
[168] Moyse Examination-in-Chief, 1361:5-1361:20, 1363:1-1363:7.

and he was not sure they would offer him a position until he received a verbal offer on May 16, 2014.[169] Mr. Moyse's nervousness and anxiety about the West Face interview process are palpable in the emails he exchanged with his fiancée around that time.[170]

129. Mr. Moyse first met in person with Thomas Dea, West Face partner, on March 26, 2014. Mr. Moyse and Mr. Dea discussed his background, duties, and skills developed at Catalyst, why he was interested in West Face, and why he was thinking of leaving his current position. They did not discuss WIND or the telecommunications industry.[171]

130. Following that meeting, Mr. Moyse made two errors. First, Mr. Moyse sent Mr. Dea four company research memos he had created at Catalyst, three of which contained compilations of public information, but which were marked as confidential. None of the memos related to the telecommunications industry. Regardless of their content, or the reasons for which he thought they were appropriate to send at the time he sent them, Mr. Moyse has repeatedly admitted that providing these documents to West Face was a mistake.[172] During his evidence in chief, Mr. Moyse described the memos, without hesitation as "confidential, definitely proprietary to Catalyst", and frankly admitted that "sending them was a serious, serious error in judgment."[173] This admission is to Mr. Moyse's credit.

[169] Moyse 2016 Affidavit, p. 40, para. 113.
[170] Exhibits 59, 60 and 61 to the Moyse 2016 Affidavit.
[171] Moyse 2016 Affidavit, p. 41, para. 115; Exhibit 62 to the Moyse 2016 Affidavit, WFC0031090; Moyse Examination-in-Chief, 1373:11-1373:25.
[172] Moyse 2016 Affidavit, p. 41, para. 116; Moyse April 2015 Affidavit, para. 20; Exhibit 63 to the Moyse 2016 Affidavit, WFC0108593.
[173] Moyse Examination-in-Chief, 1374:19-1375:2.

131. Mr. Moyse's second mistake was to delete that same email sent to Mr. Dea once he realized that he should not have sent the documents to West Face. Again, Mr. Moyse has repeatedly recognized that deleting the sent item was not the appropriate way of addressing his mistake.[174] In his own words, Mr. Moyse was "compounding poor decisions."[175]

132. There was nothing unusual or troubling about the remainder of Mr. Moyse's contacts with West Face. These consist entirely of a series of emails between March and May 2014 in which he scheduled his interviews,[176] sent thank you emails to the partners and professionals with whom he had interviewed,[177] and followed up with Mr. Dea on the status of his application.[178]

133. On April 15, 2014, Mr. Moyse met with Peter Fraser, Tony Griffin, and Yu-Jia Zhu sequentially for a series of short interviews which were very similar to his interviews with Mr. Dea.[179] All of the meeting participants agree that at no time during those meetings did they discuss WIND, Mobilicity, or Catalyst's regulatory concessions that it was seeking from the government.[180]

134. Finally, on April 28, 2014, Mr. Moyse met with Greg Boland; again his interview was brief, and similar to his previous interviews with West Face.[181] They did not discuss

[174] Moyse 2016 Affidavit, p. 42, para. 117; Moyse April 2015 Affidavit, para. 30.
[175] Moyse Examination-in-Chief, 1375:19-1375:22.
[176] Exhibit 62 to the Moyse 2016 Affidavit; Exhibit 64 to the Moyse 2016 Affidavit.
[177] Exhibit 68 to the Moyse 2016 Affidavit.
[178] Exhibit 69 to the Moyse 2016 Affidavit.
[179] Moyse 2016 Affidavit, p. 42, para. 119.
[180] Moyse Examination-in-Chief, 1379:2-1379:11.
[181] Moyse 2016 Affidavit, p. 43, para. 120.

WIND, Mobilicity or anything about Catalyst's regulatory posture with respect to the federal government.[182]

135. Mr. Moyse's evidence is consistent with the evidence of each of the West Face witnesses: at no time during these interviews did Mr. Moyse and West Face's representatives discuss WIND or the telecommunications file.[183] In any event, Mr. Moyse was not aware that Catalyst was actively pursuing WIND, or would soon be, at the time of these interviews.[184]

136. Mr. Moyse received a verbal offer from Mr. Dea on May 16, 2014. West Face's evidence is that it hired Mr. Moyse as a result of his academic background and professional credentials, the skills he had developed as an analyst, his positive interviews at West Face and excellent references, and his stated ambition and work ethic. It was not because he had imparted any confidential information with respect to WIND to them.[185] In fact, Mr. Dea expressed his concerns to Mr. Moyse about those memos at the time he provided him a written offer.[186]

137. The evidence also establishes that Alexander Singh, West Face's general counsel, expressed West Face's concerns at the memos which Mr. Moyse had sent Mr. Dea,[187] and that, shortly after Mr. Moyse commenced work at West Face, West Face

[182] Moyse Examination-in-Chief, 1380:5-1380:11.

[183] Dea Affidavit, June 3, 2016, p. 5, para. 11; Griffin Affidavit, June 4, 2016, p. 26, para. 67; Griffin Examination-in-Chief, 768:15-24, 774:14-775:3; Griffin Cross-Examination, 1003:17-1004:4, 1007:3-19; Zhu Affidavit, p. 2, para. 3; Zhu Cross-Examination by Mr. Winton, at 1295:22-1296:9.
See also Burt Cross-Examination, 833:5-20; Leitner Cross-Examination, 872:6-24.

[184] Moyse 2016 Affidavit, p. 43, para. 120.

[185] Dea June 2016 Affidavit, p. 8, para. 20.

[186] Moyse Examination-in-Chief 1377:5-1377:20.

[187] Moyse 2016 Affidavit, p. 45, para. 129; Moyse Examination-in-Chief 1376:2-1377:4.

put up a confidentiality wall prohibiting Mr. Moyse from discussing WIND with any other investment professional.[188]

138. It is clear that West Face acted entirely appropriately throughout the recruitment process. The evidence stands uncontradicted: at no time during the recruitment process did Mr. Moyse provide Catalyst Confidential Information about WIND to West Face.

2. Arcan

139. One of the four memos which Mr. Moyse sent to Mr. Dea on March 27, 2014 related to Arcan Resources Ltd. ("Arcan"), dated as of January 2014.[189] Catalyst never made an investment in Arcan.[190] Catalyst has produced no documents relating to any interest it may have had at Arcan.

140. Long after he prepared the memo, on his first and second day of work at West Face, Mr. Moyse briefly examined a potential transaction involving a plan of arrangement involving Arcan. Mr. Moyse began to study the transaction, which was announced late in the day, of his own initiative on June 23. He did so so that he could begin to learn about the deal.[191] Mr. Moyse spent approximately four to six hours on the situation before Mr. Singh, West Face's general counsel, told him to stop. He did. He did not provide his notes to anyone at West Face.[192]

141. The Arcan strategic transaction Mr. Moyse worked on briefly at West Face was entirely unrelated to the Arcan work Mr. Moyse had done while at Catalyst. There would

[188] Moyse 2016 Affidavit, p. 45, para. 128; Exhibit 78 to the Moyse 2016 Affidavit.
[189] Exhibit 69 to the Moyse 2016 Affidavit, WFC0108649.
[190] Riley Cross-Examination by Mr. Thomson, 582:2-4.
[191] Moyse Examination-in-Chief, 1394:4-1395:14; Moyse May 2015 cross-examination, Q. 660.
[192] Moyse Examination-in-Chief, 1396:17-1397:4; Moyse May 2015 cross-examination, Qs. 664-668.

have been no need to understand anything about Arcan itself to analyze the transaction at issue in June 2014.[193] Mr. Moyse used none of the information that he learned during his time at Catalyst for the work he did on June 23.[194]

3. Mr. Moyse learns that West Face has closed the WIND deal

142. Mr. Moyse first learned West Face had closed the WIND deal in September 2014 from Twitter. He was surprised by the news, as is clear from the contemporaneous emails sent to his friends at the time he learned of the transaction.[195] In one of the emails, Mr. Moyse even guessed (incorrectly) at the transaction structure.[196] At this point all he knew about West Face's interest in WIND was that they had put up a confidentiality wall with respect to WIND before he started work.[197] Catalyst's suggestion that Mr. Moyse's incorrect description of the transaction is evidence that Mr. Moyse received confidential information from West Face about its earlier April/May proposals is, frankly, absurd.[198]

E. Mr. Moyse's deletion of his personal browser history

143. On June 25, 2014, Catalyst issued a claim (which it subsequently amended three times) and brought a motion seeking interlocutory injunctive relief against Mr. Moyse and West Face.

144. As against Mr. Moyse, the original statement of claim sought primarily injunctive relief prohibiting him from commencing or continuing employment at West Face until the

[193] Moyse May 2015 cross-examination, Qs. 669-670.
[194] Moyse Examination-in-Chief, 1395:22-1396:16.
[195] Exhibits 53, 54, 55, 56, 57 and 58 to the Moyse 2016 Affidavit.
[196] Exhibit 55 to the Moyse 2016 Affidavit.
[197] Moyse 2016 Affidavit, para. 108.
[198] Moyse Cross-Examination, 1570:25-1572:16.

non-competition clause in his employment agreement expired, and other injunctive relief related to Mr. Moyse's obligations under his employment agreement.[199]

145. Given previous judicial decisions, it was reasonable for Mr. Moyse to take the position the non-competition clause was unenforceable as it appeared overbroad[200] and ambiguous[201] on its face.

146. On July 16, 2014, the parties attended before Justice Firestone on Catalyst's motion for injunctive relief. Following discussions, the parties consented to an order (the "Firestone Order").[202] The Firestone Order included a number of terms, including terms which required Mr. Moyse to:

(a) preserve and maintain all relevant records in his power, possession or control;

(b) deliver a sworn affidavit of documents setting out all documents in his power, possession or control that related to his employment with Catalyst; and

(c) turn over all his personal computer and electronic devices for the taking of a forensic image of the data served on his devices, to be conducted by a professional firm as agreed to between the parties.

147. Catalyst suggests that after the Firestone Order, Mr. Moyse intentionally deleted documents with a view to hindering Catalyst's ability to prove its case.

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[199] Statement of Claim, WFC0077899
[200] *Mason v Chem-Trend Ltd Partnership*, 2011 ONCA 344.
[201] *KRG Insurance Brokers (Western) Inc v Shafron*, 2009 SCC 6.
[202] Moyse 2016 Affidavit, para. 137; Exhibit 81 to the Moyse 2016 Affidavit, WFC0081954.

148. Mr. Moyse's uncontradicted evidence is that he did not do so.[203]

149. During the five-day period between July 16-21, 2014, counsel for the parties discussed and agreed to the process by which Mr. Moyse's devices would be imaged.[204]

1. Mr. Moyse's concerns about the images of his personal devices

150. In the days leading up to the Firestone Order, Mr. Moyse was aware that it was possible that his personal computer would have to be turned over to be reviewed for documents relevant to this matter.[205]

151. Following the Firestone Order, Mr. Moyse understood that a forensic image would be created of his computer's hard drive for the purpose of determining what, if any, documents he had in his possession that related to Catalyst or to the issues raised in Catalyst's lawsuit.[206]

152. Mr. Moyse was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit: he had good, reasonable explanations for every Catalyst-related document that would

[203] Moyse Examination-in-Chief, 1359:24-1360:3, 1415:1-1415:18.

[204] Email correspondence between J. Hopkins and A. Winton dated July 16 and 17, 2014, Exhibit "H" to the Riley February 2015 Affidavit; Email from J. Hopkins dated July 17, 2014, Exhibit "I" to the Riley February 2015 Affidavit, p. 139-144; Correspondence between A. Winton and J. Hopkins dated July 18, 2014, Exhibit "J" to the Riley February 2015 Affidavit; Email from J. Hopkins dated July 18, 2014, Exhibit "K" to the Riley February 2015 Affidavit.

[205] Moyse 2016 Affidavit, para. 140.

[206] Moyse 2016 Affidavit, para. 140.

be found on his computer, and in any event intended to disclose all such documents in his affidavit of documents, as required under the Firestone Order. [207]

153. Mr. Moyse was, however, concerned that an image of his computer hard drive would capture not only the Catalyst documents in his possession, which he agreed were relevant to this proceeding and which he would preserve in any event, but also a raft of irrelevant personal information. In particular, he was troubled that Catalyst would have access to his personal Internet browsing history, which was not relevant to the matters in dispute in this litigation but would be embarrassing to have reviewed by others and potentially become part of the public record. Mr. Moyse was particularly concerned that his personal Internet browser history would show that he had accessed a number of adult entertainment websites.[208]

154. At that point it was not clear to Mr. Moyse what would happen to the forensic image of his personal computer, which would include this irrelevant personal information: it was not clear how the image would be taken, who would take the image, or what would happen to it afterwards. The parties had not agreed to appoint an Independent Supervising Solicitor ("ISS"), and no protocol had been implemented to prevent Catalyst from accessing such irrelevant information and to prevent his irrelevant personal information from ending up in the public record.[209]

[207] Moyse 2016 Affidavit, para. 141.
[208] Moyse 2016 Affidavit, para. 142.
[209] Moyse 2016 Affidavit, para. 143; Cross-Examination of Brandon Moyse, May 11, 2015 ("Moyse 2015 Cross-Examination"), Q. 359-365.

2. Mr. Moyse's research on how to delete his Internet browsing history

155. Mr. Moyse understood and respected his obligations under the Undertaking and the Firestone Order, and took his obligations under each very seriously.[210] He was very careful in how he maintained his computer following the Firestone Order.[211] He decided that, prior to delivering his computer to his counsel, he would attempt to delete his Internet browsing history from his computer. Mr. Moyse did not believe there was anything improper about doing so: neither the Undertaking nor the Firestone Order required him to maintain his computer "as is" before he was to deliver the computer or to preserve irrelevant files.[212]

156. He read the order very closely, and was confident that by deleting his Internet browsing history, he was deleting personal information which was not relevant to the litigation.[213] The focus of both the Undertaking and the Firestone Order was to maintain and preserve documents relevant to the action as it was framed. If Catalyst had sought and obtained an order requiring that Mr. Moyse maintain the computer "as is", he would not have used it at all prior to the image being taken.[214]

157. Mr. Moyse does not have advanced knowledge about computers. However, he was aware that the mere act of deleting one's Internet browsing history through the

[210] Moyse 2016 Affidavit, p. 53, para. 152; Moyse May 2015 Cross-Examination, Q. 523.
[211] Moyse May 2015 Cross-Examination, Qs. 512-513.
[212] Moyse 2016 Affidavit, para. 144.
[213] Moyse 2015 Cross-Examination, Qs. 512-513.
[214] Moyse 2016 Affidavit, para. 144.

browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently deleted material.[215]

158. Mr. Moyse did some Internet searches on how to ensure a complete deletion of his Internet browsing history. Through these searches, Mr. Moyse came to believe that "cleaning" the computer's registry following the deletion of the Internet history would ensure the permanent deletion of that history.[216] Despite the information gleaned by Mr. Moyse through his online research, but consistent with Mr. Moyse's lack of technological sophistication, both experts at this trial agree that cleaning a computer's registry will not in fact permanently delete a user's Internet browsing history.[217]

3. Mr. Moyse's purchase and use of registry cleaning products

159. Mr. Moyse then did some further online research for "registry cleaning" products, and ultimately purchased two software products from a company called "Systweak". Systweak's website lists two of its "top products", the first called "RegCleanPro" and the second called "Advanced System Optimizer" ("ASO"). The website describes:

(a) the ASO product as an "all in one PC tuneup suite," which "includes everything your PC needs". ASO is described as a "suite" because it contains many different programs. One of the programs contained in the suite is a program called "Secure Delete".

[215] Moyse 2016 Affidavit, para. 145.
[216] Moyse 2016 Affidavit, para. 145.
[217] Affidavit of Martin Musters, sworn April 30, 2015 ("Musters April 2015 Affidavit"); Lo 2015 Cross-Examination, p. 269, Q. 115.

(b) RegCleanPro as "[s]oftware to optimize the registry."[218]

160. Mr. Moyse purchased RegCleanPro on Saturday, July 12, 2014, for the purpose of deleting his Internet browser history.[219] He left the receipt for the purchase of this software in plain sight in the Inbox of his Hotmail account.[220] He made no attempt to hide or dispose of the receipt.

161. Four days later, on Wednesday, July 16, 2014, the day of the Firestone Order, Mr. Moyse purchased the ASO product. He also left the receipt for the purchase of the software in plain sight in the Inbox of his Hotmail account. He made no attempt to hide or dispose of the receipt. Mr. Moyse intended to use this program to improve his system's functionality. Within the single program, ASO provided a number of different optimization products.[221]

162. The ISS who, as described below, was subsequently appointed to review the forensic images taken of Mr. Moyse's devices and email accounts, found the payment receipts and license keys for Mr. Moyse's purchase of the two Systweak products in plain view in his personal email inbox.[222]

163. On Sunday, July 20, 2014, the day before Mr. Moyse was scheduled to deliver his computer and other devices to his counsel, he recalls that he opened both the "RegCleanPro" and ASO software products on his computer. He looked into how each

[218] Moyse 2016 Affidavit, para. 146.
[219] Moyse 2016 Affidavit, para. 147.
[220] Tab 88 to the Paliare Roland Moyse Examination-in-Chief Brief.
[221] Moyse 2016 Affidavit, para. 148; Promotional information for Advanced System Optimizer 3; Exhibit E to the Musters February 2015 Affidavit.
[222] Exhibit 12 to the Moyse 2016 Affidavit, at para. 44.

operated. To the best of his recollection, Mr. Moyse ran the "RegCleanPro" software to clean up the computer registry after he deleted his Internet browser history.[223] He left this software in plain sight on his desktop. He made no attempt to hide the software.

4. The Secure Delete folder on Mr. Moyse's computer

164. The forensic evidence also shows that on July 20, 2014, at 8:09 p.m., a folder called "Secure Delete" was created on Mr. Moyse's computer. [224]

(a) Mr. Moyse's unchallenged evidence: he did not run Secure Delete

165. Mr. Moyse's evidence is that when he was running the RegCleanPro software, he also investigated the ASO software suite to investigate what products it offered and what the use of those products would entail.[225]

166. Mr. Moyse's evidence, unshaken on cross-examination, was that he did not:

(a) use the "Secure Delete" product included in the ASO suite to delete any files; or

(b) in any other way delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation.[226]

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[223] Moyse 2016 Affidavit, para. 149;
The RegCleanPro Log for Mr. Moyse's computer reflects that he ran the RegCleanPro performed a scan at 8:11 p.m. on July 20, 2014: Exhibit "E" to the Affidavit of Kevin Lo, affirmed April 2, 2015 ("Lo Affidavit").
[224] Lo Affidavit, para. 16;
Exhibit 12 to the Moyse 2016 Affidavit, para. 45.
[225] Moyse 2016 Affidavit, para. 150.
[226] Moyse Cross-Examination, 1508:1-1508:14; Moyse Examination-in-Chief, 1360:4-1360:7; Moyse 2016 Affidavit, para. 150.

(b) The presence of a Secure Delete folder does not mean it was run

167. The ISS's forensic expert (DEI) reached the following conclusion with respect to the Secure Delete Folder found on Mr. Moyse's computer:

> DEI **cannot determine** whether or not the Secure Delete function may or may not have been used to delete an individual file or files and this report accordingly **cannot express any conclusion** on that possibility other than to note that it exists.[227] (emphasis added)

168. Both Mr. Moyse and Catalyst retained forensic experts, both of whom were asked to provide an opinion concerning the presence of the Secure Delete folder on Mr. Moyse's computer.

169. Both experts ultimately agreed that the presence of a Secure Delete folder on a device does not mean that the Secure Delete program was used to delete any files or folders. Rather, a Secure Delete folder, such as the one found on Mr. Moyse's computer, is created as soon as a user clicks Secure Delete on the ASO menu, but before the product is used for any purpose.[228] The Secure Delete folder is created even if a user does not delete a single file.[229]

170. The initial evidence of Catalyst's expert, Mr. Musters, was that a Secure Delete folder is only created when a user runs the Secure Delete feature to delete a file or folder from the computer.[230] Mr. Musters eventually conceded that his evidence on this point – the central question he was retained to answer – was simply incorrect.[231]

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[227] Exhibit 12 to the Moyse 2016 Affidavit, para. 48.
[228] Lo Affidavit, para. 13;
Cross-Examination of Martin Musters, May 19, 2015 ("Musters 2015 Cross"), Q. 78-83, 93.
[229] Lo Affidavit, p. 138, para. 13.
[230] Musters February 2015 Affidavit, para. 12.
[231] Musters Examination-in-Chief, 660:8-661:21

171. Mr. Musters' concession on this point is crucial. It confirms the opinion of Mr. Lo, that the presence of a Secure Delete folder on Mr. Moyse's system is not evidence that he ran the Secure Delete program, or used it to delete any files. It is, at its highest, evidence that Mr. Moyse clicked on the program, one of many programs in the ASO suite of products.

172. Having made that concession, Mr. Musters' opinion loses any force it might otherwise have had. He has acknowledged that the presence of the Secure Delete folder is not evidence that Mr. Moyse deleted any files or folders. This should have ended this part of the case.

173. However, consistent with his tendency to testify as an advocate rather than as an objective expert, Mr. Musters refused to accept that his crucial error in any way undermined his conclusion that Mr. Moyse had used the Secure Delete program to delete files. When pressed by the Court at trial, Mr. Musters sought to ground his conclusion in matters entirely unrelated to his field of expertise:

> THE COURT: Well, it's your case. Can I just ask you a question, Mr. Musters. I understand what you said, just launching a program creates the Secure Delete file. I understand that.
>
> THE WITNESS: Secure Delete folder, Your Honour.
>
> THE COURT: Folder. So does that mean that your conclusion in paragraph 13 isn't correct?
>
> THE WITNESS: My conclusion remains the same, Your Honour. The steps in terms of when that folder got created is not correct.
>
> BY MR. WINTON:
>
> Q. Maybe we could –

THE COURT: Just a minute.

MR. WINTON: Sure.

THE COURT: The reason I ask is because in paragraph 12, what it says in paragraph 12 is that the folder is only created when the user runs the Secure Delete feature to delete a file or folder.

THE WITNESS: Correct, Your Honour.

THE COURT: Now you're saying but the folder is created just by launching the program?

THE WITNESS: That's correct.

THE COURT: So the conclusion -- what's the conclusion of 13 based on then, if the last sentence of 12 is a mistake?

THE WITNESS: The last sentence of 12 is a mistake. My conclusion is based on a number of factors. The program was purchased and paid for. The Secure Delete feature is a function of a program called the advanced system optimizer, and when you load -- when you launch advanced system optimizer, you get a home screen, and the Secure Delete feature is not on the home screen. There are about five options, if you will, on the left-hand side, one of them is security and privacy. If you then go to the security and privacy, it gives you, I believe, three options, one of them being Secure Delete. Underneath the Secure Delete it says this is how you permanently erase a file, its contents, never to be recovered, and then you launch -- then you click on that Secure Delete feature to launch that function. That's when the folder gets created. **I draw my conclusion in 13 on the fact that the program was bought, paid, installed, it wasn't easy to get to that function, and it was done on the night before the ISS was to examine the computer. So for those reasons, based on my experience, it makes no sense to me that number 13 wouldn't remain valid.**[232] [Emphasis added.]

(c) There is no evidence on Mr. Moyse's computer that he ran Secure Delete or deleted relevant documents

(i) The forensic evidence

174. The only objective forensic evidence on which Mr. Musters relied for his conclusion that Mr. Moyse ran the Secure Delete program to delete files was the presence of the Secure Delete folder on Mr. Moyse's computer. As described above, he subsequently conceded that his opinion in this regard was incorrect.

[232] Musters Examination-in-Chief, 662:3-664:5.

175. Mr. Lo conducted a complete forensic analysis of Mr. Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Mr. Moyse's computer.[233] Mr. Lo explained that if the program had been run on the computer, a log would have been found which maintains records of the files deleted, but no such log exists on Mr. Moyse's computer (the "Secure Delete Log").[234] Mr. Lo then considered and ruled out a number of ways in which Mr. Moyse could theoretically have deleted the Secure Delete Log.[235]

176. Mr. Musters agreed that using Secure Delete to delete files would result in the creation of a Secure Delete Log. He also conceded that, absent any intervention by the computer's user, the fact that there was no Secure Delete Log on a computer "would be a meaningful fact absolutely."[236]

177. Therefore, once Mr. Musters conceded that his conclusion concerning the genesis of the Secure Delete folder was erroneous, there ended up being important common ground between the respective evidence of Mr. Musters and Mr. Lo with respect to the Secure Delete issue. They agreed that:

(a) the presence of a Secure Delete folder is not evidence of the Secure Delete program having been used to delete files;

(b) the use of the Secure Delete program to delete files generates a Secure Delete Log;

[233] Lo Affidavit, paras. 14-19.
[234] Lo Affidavit, paras. 17-18.
[235] Lo Affidavit, paras. 25-27.
[236] Musters Examination-in-Chief, 680:5-17.

(c) there was no Secure Delete Log on Mr. Moyse's computer;

(d) it would be theoretically possible for a user to use the computer's Registry Editor to delete a Secure Delete Log.

178. The respective evidence of Mr. Musters and Mr. Lo diverged principally with respect to the relative ease or difficulty of using a computer function called "Registry Editor" to delete a Secure Delete Log.

179. Mr. Moyse's evidence is he never altered, modified or tampered with the Secure Delete Log on his computer.[237]

180. The absence of a secure delete log should have ended this portion of the case. Nevertheless, Mr. Musters testified that it was a "relatively simple" matter to "reset" Secure Delete (i.e., to delete the Secure Delete Log), by using Registry Editor to hide any trace of having run the program. Mr. Musters based his opinion that this was a relatively simple process on what he described as a simple Internet search of how to delete the remnant files of ASO from a computer's registry.[238] Mr. Musters however did not append to his affidavit the "publicly available information" which he claimed would advise a user on how to simply delete "the remnant files" from a computer's registry. He subsequently described his failure to include that documentation with his affidavit as an "oversight".[239]

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[237] Moyse Examination-in-Chief, 1360:8-1360:11.

[238] Musters April 2015 Affidavit, para. 8. Mr. Musters relies on a "publicly available information" for his evidence, though he did not append that information to his affidavit, and only produced it as an answer to undertaking: Letter from Andrew Winton to Matthew Milne-Smith and Robert A. Centa, May 21, 2015 and attachments thereto.

[239] Musters 2015 Cross-Examination, Q. 168.

181. In an answer to an undertaking delivered by Catalyst's counsel following Mr. Musters' cross-examination in May 2015, Mr. Musters produced a copy of the "publicly available information" cited in his affidavit, in connection with which he was compelled to acknowledge another critical error in his evidence:

> Mr. Musters wishes to correct an error in his testimony. At question 162, Mr. Musters stated that it was incorrect the information he was referring to provided advice as on the removal of the entire ASO program and not simply the removal of the remnant files. Upon reviewing the publicly available information, Mr. Musters notes that **the information includes advice on the removal of the entire ASO program** and his answer to question 162 was incorrect.[240] [Emphasis added]

182. At trial, Mr. Lo confirmed the information in Mr. Musters' correction, describing the "publicly available information" as follows:

> Q. How would you describe generally the bundle of information, it starts on page 3207 and runs through page 3212, what is this?
>
> A. Well, this appears to be an article pointing to the reader on how to uninstall or remove the program ASO.
>
> Q. Does this article refer specifically to the Secure Delete log?
>
> A. No, I don't think they made any specific reference to that at all.[241]

183. Mr. Lo's forensic review of Mr. Moyse's computer confirmed that the ASO software remained in place on the computer. Although Mr. Lo corrected his earlier affidavit evidence by conceding that Mr. Moyse could, in theory, have used the Registry Editor on his computer to delete the Secure Delete Log, Mr. Lo explained that, as described more fully below, (a) this would not be a "relatively simple matter" as

[240] Answer to undertaking from Mr. Musters' May 2015 cross-examination, letter from Andrew Winton to Matthew Milne-Smith and Robert A. Centa, May 21, 2015 and attachments thereto.
[241] Lo Examination-in-Chief, 1318:12-21.

described by Mr. Musters, and (b) in any event, no forensic evidence exists of Mr. Moyse having taken such steps.

184. Mr. Lo describe the process set out in the “publicly available information” for deleting the Secure Delete Log as follows:

> Q. If one followed the steps set out on the page and the following page, could one use these steps to delete the Secure Delete log?
>
> A. It could, but it would be pretty difficult, because even though the direction -- it gives you a general direction where the registry entry is, one first of all has to know the existence of the Secure Delete folder; then secondly, one has to know exactly where on the registry entry to go to; and thirdly, the person have to know what value or what changes should be made to quote/unquote get rid of the Secure Delete folder, or the Secure Delete log, sorry.
>
> Q. Mr. Lo, if I could just stop you there, I believe you said one first of all has to know the existence of the Secure Delete folder?
>
> A. That's correct.
>
> Q. Did you mean folder or log?
>
> A. Log.
>
> Q. And at the bottom of page 311, which is the fifth page of image 000391, the text reads:
>
> > "Some programs may have files in other locations, therefore manually editing registry could be very time-consuming and risky. Please know that Windows registry is the most important central base of your computer, so you should be extremely careful when deleting entries there. Otherwise, your system will be crashed."
>
> Do you agree with that text?
>
> A. I do.

185. Mr. Lo went on to testify that his forensic review of Mr. Moyse’s computer found no evidence that the Secure Delete Log had been deleted through the use of the

Registry Editor in the manner suggested by Mr. Musters.[242] He also confirmed that such evidence would exist if Mr. Moyse had, in fact, taken the steps suggested by Mr. Musters:

> THE COURT: But I thought you were now talking about going -- this system to remove remnant files. I thought that is what you were being asked.
>
> THE WITNESS: Yes.
>
> THE COURT: If he had removed remnant files, would there be evidence on the computer that he had done so?
>
> THE WITNESS: Yes, because then the registry keys and values we got would be removed, would be gone. So therefore, that to me would be a good example that it had been altered.[243]

186. Mr. Lo thus gave cogent reasons why the process would be complicated for the lay user, and agreed with the disclaimer in the "publicly available information" to the effect that attempting to manually delete registry keys could be extremely time-consuming and risky, and could crash one's computer. Moreover, Mr. Lo explained that his analysis of Mr. Moyse's computer disclosed no evidence that Mr. Moyse took any steps to delete remnant files.

187. Mr. Musters, on the other hand, suggested that "with a little bit of knowledge" based on "a little bit of searching on the Internet", he was able to delete a Secure Delete Log in his test environment.

188. To his credit, Mr. Musters did concede in cross-examination that what he was able to do based on his own "little bit of knowledge" derived from decades as a

[242] Lo Examination-in-Chief, 1323:13-21.
[243] Lo Examination-in-Chief, 1324:15-21.

computer forensics expert is not necessarily indicative of what somebody with less training would be able to do.[244]

189. Mr. Musters' insistence that Mr. Moyse must have used Secure Delete to delete files and then used the Registry Editor to delete any evidence of his having run Secure Delete is not only inconsistent with the forensic evidence. It is, with respect, entirely illogical. It presumes that Mr. Moyse whose evidence is that his computer knowledge is limited was savvy enough to undertake the complicated and risky task of adjusting registry keys to delete a Secure Delete Log, yet careless enough to have left in place obvious evidence that he had used the program. In short, Mr. Musters' position requires one to believe that Mr. Moyse, having used the ASO software to delete relevant files in flagrant violation of a court order, then:

(a) sought and obtained information which explained how to remove the ASO software from his computer,

(b) yet chose not to use that information to remove that software from his computer (even though, in Mr. Musters' "publicly available information", removal of the ASO software was the predicate step to deleting any registry entries),

(c) but rather went through a series of convoluted steps to remove only the "remnant files" of the Secure Delete Log (even though, as Mr. Lo testified, nothing in the "publicly available information" cited by Mr. Musters made any reference whatsoever to Secure Delete or a Secure Delete Log),

[244] Musters Examination-in-Chief, 692:3-20.

(d) leaving the ASO software and the Secure Delete folder in place, along with emails and the receipts recording his purchase of the software, to be easily found by a forensic investigator;

(e) leaving behind none of the evidentiary traces that Mr. Lo testified would exist upon operation of the Registry Editor;

(f) leaving behind over 800 Catalyst documents relevant to the proceeding; and

(g) taking no steps to remove the Catalyst documents contained on his iPad.

190. Mr. Musters' evidence should be excluded or given little weight. The common law has long recognized that an expert witness has a duty to the court to provide assistance by way of an "objective unbiased opinion".[245] In 2010, Ontario codified this basic common law principle by amending the *Rules of Civil Procedure* to explicitly provide that expert witnesses have a duty to "provide opinion evidence that is fair, objective and non-partisan."[246]

191. Unfortunately, Mr. Musters repeatedly acted as an advocate for Catalyst's position that Mr. Moyse ran the Secure Delete program to delete relevant information, despite the lack of forensic evidence in support of that position. For instance:

(a) Having had to concede the incorrectness of the key premise of his conclusion that Mr. Moyse used Secure Delete to delete files from his computer – namely, that the presence of the Secure Delete folder could only mean that the program had been run to delete files from that

[245] *White Burgess Langille Inman v Abbott and Haliburton*, 2015 SCC 23, at paras 26-27.
[246] *Moore v Getahun*, 2015 ONCA 55, at paras 37-40 and 52.
See also *Rules of Civil Procedure*, Ontario Regulation 194, rule 4.1.01(1)(a) and 53.03(2.1)

computer – Mr. Musters took the incredible position that his conclusion was utterly unaffected by that concession;

(b) Mr. Musters' evidence contained clear contradictions. For instance, he opined in his supplementary affidavit that Mr. Moyse's understanding of a registry cleaner made "no sense", while simultaneously suggesting that Mr. Moyse's attempts to use a registry cleaner displayed "a level of IT sophistication that exceeds that of the ordinary user";

(c) When confronted with this contradiction on cross-examination, Mr. Musters eventually conceded that if Mr. Moyse in fact did not understand what was in the registry, it would suggest "the opposite" of a high level of IT sophistication, but used the opportunity to delve into impermissible speculation about Mr. Moyse's motives, an inquiry utterly unrelated to his field of expertise:

> Q. So I put it to you, Mr. Musters, that in fact Mr. Moyse's conduct with respect to attempting to clean his registry displays the opposite of a high level of sophistication. He couldn't even figure out how to delete his Internet history. That's what you've just told us, that his explanation made no sense.
>
> A. I have a different theory, if you allow me it.
>
> Q. Sure.
>
> A. Well, we know that he's a very bright research analyst and maybe five hours prior to these events he didn't know anything about the registry. But he's a smart guy and he's figuring it out through publicly available information. And that's why I'd love to see his Internet browsing history and maybe that's why he wants to get rid of it. I'm being purely speculative. I don't know any of these things. But again, I'm just saying – I understand what you're saying, if he doesn't understand what's in the registry, then he clearly has got it wrong. I understand that.
>
> Q. And it would be the opposite of a high level of IT sophistication?
>
> A. And it would be the opposite. At the same time, what's he trying to hide? Why does he even bother? Why doesn't he just hand over his machine?[247]

[247] Musters Cross-Examination by Mr. Borg-Olivier, 702:1 – 703:5.

(d) Mr. Musters' tendency to impermissibly stray well beyond the proper bounds of his expertise[248] was evident not only in his oral evidence, but in his affidavits as well. He purported to give opinions with respect to psychology and human behaviour, fields in which he is concededly not an expert.[249] For example, he opined as follows in his first affidavit:

> In my experience, in situations involving the departure of an employee to a competitor, when I encounter evidence that someone used a secure delete tool to delete data in such a way as to make it impossible to review through forensic analysis, the deletion was committed to hide evidence that the person took confidential information from a former employer and communicated it to their new employer.[250]

192. In contrast, when Mr. Lo was invited to speculate as to why someone might launch the Secure Delete program, he declined to do so – quite correctly, as such speculation would clearly be beyond the bounds of his recognized expertise.[251]

F. The report of the Independent Supervising Solicitor Finds no Evidence of Transmittal of Catalyst Confidential Information to West Face

193. Mr. Moyse turned over his personal devices to his counsel on July 21, 2014, for imaging, as scheduled.[252] On that day, H & A eDiscovery created two images of Mr. Moyse's devices and email accounts.[253]

194. At the time he swore his original affidavit in this proceeding in early June, Mr. Moyse was not aware that he had Catalyst confidential information on his devices, and believed Catalyst's concerns were unfounded.[254] Mr. Moyse later discovered that he had a number of documents contained in the "Downloads" folder on his home computer.

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[248] *R v Sekhon*, 2014 SCC 15 at paras 46-47.
[249] Musters Cross-Examination by Mr. Borg-Olivier, 677:1 – 678:14.
[250] Affidavit of Martin Musters, sworn February 16 2015, para. 16.
[251] Lo Examination-in-Chief, 1325:7-11.
[252] Moyse 2016 Affidavit, para. 151.
[253] Email from J. Hopkins dated July 22, 2014.
[254] Moyse July 4, 2014 Affidavit, paragraph 36; Moyse July 2014 Cross-Examination, Q. 323.

It was in this folder because Catalyst's remote access system was slow and unreliable, and he would frequently email himself files to work from at home. He did not realize that the files were retained in that folder.[255]

195. Pursuant to the Firestone Order, Mr. Moyse swore two affidavits of documents on July 22, 2014, and July 29, 2014, which outlined 833 items which were the documents in his power, possession, or control that related to his employment with Catalyst.[256]

196. Catalyst never reviewed and considered whether the documents which Mr. Moyse disclosed were confidential and never raised any concerns about the two documents which related to WIND (which were two copies of an WIND initial due diligence list). It only reviewed the list and believed that "at least" 200 of them were confidential.[257]

197. On October 7, 2014, Justice Spence ordered that Catalyst's claim for punitive damages against Mr. Moyse be stayed in favour of the arbitration provision in the employment agreement.[258]

198. Catalyst's motion for interlocutory relief was heard before Mr. Justice Lederer on October 27, 2014. The court issued its reasons on November 10, 2014. The court ordered, among other things, that an ISS be appointed to review the images of Mr. Moyse's devices created on July 21, 2014 pursuant to a protocol to be jointly agreed to

[255] Moyse July 31, 2014 Cross-Examination, Q. 330.
[256] Exhibit 12 to the Moyse 2016 Affidavit, para. 28.
[257] Riley Examination-in-Chief, 572:16 – 573:7.
[258] Endorsement of Justice Spence, October 7, 2014.

by counsel for the parties.[259] The general purpose of the review, as described by Justice Lederer, was "to identify what, if any, material these images may contain that are confidential to Catalyst."[260]

199. Following the ISS's appointment, H & A eDiscovery provided a copy of the image of Mr. Moyse's devices and email accounts to the forensic firm retained by the ISS.[261]

200. The ISS released its initial report following a review of Mr. Moyse's devices and email accounts on February 17, 2015, followed by an amended report on March 13, 2015. The ISS report was consistent with Mr. Moyse's evidence that he had not transmitted any confidential Catalyst information to West Face, other than the March 27 email described above.

201. The ISS found no evidence of Mr. Moyse transmitting Catalyst confidential information to West Face. The only Catalyst document found to have been transmitted by Mr. Moyse to West Face was a redacted copy of his Catalyst Employment Agreement, which he delivered by email to West Face's General Counsel.[262]

202. The ISS concluded that:

> We found no further concrete evidence from our review of the files, their surrounding metadata, or Moyse's email material or mobile devices, that confidential information belonging to Catalyst was provided to West Face. That of course does not exclude the possibility that such information was transmitted to West Face in other ways, or that records of other confidential information could have been destroyed through deletion and overwriting, as noted [below].[263]

[259] Reasons of Justice Lederer, November 10, 2014.
[260] Reasons of Justice Lederer, November 10, 2014.
[261] Exhibit 12 to the Moyse 2016 Affidavit.
[262] Exhibit 12 to the Moyse 2016 Affidavit, para. 42.
[263] Exhibit 12 to the Moyse 2016 Affidavit, para. 59.

203. In addition to its observations with respect to the Catalyst documents found on Mr. Moyse's computer, the ISS noted in its report that it had identified the presence of the Secure Delete folder on Mr. Moyse's computer.

204. That observation gave rise to Catalyst's contempt motion against Mr. Moyse, in which it sought a jail sentence, which was dismissed by Justice Glustein on July 7, 2015.[264]

PART IV. ISSUES

205. Catalyst seeks general damages against Mr. Moyse, arising out of his alleged spoliation of evidence relevant to this litigation.[265]

206. Catalyst seeks relief as against West Face for breach of confidence, based on allegations that Mr. Moyse passed on confidential information to West Face with respect to WIND.

207. Catalyst also seeks various injunctive relief against both defendants though it has led no evidence with respect to this relief.

208. In order to succeed in its claim against both defendants, Catalyst must establish, among other things, that:

(a) Mr. Moyse passed on Catalyst's confidential information with respect ot the WIND transaction to West Face, and

[264] Order of Justice Glustein, WFC0082057; Endorsement of Justice Glustein, WFC0082060.
[265] Amended Statement of Claim, para. 1(f)

(b) Mr. Moyse intentionally destroyed evidence relevant to this litigation, and he did so in order to affect the outcome of this litigation.

209. Mr. De Alba clearly acknowledged that Catalyst has no direct evidence for these essential elements of its claims:

> Q. Mr. de Alba, after all of the extensive productions in this case, you cannot identify a single confidential Catalyst document relating to Wind that ended up in the possession of West Face, can you?
>
> A. I can't.
>
> Q. Mr. de Alba, you cannot identify a single email received by West Face from Mr. Moyse that contained any confidential Catalyst information about Wind, can you?
>
> A. No, I can't.
>
> Q. Mr. De Alba, you cannot identify a single email sent by Mr. Moyse to West Face that contained any confidential Catalyst information about Wind?
>
> A. Correct.
>
> Q. Mr. Moyse never told you that he had provided confidential Catalyst information about Wind to West Face, did he?
>
> A. I never asked.
>
> Q. No one at West Face has ever told you that Mr. Moyse provided confidential Catalyst information about Wind to West Face?
>
> A. No, I have not asked.
>
> Q. Not that you didn't ask. No one has told you that either, correct?
>
> A. Correct.
>
> Q. No one in the entire world has ever told you that Mr. Moyse provided confidential Catalyst information about Wind to West Face, have they?
>
> …
>
> THE WITNESS: No.
>
> …
>
> Q. You have no direct evidence, I'm not asking about inference drawing, you have no direct evidence that Mr. Moyse provided any confidential Catalyst information about Wind to West Face, do you?

A. No, I don't.[266]

210. Catalyst's claim against Mr. Moyse raises the following issues:

(a) What inferences can logically and reasonably be drawn from the factual foundation established?

(b) Has Catalyst established a cause of action in spoliation against Mr. Moyse?

(c) Has Catalyst established with sufficient specificity the confidential information it says Mr. Moyse possessed?

(d) Has Catalyst established an action in breach of confidence against Mr. Moyse?

(e) Is Catalyst entitled to the injunctive relief sought?

PART V. LEGAL ARGUMENT

211. In assessing the *bona fides* and merits of Catalyst's claim, the court must consider that less than a week before this trial was scheduled to commence, Catalyst issued a statement of claim against West Face, and the consortium of investors with which it purchased WIND.[267]

212. In this claim, Catalyst alleges that between April 2014 and August 18, 2014, Anthony Lacavera, the principal of Globalive Wireless Management Corp., shared Catalyst's confidential information with West Face and other members of the consortium

[266] De Alba Cross-Examination by Mr. Centa, 233:2 – 234:21
[267] Exhibit 85 to the Moyse 2016 Affidavit.

to assist the consortium in preventing Catalyst from successfully purchasing Wind.[268] Catalyst pleads that the confidential information Mr. Lacavera transmitted to West Face included "critical information regarding Catalyst's confidential negotiation communications [*sic*] with VimpelCom."[269] Catalyst further pleads that this information was misused by the consortium, including West Face, to gain an unfair advantage over Catalyst in its negotiations with VimpelCom.

213. This pleading is fundamentally at odds with Catalyst's core allegation in this action:

(a) Catalyst alleges in this action, against Mr. Moyse, that West Face was able to successfully bid for WIND only by virtue of confidential Catalyst information that it received and used from Mr. Moyse.

(b) Catalyst alleges in the second action that West Face was able to successfully bid for WIND only by virtue of confidential Catalyst information that it received and used from a completely different source.

214. The court should note, in weighing Catalyst's evidence, that it is apparent that not even Catalyst is convinced that Mr. Moyse transmitted confidential information which permitted West Face to successfully bid on WIND. Rather, Catalyst is desperate to blame some other party, not itself, for its own failure to propose the winning bid.

[268] Exhibit 85 to the Moyse 2016 Affidavit, para. 76
[269] Exhibit 85 to the Moyse 2016 Affidavit, para. 78

A. Inferences sought not available

215. Catalyst asks the court to draw a series of inferences to establish its case, namely, that:

(a) Mr. Moyse passed on Catalyst's confidential information with respect to the WIND transaction to West Face, and

(b) that Mr. Moyse intentionally destroyed evidence he had done so in order to affect the outcome of this litigation.

216. There is no factual foundation before the court which supports the inferences necessary to establish the claim against Mr. Moyse. These inferences cannot reasonably and logically be drawn from the evidence before the court. Catalyst asks this court to descend into impermissible conjecture and speculation.

1. General principles

217. Justice Watt describes an inference as a "deduction of fact which may logically and reasonably be drawn from another fact or group of facts or established by a proceeding."[270] The conclusion sought is not inherent in the evidence itself, but rather flows from "an interpretation of that evidence derived from experience."[271]

218. The boundary between permissible inferences on the one hand, which can reasonably and logically be drawn from a fact or group of facts, and impermissible

[270] *R v Munoz*, [2006] OJ No 446 at para 24 (Ont Sup Ct J) ["*Munoz"*], citing to D Watt, *Watt's Manual of Criminal Evidence* (Toronto: Carswell, 2005) at p 108.
[271] *Munoz,* at at para. 23.

speculation and conjecture on the other, can be difficult to locate.[272] Justice Doherty explained the distinction in *R. v. Morrissey*:[273]

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 [28 C.R. (4th) 160] (Nfld. C.A.) at p. 351 [C.C.C., p. 175 C.R.]:
>
> > These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.[274]

219. In *R. v. Munoz*, the court identified two circumstances in which the attempt to draw inferences descends into impermissible conjecture and speculation:

(a) where the primary facts on which the inference is based have not been established by the evidence;[275] and

(b) where the proposed inference cannot be reasonably and logically drawn from the established primary facts.[276]

220. While these principles originate in the criminal context, they apply equally in the civil context.[277]

221. *R. v. Portillo* illustrates the first type of impermissible speculation.[278] Shoe prints found at the scene of the crime were similar to the treads of a pair of shoes found in the

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[272] *Munoz*, at para. 24.
[273] *R v Morrissey,* [1995] OJ No 639(Ont CA) [“*Morrissey”*].
[274] *Morrissey*, at para 52.
[275] *Munoz*, at para 26.
[276] *Munoz*, at para 26.
[277] *Martin v Munsee Delaware Nation*, 2016 ONSC 620, at para 51.
[278] *R v Portillo* (2003), 174 OAC 226 (Ont CA) [*“Portillo*”].

vicinity of the appellant's apartment. There was, however, no evidence that the shoes found in the vicinity of the appellant's apartment had made the prints, or evidence connecting the shoes found close to the appellant's apartment to the appellant himself.

222. Justice Doherty held that the evidence before the jury could not support the inference that the shoe prints at the crime scene came from shoes belonging to the appellant. The only evidence before the jury with respect to the shoes – that the treads of the shoes found at both locations were similar, and the proximity of the shoes to the appellant's home – could not support the inference sought by the Crown.[279] Further evidence was necessary to support the inference sought, such as evidence that the actual shoes found by the police close to the appellant's apartment made the prints at the scene, and that the shoes belonged to the appellant.[280]

223. *United States v Huynh* illustrates the second kind of circumstance where inference-drawing descends into impermissible speculation (where there is an inferential gap between the primary facts and the inference sought).[281] In that case, the United States of America sought the appellant's extradition. Very large amounts of cash had been found hidden in a vehicle owned by the appellant, but there was no direct evidence of the source of the cash. While Justice Doherty was prepared to find that the evidence supported the inference that the cash was the proceeds of some illicit activity, there was no evidence to support the further inference that the specific illicit activity was

[279] *Portillo*, at paras 33-35.
[280] *Portillo*, at paras 34.
[281] *United States v Huynh* (2005), 202 OAC 198 (Ont CA) ["*Huynh*"].

trafficking in a controlled substance. The jump from the first inference to the second was not supported by evidence, and so was impermissible speculation.[282]

2. Inferences sought do not flow reasonably and logically from evidence

224. The first step in inference drawing is that the primary facts, which are said to provide the basis for the inference, must be established by the evidence.[283] In this case, the direct evidence, set out above, supports the following findings of primary fact, on a balance of probabilities:

(a) Mr. Moyse was aware of Catalyst's interest in the telecommunications industry, and specifically of its interest in developing a fourth wireless carrier;

(b) Mr. Moyse's involvement in Catalyst's telecommunications "core" deal team was limited in both time and extent;

(c) Mr. Moyse was generally aware of Mr. Glassman's views about Catalyst's regulatory strategy for building out a fourth national carrier;

(d) Mr. Moyse had no direct involvement or engagement in the development of that strategy, and only a limited understanding of it;

(e) it was not have been clear even to Mr. De Alba, and others closer to the deal than Mr. Moyse, which aspects of Mr. Glassman's rhetoric were Catalyst's posturing towards the government, and which were Mr. Glassman's genuine belief as to the concessions Catalyst required;

[282] *Huynh, at* para 7.
[283] *Munoz*, at para 26.

(f) Mr. Moyse was unhappy with the type of work he was doing at Catalyst, and beginning in early 2014, he began to look for alternate employment;

(g) he interviewed with West Face between March 26, 2014 and May 16, 2014, at which time West Face offered him a position;

(h) in the course of his recruitment, Mr. Moyse and West Face's discussions touched exclusively on the very kinds of things which one would expect to be discussed in a job interview, including his experience, the reasons for his dissatisfaction at Catalyst, and the reasons for his interest in West Face;

(i) Mr. Moyse and West Face representatives did not discuss WIND during the interview process;

(j) the only time Mr. Moyse and West Face representatives ever spoke of WIND at all was in connection with the establishment of a confidentiality screen at West Face; and

(k) in the days prior to turning his devices over for forensic imaging, Mr. Moyse was concerned that his personal browser history would reveal personally embarrassing materials, and he took steps to delete the history.

225. To succeed in its claim against Mr. Moyse and West Face, Catalyst asked the court in its opening statement to infer, based on these facts, that:

(a) by June 4, 2014, West Face knew exactly what Catalyst was bidding, and what its negotiating strategy was, and West Face learned this from Mr. Moyse; and

(b) Mr. Moyse deleted the evidence that he did so, which in turn requires the court to infer either that:

(i) Mr. Moyse's browser history (which he admits to having deleted), contained relevant information; or

(ii) Mr. Moyse somehow deleted relevant files using a "Secure Delete" program.

226. None of these conclusions can be reasonably and logically drawn from the facts established in this case.

(i) Cannot infer Mr. Moyse provided Catalyst confidential information to West Face

227. Catalyst's theory that Mr. Moyse passed on confidential information to West Face cannot be rationally drawn from the primary facts established at trial, but rather are based on its principals' hypothetical theory that Mr. Moyse and West Face masterminded Catalyst's failure to secure the WIND deal. There is no logical basis on which the findings sought by Catalyst flow from the narrative established by the evidence.

228. Particularly apposite in this case is the admonition in *R. v. Munoz* that the drawing of inferences is an exercise in logic and reason, not in speculation based on a hypothetical narrative:

> ...the requirement of reasonable or logical probability is meant to underscore that the drawing of inferences is not a process of subjective imagination, but rather is one of rational explication. Supposition or conjecture is no substitute for evidence and cannot be relied upon as the basis for a reasonably drawn inference. Therefore, it is not enough simply to create a hypothetical narrative that, however speculative, could possibly link the primary fact or facts to the inference or inferences sought to be drawn. As Fairgrieve J. noted in R. v. Ruiz, [2000] O.J. No. 2713 (Ont. C.J.) at para. 3, "Simply because a possibility cannot be excluded does not necessarily mean that a reasonable trier could be justified in reaching such a conclusion on the evidence." The inference must be one that can be reasonably and logically drawn and, even where difficult; it cannot depend on speculation or conjecture, rather than evidence, to bridge any inferential gaps.[284]

229. Catalyst asks the court to engage in precisely this sort of speculative exercise. At its highest, Catalyst has led evidence which suggests that the possibility that Mr. Moyse passed on confidential information to West Face cannot be excluded with absolute certainty. This does not mean that it is reasonable and logical to conclude, on a balance of probabilities, that he did do so.

230. Catalyst has conducted a forensic review of Mr. Moyse's work computer, and led no evidence from that review to suggest Mr. Moyse ever transferred Catalyst confidential information with respect to WIND to himself via Dropbox. Indeed, the evidence it has led suggests otherwise: that Mr. Moyse's work computer accessed Dropbox through the web application on two occasions, once in February 2014 (before he was in contact with Mr. Dea, and before he was on the core telecommunications deal team), and the second in June 2014 (when he was no longer in the Catalyst office, and therefore it could not have been Mr. Moyse who accessed the web application). The

[284] *Munoz*, at para 31.

complete list of files in Mr. Moyse's Dropbox folder at work as of June 21, 2014, contained no WIND-related documents.

(ii) Cannot infer that Mr. Moyse's browser history contained relevant information

231. Catalyst has led no evidence from which it is possible to reasonably infer that Mr. Moyse's browser history contained relevant information.

232. Catalyst pleads that Mr. Moyse's browser history contained information about his use of web-based email, or Dropbox or Google searches, yet it has led no factual or expert evidence as to what Mr. Moyse's browser history would have indicated about his use of Dropbox, or web-based email services, and whether any of this information would have been relevant.

233. Mr. Moyse's evidence is that he used the Internet on his personal computer for, among other things, recreational online gambling, online gaming, and adult entertainment websites.[285]

234. Mr. Moyse has produced all relevant documents in his Hotmail and other personal email accounts, the Dropbox folders on his desktop computer, and his iPad. Catalyst has not created an evidentiary foundation to suggest that anything is missing from those productions.

235. Remarkably, Catalyst has never:

[285] Moyse 2016 Affidavit para. 142

(a) asked the ISS to review the browser history on any of Mr. Moyse's devices, including his iPad;

(b) made any inquiries of Mr. Lo or the ISS with respect to the browser retention settings on Mr. Moyse's desktop computer, which would have provided evidence of how long the records were automatically retained on Mr. Moyse's computer. Having failed to make this most basic inquiry, Catalyst cannot suggest that the history on July 20 would have recorded his activities since March 27, 2014;

(c) led any evidence of the browser history on Mr. Moyse's Catalyst computer, though had he passed on confidential Catalyst information, he likely would have done it from that computer, where he had direct access to the confidential information; or

(d) challenged West Face's productions in this respect: if Mr. Moyse used e-mail to transmit confidential Catalyst information to West Face, there should be such evidence in West Face's productions. There is none.

236. That Mr. Moyse deleted his history of Google searches cannot amount to deletion of relevant evidence. Mr. Moyse has admitted that he conducted browser searches on how to ensure a complete deletion of his browser history, and based on those searches, which told him that cleaning the registry would accomplish this, he did some further research for "registry cleaning" products.[286]

[286] Moyse 2016 Affidavit, paras. 144-145

237. This meagre evidence cannot support the inference sought.

238. Catalyst previously submitted before Justice Glustein that Mr. Moyse's deletion of his personal browsing history could have resulted in deletion of evidence concerning searches of his "Dropbox" files, which could have been relevant to the allegations against him. Justice Glustein carefully reviewed the expert forensic evidence and Moyse's own evidence,[287] and concluded that Catalyst could at most "speculate" that Moyse may have deleted references to searches of Dropbox files.[288] Justice Glustein held that neither the evidence nor Catalyst's speculation established beyond a reasonable doubt that Moyse had deleted such information.[289]

(iii) Not reasonable to infer that Mr. Moyse ran the Secure Delete program

239. The court should conclude that Catalyst has failed to prove on a balance of probabilities that Mr. Moyse used the Secure Delete program to delete any relevant documents.

240. The lack of a Secure Delete Log on Mr. Moyse's computer should end this debate entirely. There is no evidence, none, that Mr. Moyse took any steps to alter the log. The only evidence is that that it is theoretically possible that he could have altered it.

241. As described above, the evidence of Mr. Lo and Mr. Musters diverges principally on the question of the relative ease or difficulty of using the Registry Editor to delete a

[287] Endorsement of Justice Glustein, at paras. 75-78.
[288] Endorsement of Justice Glustein, at para. 74.
[289] Endorsement of Justice Glustein, at para. 78.

Secure Delete Log. On this issue, and in all areas in which the court must consider whether to prefer the evidence of Mr. Musters or Mr. Lo, it is respectfully suggested that, for the reasons set out above, this court should reject Mr. Musters' evidence, which was manifestly biased towards Catalyst's position in this litigation, and accept that of Mr. Lo.

242. It defies common sense that Mr. Moyse would have run Secure Delete to delete relevant files, then had the technical sophistication to delete the Secure Delete Log to cover his tracks, and yet still left the program itself (along with the Secure Delete folder) on his computer, the email receipt for the purchase of ASO in his inbox, and over 800 relevant Catalyst documents on his computer (which he subsequently disclosed in his affidavit of documents).

(iv) Not reasonable to infer Blackberry contained relevant information

243. In yet another late-breaking Catalyst theory, which counsel pursued on Mr. Moyse's cross-examination at trial, Catalyst suggested that Mr. Moyses' wiping of his Blackberry deleted relevant evidence.[290] It was not pleaded.

244. Catalyst has led no evidentiary basis from which the court can infer what relevant information could have been recorded in Mr. Moyse's Blackberry, including, whether there even was a call log, how long it would have been retained, and what it would have indicated. Moreover Catalyst has not produced any records it may have access to with respect to Mr. Moyse's Blackberry device, such as cell phone billings.

[290] Moyse Cross-Examination, 1452:5-1454:4.

(v) Character evidence cannot bridge the inferential gap

245. In an attempt to bolster its case, and to bridge the inferential gap it faces, Catalyst has attempted to impugn Mr. Moyse's character, so as to suggest that he is the *kind* of person with no regard for confidential information, and that he is the *kind* of person who would have deleted the evidence that he did so.

246. In *R. v. Handy*, the Supreme Court described the reasons why "bad character" evidence is *prima facie* impermissible:

> [P]roof of general disposition is a prohibited purpose. Bad character is not an offence known to the law. Discreditable disposition or character evidence, at large, creates nothing but "moral prejudice.[291]

247. That is precisely what Catalyst seeks to do – because it has no direct evidence of Mr. Moyse's transmission of confidential information, it seeks to create "moral prejudice" against Mr. Moyse based on the fact that he made certain mistakes. This Court should see through Catalyst's attempt to cover up the frailties in its own evidence by resorting to reliance on, and extrapolation from, minor mistakes which Mr. Moyse made.

248. The probative value of similar fact evidence depends on the nexus between the similar fact evidence, and the alleged incident for which there is no direct evidence. The following factors allow the court to determine whether the probative value of the similar fact evidence:

> (1) proximity in time of the similar acts
>
> (2) extent to which the other acts are similar in detail to the charged conduct:
>
> (3) number of occurrences of the similar acts
>
> (4) circumstances surrounding or relating to the similar acts

[291] *R v Handy,* 2002 SCC 56 at para 72.

> (5) any distinctive feature(s) unifying the incidents
>
> (6) intervening events
>
> (7) any other factor which would tend to support or rebut the underlying unity of the similar acts.[292]
>
> The general principles that govern the admission of similar fact evidence in criminal cases apply equally to civil cases. Thus, evidence of discreditable conduct on other occasions is presumptively admissible and evidence tendered solely to show a general disposition or a mere propensity to act or to think or to feel in a particular way is inadmissible. The party who proffers evidence of discreditable conduct on other occasions must satisfy the trial judge on a balance of probabilities that in the context of the particular case the probative value of the evidence in relation to a particular issue outweighs its potential prejudicial effect.[293]

249. The similar fact evidence which Catalyst has led has no probative value in determining whether Mr. Moyse passed on confidential information to West Face, or deleted evidence he did so.

250. With respect to the inference that Mr. Moyse passed on Catalyst confidential information with respect to WIND, Catalyst relies on other mistakes Mr. Moyse has made in relation to confidential information, some admitted, and all overblown, and asks the court to infer that he would have passed on confidential information with respect to WIND. It is impossible to infer from these mistakes that Mr. Moyse had such a poor appreciation of confidentiality that he would have passed on highly sensitive information.

(a) Mr. Moyse sent Mr. Dea four memos marked “confidential” on March 27: this was a mistake which Mr. Moyse readily admits, and which he recognized very soon after sending the email. Mr. Moyse acknowledged that he made a mistake in drawing the line around confidential information

[292] *R v Handy*, 2002 SCC 56 at para 82.
[293] Sopinka, *The Law of Evidence in Canada*, at 759-762.

with respect to these memos. He reached the conclusion that these memos were not confidential on the basis that they contained dead, stale, inactive and inactionable ideas.[294] It cannot be inferred from this lapse in judgment in recognizing confidential information that Mr. Moyse would have divulged current, sensitive information about an active file, and a presentation to the federal government. It is not reasonable to infer that this mistake was part of a pattern of disregard for (let alone willful disclosure of) confidential information.

(b) The "suspect pattern" of accessing documents which Catalyst identified in its initial affidavit: as described above, on cross-examination, Mr. Riley largely conceded that none of these incidents was actually suspect, and in fact his descriptions were, in certain cases, misleading.

(c) Mr. Moyse's brief work on the Arcan file on his first two days at West Face: Catalyst tries to ascribe inordinate importance to this. Mr. Moyse worked on a transaction completely unrelated to the work he had done at Catalyst for a period of less than 24 hours, and West Face never saw that work product. Catalyst simply assumes there was something improper about this work simply because the same company was involved, without articulating the precise contractual or legal basis for the impropriety.

251. With respect to the inference that Mr. Moyse deleted evidence he had passed on confidential information, again, Mr. Moyse's mistakes do not reasonably and logically

[294] Moyse Examination-in-Chief, 1375:3-1375:11.

lead to the inference that he intentionally deleted evidence relevant to this litigation with a view to interfering with Catalyst's ability to prove its case:

(a) Mr. Moyse deleted the email he sent to Mr. Dea: this was an error of judgment, and an entirely understandable one, made by a young man who realized he had just made a mistake, and who responded inappropriately.

(b) Mr. Moyse wiped his Blackberry: though a mistake, Mr. Moyse did not delete his Blackberry for any nefarious purpose, but out of a concern for ensuring that Catalyst did not have access to any personal information on that device. He believed that Catalyst would retain a record of all of the Catalyst information contained on that device, which it did.

(c) Mr. Moyse deleted his web browser history: again, Mr. Moyse admits that he could have addressed his concerns differently but he made this decision at a time when he faced disclosure of all his personal electronics to Catalyst without a clear understanding of what limits would be placed on Catalyst's access to these documents. He had an entirely understandable concern for his personal privacy.

B. Spoliation is not made out

252. Catalyst has pleaded the following particular acts constitute spoliation:

> 34.21 Moyse admitted to downloading the Scrubber and admitted to having deleted his Internet browsing history. By deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014. The web browsing history included, among other things his use of personal web-based email services such as "Gmail", evidence of

> Moyse's use of web-based storage storage services at issue in this action, and evidence of Moyse's web-searching activity.[295]

253. Catalyst has also, through its evidence, alluded to other alleged acts of spoliation, though they have not been pleaded. These include Mr. Moyse's alleged use of the Secure Delete program to delete files (based on the presence of the Secure Delete folder on his computer), the alleged deletion of emails in which he transmitted Catalyst confidential information to West Face, and the wiping of his Blackberry.

254. Catalyst is precluded from pursuing these alleged acts of spoliation, as the particular acts of spoliation must be pleaded.[296] In any event, the allegation of spoliation is not made out.

1. General principles

255. While Catalyst has pleaded spoliation as a free-standing cause of action, spoliation is more commonly known as a rule of evidence, whereby in circumstances where evidence is intentionally lost, destroyed, concealed, or mutilated by a party, a rebuttable presumption arises that the destroyed evidence was harmful to the spoliator's case. [297]

256. To establish spoliation the plaintiff must prove on a balance of probabilities the following elements, recently restated in *Nova Growth Corporation v Andrzej Roman Kepinski*:[298]

> (1) The missing evidence must be relevant;

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[295] Amended Claim, para. 34.21
[296] *Spicer v CAA Insurance,* 2013 ONSC 5148, at para 28.
[297] *St Louis v Canada* (1896), 25 SCR 649, at para 1 (SCC) [*St Louis*].
[298] 2014 ONSC 2763.

(2) The missing evidence must have been destroyed intentionally;

(3) At the time of destruction, litigation must have been ongoing or contemplated; and

(4) It must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.[299]

257. Spoliation cannot be found simply on the basis that evidence has been destroyed, but further requires evidence of an intention that the evidence was destroyed in order to affect the litigation.[300]

2. There is no independent cause of action for spoliation

258. No Canadian court has recognized the existence of an independent tort of spoliation. A number of Canadian courts, however, have concluded on pleadings motions that it is not plain and obvious that spoliation can form the basis for an independent tort.[301] Such claims have been allowed to proceed to trial "so that the logic and necessity of such a tort can be tested against the reality of the facts in the case."[302]

259. This case appears to be the first case in which a free-standing cause of action in spoliation has proceeded to trial. When considered in the context of the record in this case, it is clear that recognizing such a tort would be inappropriate, and unnecessary, given the existing procedural remedies for spoliation, none of which Catalyst has sought. These remedies are extensive and include: procedural remedies, evidentiary

[299] *Nova Growth Corp v Andrzej Roman Kepinski,* 2014 ONSC 2763 at para 296.
[300] *McDougall v Black & Decker Canada Inc* (2008), 2008 ABCA 353 at para 18 (Alta CA).
[301] *Spasic Estate v Imperial Tobacco Ltd* (2000), 135 OAC 126 at para 12 (Ont CA).
[302] *Coriale (Litigation Guardian of) v Sisters of St Joseph of Sault Ste Marie,* [1998] OJ No 3735 at para 25 (Ont Sup Ct J).

presumptions, contempt proceedings, cost orders, preservation orders, [303] and the exclusion of expert reports.[304]

260. Spoliation as an independent tort has been accepted in a number of American jurisdictions; however, it has either been rejected or the issue remains undecided in many others. Many American jurisdictions have rejected spoliation as an independent tort for policy reasons which apply equally here. In *Cedars-Sinai Medical Center v. Superior Court*,[305] the Supreme Court of California laid out a variety of policy reasons to deny recognition of a tort for spoliation against a defendant in a primary action:

> [T]he conflict between a tort remedy for intentional … spoliation and the policy against creating derivative tort remedies for litigation-related misconduct;[306] the strength of existing nontort remedies for spoliation; and the uncertainty of the fact of harm in spoliation cases.[307]

261. The court in *Cedars-Sinai* also determined that as existing remedies allow underlying litigation to be decided fairly, any incremental benefits of an independent spoliation tort are outweighed by policy considerations and costs.[308] In *Foster v Lawrence Memorial Hospital*,[309] the court produced the following summary of the grounds on which US courts have refused to implement an independent tort for spoliation, including the following, which are relevant to this case:

> (1) The availability of alternative remedies such as discovery sanctions and negative inferences;
>
> (2) The uncertainty of the existence or extent of damages;

[303] *Holland v Marshall*, 2008 BCCA 468 at para 59.
[304] *Cheung (Litigation Guardian of) v Toyota Canada Inc*, [2003] OJ No 411 at para 13 (Sup Ct J).
[305] (1998), 18 Cal 4th 1 at 8 (US Cal 1998). [*Cedars-Sinai*]
[306] To expand on this point, US courts have declined to recognize causes of action for perjury or embracery on similar grounds.
[307] *Cedars-Sinai Medical Center v Superior Court* (1998), 18 Cal 4th 1 at 8 (US Cal 1998).
[308] *Cedars-Sinai Medical Center v Superior Court* (1998), 18 Cal 4th 1 at 13-17 (US Cal 1998).
[309] 809 F Supp 831 (D Kan 1992).

…

> (4) Recognition of the tort interferes with a person's right to dispose of his property as he chooses;
>
> …
>
> (6) The tort may be inconsistent with the policy favoring final judgments; a plaintiff who loses his primary suit may bring a second suit by trying to establish that some relevant piece of evidence was not preserved.[310]

262. The American cases which have recognized a tort of spoliation can be clearly distinguished from this case. In those cases, the court considered a free-standing cause of action to be necessary because in the absence of a free-standing action, the plaintiff would be unable to establish its underlying claim entirely, or there would be considerable prejudice to the underlying claim due to the significance of the spoliated evidence. For example, in the U.S., independent torts for spoliation have been established where:

(1) In the context of a product liability suit, the spoliators destroyed a ladder that had collapsed under the plaintiff and caused him injury, following their own expert's determination that the ladder was not defective;[311]

(2) The alleged spoliators disassembled, replaced, and lost pieces from an allegedly malfunctioning belt-lift shortly after the plaintiff fell from the belt-lift and suffered injuries;[312]

(3) The plaintiff brought actions based on false arrest and malicious prosecution and the alleged spoliators altered the plaintiff's arrest tape;[313] and

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[310] *Foster v Lawrence Memorial Hosp,* 809 F Supp 831 at 836 (D Kan 1992).
[311] *Rizzuto v Davidson Ladders, Inc*, 280 Conn 225 (2006).
[312] *Coleman v Eddy Potash, Inc*, 120 NM 645 (1995).; reversed by *Delgado v. Phelps Dodge Chino, Inc.,* 131 NM 272 (2001).

(4) The plaintiff sued the defendants, a hospital and treating physician, for negligence and violation of the *Social Security Act* based on the death of his son but the physician had disposed of his personal notes documenting the treatment of the deceased.[314]

263. These cases are clearly distinguishable from the present case. Catalyst has not pleaded, or established that Mr. Moyse's conduct amounted an act of "extreme spoliation" (as is referred to in the American cases), which completely destroyed Catalyst's ability to prove its case and which necessitates the recognition of a free-standing cause of action to adequately protect its rights. Indeed, the very fact Catalyst was able to conduct this trial belies any suggestion that Mr. Moyse's conduct prevented it from prosecuting its case, and that it is entitled to relief.

3. Spoliation is not made out in this case

264. In any event, even if such an independent cause of action exists in Canada, it is not made out in this case. There is no evidence that a particular piece of evidence was destroyed, and no evidence that Mr. Moyse wanted to permanently delete records with a view to affecting the outcome of this litigation.

(a) No reason to believe any "relevant evidence" ever existed

265. Catalyst has failed to establish perhaps the most critical element of a claim for spoliation: that relevant evidence ever existed.[315] A claim of spoliation cannot be based

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[313] *Hazen v Municipality of Anchorage*, 718 P (2d) 456 (Alaska 1986).
[314] *Foster v Lawrence Memorial Hospital*, 809 F Supp 831 (D Kan 1992).
[315] *Nova Growth Corp v Andrzej Roman Kepinski,* 2014 ONSC 2763 at paras 298, 314.

on mere speculation that relevant evidence was destroyed, yet this is exactly what Catalyst has done:

> Speculating about what might have been destroyed is not good enough for an inference to be raised. There must be a particular piece of evidence that has been destroyed that is relevant. Without knowing that it would not be possible to make any meaningful inference.[316]

266. Catalyst has not produced any evidence that a particular, specific piece of relevant evidence has been destroyed. Rather, it asks the court to infer that such evidence existed in Mr. Moyse's web browser history for the period from March 27, 2014-July 20, 2014.

267. As described above, Catalyst has made no attempt to lay an evidentiary foundation from which the court could infer that Mr. Moyse's browser history contained relevant information, but has instead chosen to rely on clumsy speculation. It is entirely speculative for Catalyst to say that the browser history would have contained evidence of his personal web-based email services such as "Gmail" or evidence of his use of web-based storage services.

268. Catalyst has been more "intent on establishing a case of spoliation than determining if [any relevant] document existed."[317] As was the case with the plaintiffs in *Nova Growth,* the fact that Catalyst failed to make any inquiries which would have laid the evidentiary basis for the claim "suggests that they were more interested in creating a spoliation case rather than finding evidence to help them."[318]

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[316] *Nova Growth Corp v Andrzej Roman Kepinski*, 2014 ONSC 2763 at para 314.
[317] *Nova Growth* at para 316.
[318] *Nova Growth* at para 318.

269. Moreover, if Mr. Moyse did in fact transmit Catalyst confidential information to West Face in a form susceptible to spoliation (be it a document or an email), West Face would necessarily also have a record of such confidential information. West Face has made extensive productions in this matter, productions which have gone unchallenged. Nowhere in these productions is evidence Mr. Moyse transmitted Catalyst confidential information. Yet Catalyst has not alleged West Face spoliated relevant evidence, though it would have had to if such evidence existed.

(b) No intention to interfere with the outcome of this case

270. With respect to the other acts of spoliation to which Catalyst has alluded in its evidence (the use of Secure Delete, deletion of emails, the wiping of the Blackberry), there is equally no evidentiary foundation on which to find there either existed or contained any relevant information.

271. Mr. Moyse's evidence is plainly that he did not intend to interfere with Catalyst's case.[319] There is no factual basis from which the court can infer that he intended to do so. Indeed, the evidence is to the contrary. Mr. Moyse disclosed all relevant documents in his power, possession, and control, and the scope of his productions went unchallenged on discovery.

(c) No damages

272. Catalyst has led no evidence with respect to its damages for any spoliation. In the absence of any evidence, the Court cannot make any finding as to damages, and none should be awarded.

[319] Moyse Examination-in-Chief, 1415:12-1415:18.

273. In jurisdictions which have accepted spoliation, damages are the most difficult aspect of spoliation claims to establish because one cannot guarantee the outcome of a claim even with all relevant evidence available, and because the value of destroyed evidence is difficult to quantify. Thus, damages are often calculated by "reasonable estimate."[320]

274. In this case, even if spoliation were made out, any damages award against Mr. Moyse should be nominal. Catalyst's underlying claim against West Face for breach of confidence is weak. Even if Catalyst were able to prove that Mr. Moyse had passed on confidential information to West Face, it would still have to establish misuse by the party to whom it was communicated. West Face has led extensive evidence explaining the basis on which it completed the WIND transaction, in the absence of any confidential information from Mr. Moyse. Catalyst's claim would clearly have failed in any event.

C. No passage of confidential information

275. Catalyst's claim must further fail because it has not pleaded with any degree of particularity the confidential information which Mr. Moyse allegedly passed on.

276. Catalyst's position is that Mr. Moyse communicated confidential information concerning Catalyst's position with VimpelCom and the federal government. Catalyst has failed to articulate with the necessary specificity the confidential information which it claims Mr. Moyse transmitted to West Face, and which West Face then misused, and its claim in this respect must be dismissed. Mr. Moyse relies on West Face's extensive submissions with respect to this issue.

[320] *Holmes v Amerex Rent-A-Car*, 710 A (2d) 846, at 853 (DC 1998).

277. In *International Corona Resources Ltd. v LAC Minerals Ltd,* the Supreme Court of Canada confirmed that a breach of confidence action will succeed if the following three requirements are satisfied.[321]

(a) The information conveyed was confidential;

(b) The information was communicated in confidence; and

(c) The information was misused by the party to whom it was communicated.

278. Canadian courts have generally required parties alleging breach of confidence to very specifically describe the confidential information that has purportedly been divulged. The specificity requirement is rooted in the English Court of Appeal's decision in *G.D Searle & Co. Ltd. v Celltech Ltd. & Others*, where Cumming Bruce L.J. held:

> "In my opinion, if an employer seeks to restrain his ex-employee from making use of know-how acquired by him during the course of his employment, the employer's evidence should specifically identify the secret which he claims to be his property, and explain exactly how knowledge of that secret came into the possession of the employee in such circumstances that the conscience of the employee was affected so that it would be unconscionable of the employee to make use of the information for his own purposes."[322] [Emphasis Added]

279. In *Blue Line Hockey Acquisition Co. v Orca Bay Hockey Ltd. Partnership*, [323] the British Columbia Supreme Court – ruling on motions for particulars and answers to questions from examinations – accepted the following proposition:

> [I]n breach of confidence cases, the plaintiff ought to specifically identify the information over which it claims a proprietary right, and the circumstances in which knowledge of the

[321] *International Corona Resources Ltd. v LAC Minerals Ltd,* [1989] 2 SCR 574, at para. 10 (SCC).
[322] *GD Searle & Co Ltd v Celltech Ltd & Others*, [1982] FSR 82 at 109,leave to Appeal to House of Lords denied.
[323] *Blue Line Hockey Acquisition Co. v Orca Bay Hockey Ltd. Partnership,* 2007 BCSC 143.

> information came into the possession of the defendant such that use of the information by the defendant would be unconscionable.[324]

280. More recently, in *Husky Injection Molding Systems Ltd. v Schad,* this court rejected a claim to breach of confidence, in part on the basis that the plaintiff had not specified exactly what the information in question was. Justice Newbould expressed agreement with the principles from *Blue Line Hockey* and held that:

> It is evident that it is important not just to plead with particularity, but at trial to prove the case with particularity. Husky particularized its claim in its pleading and in its reply to demand for particulars. But its argument that overall the combination of subsystems was innovative, confidential and used by Athena or that Athena accessed and used know-how developed by Husky without particularizing the matter is not sufficient to prove any misuse of confidential information.[325]

281. To say that Mr. Moyse passed on the information he possessed "concerning Catalyst's positions with VimpelCom and the federal government" plainly does not meet the high bar established in the case law. Throughout the trial, Catalyst had difficulty even articulating what "positions" it held that might have been useful to West Face in its dealings with WIND, let alone establishing that Mr. Moyse ever had access to, understood, and passed on those positions to West Face.

D. No breach of duty of confidence

282. Catalyst pleads, though it seeks no specific relief in this respect, that Mr. Moyse breached his duty of confidence to Catalyst.[326] To the extent Catalyst seeks damages for breach of confidence, this claim was struck by Justice Spence.[327]

283. The particulars pleaded are that Mr. Moyse breached his duty of confidence when he forwarded Catalyst confidential information from his Catalyst email address to

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[324] *Blue Line Hockey Acquisition Co. v Orca Bay Hockey Ltd. Partnership,* 2007 BCSC 143, at para 63.
[325] *Husky Injection Molding Systems Ltd. v Schad*, 2016 ONSC 2297, at para 225.
[326] Amended Statement of Claim, para. 25.
[327] Endorsement of Justice Spence, October 7, 2014.

his personal email address and his personal Internet file storage accounts without Catalyst's knowledge or approval.[328]

284. This claim must fail. Mr. Moyse provided cogent evidence as to why, on occasion, he was required to forward Catalyst information to his personal email address while out of the office as a result of Catalyst's faulty virtual private network. Mr. De Alba on cross-examination conceded that simply forwarding emails to one's personal account does not breach the duty of confidence.[329]

E. Request for injunctive relief should be dismissed

285. Catalyst, in its claim, initially sought, and continues to seek, the following injunctive relief against Mr. Moyse:

(a) preventing Mr. Moyse from soliciting or attempting to solicit equity or other forms of capital for investment vehicles related to Catalyst's funds, until June 25, 2015;

(b) preventing Mr. Moyse from interfering with Catalyst's relationships with its employees, including any attempt to induce employees to leave their employment;

(c) preventing Mr. Moyse from using or disclosing Catalyst's confidential and proprietary information;

[328] Amended Statement of Claim, para. 25.
[329] De Alba Cross-Examination by Mr. Centa, 232:8-233:1.

(d) requiring Mr. Moyse to immediately return to Catalyst all confidential information in his possession or control;

(e) prohibiting Mr. Moyse from modifying his computers and other electronic devices;

(f) prohibiting Mr. Moyse from commencing or continuing employment at West Face until December 25, 2014.[330]

286. Much of the injunctive relief sought is moot.

287. Catalyst has not led evidence at trial to establish it is entitled to the relief sought. It has not met its burden of proof, and its claim for injunctive relief should be dismissed.

PART VI. ORDER REQUESTED

288. Mr. Moyse requests that this action be dismissed against him with costs, and requests the opportunity to make written submissions on the appropriate scale and quantum of the costs he seeks.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

June 14, 2016

Robert A. Centa / Kris Borg-Olivier / Denise Cooney

Paliare Roland Rosenberg Rothstein LLP

Lawyers for the defendant, Brandon Moyse

[330] Amended Statement of Claim, para. 1.

SCHEDULE "A" – AUTHORITY CITED

Case law

1. *Pitts v Ontario (Director of Family Benefits, Ministry of Community and Social Services,* [1985] OJ No 2578 (SC).
2. *Adams v Ginsberg,* 1994 CarswellOnt 3710 (Ont Ct J [Gen Div]).
3. *Atlantic Financial Corp v Henderson,* [2007] OJ No 1743 (Sup Ct J).
4. *Faryna v Chorny*, [1951] BCJ No 152.
5. *Mason v Chem-Trend Ltd Partnership*, 2011 ONCA 344.
6. *KRG Insurance Brokers (Western) Inc v Shafron*, 2009 SCC 6.
7. *White Burgess Langille Inman v Abbott and Haliburton*, 2015 SCC 23.
8. *Moore v Getahun*, 2015 ONCA 55.
9. *R v Sekhon*, 2014 SCC 15.
10. *R v Munoz,* [2006] OJ No 446 (Ont Sup Ct J).
11. *R v Morrissey,* [1995] OJ No 639 (Ont CA).
12. *Martin v Munsee Delaware Nation*, 2016 ONSC 620.
13. *R v Portillo* (2003), 174 OAC 226 (Ont CA).
14. *United States v Huynh* (2005), 202 OAC 198 (Ont CA).
15. *R v Handy,* 2002 SCC 56.
16. *Spicer v CAA Insurance,* 2013 ONSC 5148.
17. *St Louis v Canada* (1896), 25 SCR 649 (SCC).
18. *Nova Growth Corporation v Andrzej Roman Kepinski,* 2014 ONSC 2763.
19. *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 (Alta CA).
20. *Spasic Estate v Imperial Tobacco Ltd* (2000), 135 OAC 126 (Ont CA).
21. *Coriale (Litigation Guardian of) v Sisters of St Joseph of Sault Ste Marie,* [1998] OJ No 3735 (Ont Sup Ct J).

22. *Holland v Marshall*, 2008 BCCA 468.

23. *Cheung (Litigation Guardian of) v Toyota Canada Inc*, [2003] OJ No 411 (Ont Sup Ct J).

24. *Cedars-Sinai Medical Center v Superior Court* (1998), 18 Cal 4th 1 (US Cal 1998).

25. *Foster v Lawrence Memorial Hosp,* 809 F Supp 831 (D Kan 1992).

26. *Rizzuto v Davidson Ladders, Inc*, 280 Conn 225 (2006).

27. *Coleman v Eddy Potash, Inc*, 120 NM 645 (1995).

28. *Hazen v Municipality of Anchorage*, 718 P (2d) 456 (Alaska 1986).

29. *Holmes v Amerex Rent-A-Car*, 710 A (2d) 846 (DC 1998).

30. *International Corona Resources Ltd v LAC Minerals Ltd,* [1989] 2 SCR 574 (SCC).

31. *GD Searle & Co Ltd v Celltech Ltd & Others*, [1982] FSR 82, leave to appeal to House of Lords denied.

32. *Blue Line Hockey Acquisition Co v Orca Bay Hockey Ltd Partnership,* 2007 BCSC 143.

33. *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2297.

Secondary sources

34. Sopinka, *The Law of Evidence in Canada*

SCHEDULE "B" – RELEVANT LEGISLATION

Rules of Civil Procedure

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules, (a) to provide opinion evidence that is fair, objective and non-partisan…

[…]

53.03(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
5. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
6. The expert's reasons for his or her opinion, including,
    i. a description of the factual assumptions on which the opinion is based,
    ii. a description of any research conducted by the expert that led him or her to form the opinion, and
    iii. a list of every document, if any, relied on by the expert in forming the opinion.
7. An acknowledgement of expert's duty (Form 53) signed by the expert.

Court File No. CV-16-11272-00CL

THE CATALYST CAPITAL GROUP INC.
Plaintiff

-and-

BRANDON MOYSE et al.
Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

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