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

PLAINTIFF'S CLOSING SUBMISSIONS

June 14, 2016

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PART I - OVERVIEW

1. The two core issues for decision in this trial are: (a) whether The Catalyst Capital Group Inc. ("Catalyst") has established on a balance of probabilities that the Defendant West Face Capital Inc. ("West Face") misused Catalyst's confidential information to successfully bid on, and ultimately purchase, an interest in Wind Mobile ("Wind"), and (b) whether the defendant Brandon Moyse intentionally destroyed relevant evidence on July 20, 2014, by deleting his web browsing history and running a "Scrubber" the night before his personal computer was forensically imaged.

2. This case was commenced as an action to enforce restrictive covenants in the employment contract of the defendant Brandon Moyse, a former Catalyst employee. In late June 2014, when Catalyst commenced the action shortly after Moyse resigned from Catalyst and began working at West Face, both Catalyst and West Face were actively pursuing the Wind opportunity. Immediately thereafter, Catalyst brought a motion to restrain Moyse from working at West Face for the duration of the six-month non-competition covenant in his employment agreement.

3. In its motion materials, Catalyst expressed concern that Moyse would share its confidential information concerning the Wind opportunity with West Face, which would enable West Face to gain an unfair advantage in the bidding. That concern was based, among other things, on evidence of unusual behaviour by Moyse commencing from the time he first met with Tom Dea, a partner at West Face, and leading up to his resignation on May 24, 2014.

4. Before Catalyst commenced this litigation, it acted reasonably by attempting to resolve the matter through direct discussions between the principals of the firms and through correspondence with the defendants' lawyers. In this pre-litigation correspondence, the defendants denied any wrongdoing and repeatedly stated that Catalyst's concerns were unfounded.

5. It turns out that these denials were misleading – in fact, immediately after his interview with Dea, Moyse sent four confidential deal memos to West Face. Although the memos were clearly marked "Private and Confidential" and "For Internal Discussion Purposes Only", Moyse did not give it a second thought before sending these documents to Dea. Throughout 2014, Moyse's position was that these documents were not confidential and did not contain any confidential information.[1]

6. West Face also demonstrated a cavalier attitude towards Catalyst's confidential information. When he received the deal memos from Moyse, Dea did not delete them, or inform Moyse that it was a mistake to have sent them. **Instead, he read them to determine whether the information was actually confidential and circulated them to his partners.** Dea's justification for his conduct was that the information in the memos was "pedestrian" and "benign".

7. When Catalyst brought its injunction motion in June 2014, it expressly avoided naming the "telecom opportunity" that lay at the core of its concern about confidential information that Moyse might pass on to West Face. Moyse disregarded these efforts and in his responding affidavit he expressly named Wind as the entity that Catalyst was pursuing, even though this information was confidential pursuant to a non-disclosure agreement between Catalyst and VimpelCom.

8. While litigation was ongoing, on or around July 23, 2014, West Face learned that Catalyst had entered into an exclusivity agreement with VimpelCom, the beneficial majority owner of Wind. After several months of study and negotiation, West Face was determined not to lose out on this opportunity. It partnered with two other bidders, and together, this consortium delivered a

[1] At his cross-examination held July 31, 2014, Moyse admitted that he did not know what made these memos confidential and refused to admit that the memos were **confidential**, and not just **proprietary**, to Catalyst.

last-ditch bid to VimpelCom on August 7, 2014, with the express intent of giving VimpelCom "two birds in hand" to consider at an upcoming board meeting (the "August Offer").

9. The August Offer was highly unusual in that it waived a condition of purchase to which VimpelCom had always been willing to agree. Notably, this condition (requiring regulatory approval) was the one condition that Catalyst would not, **and could not**, waive, and required the consortium to appear to take on an inordinate amount of risk.

10. Ultimately, VimpelCom and Catalyst did not finalize their SPA. The exclusivity period expired. Shortly thereafter, the consortium entered into exclusivity with VimpelCom and within weeks it successfully purchased VimpelCom's interest in Wind.

11. Earlier this year, the consortium sold Wind to Shaw Communications for approximately $1.6 billion. West Face made an enormous profit on this opportunity through its misuse of Catalyst's confidential information. In this action, Catalyst claims the equitable remedy of an accounting for West Face's profit on the sale of Wind and disgorgement of that profit to Catalyst.

12. In 2014, Catalyst's inability to waive the regulatory approval condition was well known to Moyse, although he did not appreciate at the time that this information was confidential. And, as has been very clearly demonstrated at this trial, on multiple occasions, Moyse disclosed confidential information in circumstances where he did not think the information was confidential.

13. Catalyst readily acknowledges that there is no "direct" evidence that Moyse communicated confidential information about Wind to West Face. But this is not unusual in a misuse of confidential information case, where subterfuge and secrecy are essential components of the tort. The tort can be successfully made out where the defendant engages in a course of conduct from

which misuse of the plaintiff's confidential information can be inferred as a logical and reasonable consequence from established facts. Where the confidential information is easily communicated in oral conversation, the defendants cannot point to the absence of direct evidence of communication as a fatal flaw in Catalyst's case.

14. The case is complicated by the fact that Moyse destroyed relevant evidence after the action was commenced, in the face of a consent preservation order made by Justice Firestone, which provided for a forensic image to be taken of Moyse's personal devices, including his personal computer.

15. In July 2014, Moyse downloaded and ran software that is intentionally designed to delete files in a manner that prevents their recovery through a forensic investigation (a "Scrubber"). The undisputed forensic evidence demonstrates that Moyse installed the Scrubber at 8:53 a.m. on July 16, 2014, the morning of the interim injunction motion, and clicked through two software screens to launch the Scrubber at 8:09 p.m. on July 20, 2014, the night before he was required to have his personal computer forensically imaged by a computer expert.

16. The forensic evidence does not conclusively establish that Moyse ran the Scrubber, nor does it conclusively establish that he did not run the Scrubber. But the undisputed circumstances in which the Scrubber was purchased, downloaded, and launched the night before Moyse's computer was scheduled to be forensically imaged lead to only one logical and reasonable inference: namely, that Moyse ran the Scrubber to delete relevant inculpatory evidence.

17. In 2015, Moyse admitted that he secretly deleted his web history on July 20, 2014, thereby destroying evidence of his computer searches and other web activity for the relevant time period in

this action. He did not tell his lawyers at the time that he intended to do this, and only admitted to doing so after his installation of the Scrubber was revealed by an ISS.

18. Moyse committed the tort of spoliation by intentionally destroying evidence after litigation commenced, which permits this Court to draw the adverse inference that the destroyed evidence would have been detrimental to his case, and by extension, West Face's case. The Court should draw this inference and should infer from Moyse's conduct that the "direct" evidence that is missing from this case would have been found on Moyse's personal computer, but for his destruction of that evidence.

19. Even in the absence of this adverse inference, Catalyst has established sufficient facts from which a logical and reasonable inference of misuse of confidential information can be drawn:

(a) Moyse communicated Catalyst's confidential information to Dea in March 2014 as part of his effort to secure employment there, and then deleted evidence of that communication to cover his tracks;

(b) Moyse did not think the information he communicated was confidential, notwithstanding the fact it was clearly marked as such;

(c) Dea did not demonstrate any concern about receiving this confidential information, and in fact he read it and distributed it to his partners on two separate occasions;

(d) The day after he sent this information to Dea, Moyse began reviewing Catalyst's confidential letters to investors in a closed fund;

(e) The day after he scheduled an interview with Greg Boland, Moyse transferred confidential documents concerning the Stelco transaction (in which Catalyst and West Face were adverse in interest) to his Dropbox account;

(f) Moyse was exposed to confidential information about Catalyst's Wind deal, including confidential information about Catalyst's negotiation strategy for the requisite regulatory approvals;

(g) In 2014 and 2015, Moyse thought that this confidential information was generic and widely known, but he now admits that this information was in fact highly strategic and confidential to Catalyst;

(h) On May 23, 2014, while on vacation in southeast Asia, Moyse engaged in a 16-minute telephone conversation with Dea and later asked a colleague at Catalyst whether Catalyst had submitted a bid on Wind;

(i) Moyse and West Face engaged in several unexplained telephone calls in June and July 2014;

(j) Moyse wiped his Catalyst-issued Blackberry before returning it to Catalyst in circumstances where he knew litigation was about to commence. When he was caught having done so, he took the position that his Blackberry device was not used to communicate with West Face, which was incorrect;

(k) In April, May and June 2014, West Face made multiple offers to VimpelCom that included a condition of regulatory approval;

(l) On June 4, 2014, Anthony (Tony) Griffin, a partner at West Face, asked Anthony (Tony) Lacavera, the CEO of Wind, for information about Catalyst's Wind bid;

(m) Griffin denies that Lacavera gave him any confidential information about Catalyst's bid in response to this question, yet hours later, Griffin possessed sufficient insight into Catalyst's bidding strategy that he was able to inform Lacavera that Catalyst's bid was "a lot of air";

(n) West Face refused hold off on employing Moyse before June 23, notwithstanding that Moyse did little to no work there during his first two weeks on the job;

(o) Moyse misled the Court about his involvement on the Catalyst Wind deal team and his knowledge of the Wind deal details in his July 2014 affidavit;

(p) On the morning of July 16, 2014, Moyse installed registry cleaner the Scrubber software approximately one hour before the Interim Motion began;

(q) On July 20, 2014, the night before his personal computer was to be forensically imaged, Moyse launched the Scrubber, deleted his web browsing history and ran registry cleaner software;

(r) West Face denies knowing definitively that Catalyst entered into exclusivity with VimpelCom in late July 2014 when this knowledge has been conclusively demonstrated in contemporaneous documents;

(s) Likewise, West Face denies possessing knowledge about the status of Catalyst's negotiations with VimpelCom when contemporaneous documents establish that was regularly apprised of the status of Catalyst's negotiations;

(t) The August Offer was understood by West Face and its fellow consortium members as possessing "advantages" over Catalyst's offer that made it "superior to any other offer";

(u) In circumstances where the consortium claims not to know the details of Catalyst's negotiations with VimpelCom, the August Offer waived the regulatory condition but did not offer to purchase Wind for $1 above the minimum reserve price set by VimpelCom in May 2014, in what was supposed to be a blind auction process, and in circumstances where the consortium was making a bid with knowledge that VimpelCom's board would shortly be considering the Catalyst SPA; and

(v) West Face's September 2014 Wind investment memo included, as its first mitigating strategy if the investment was unsuccessful, the very strategy that Catalyst pursued with Industry Canada as a condition of closing (sale to an incumbent), even though Griffin adamantly denied at trial that this formed any part of West Face's regulatory strategy;

(w) In September 2014, after spending two months on leave pursuant to the interim consent order, Moyse "guessed" that West Face's purchase of Wind mirrored the terms and conditions it repeatedly proposed to VimpelCom in April, May and June 2014.

20. Any one of these facts, standing alone, may seem insignificant. But the intricate web of established facts summarized above is too to complex to characterize as mere "coincidence", as the defendants claim. The most logical and reasonable inference to be drawn is that Moyse communicated confidential information about Catalyst's negotiation strategy and bidding strategy to West Face, and that West Face used that information to gain an advantage over Catalyst in the bidding for Wind.

PART II - THE FACTS

1. THE PARTIES

A. CATALYST: A LEAN, FLAT STAFFING MODEL

21. Catalyst is an investment firm that is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, which are known in the industry as

"special situations for control". As of 2015, Catalyst had in excess of $3 billion dollars in assets under management.[2]

22. Catalyst uses a very lean and flat, entrepreneurial staffing model.[3] In the period spanning mid-March through May 26, 2014, Catalyst's six-member investment team consisted of three partners and three analysts:

(a) Newton Glassman (managing partner);

(b) Gabriel de Alba (partner and managing director);

(c) James Riley (partner and chief operating officer);

(d) Zach Michaud (vice president/analyst);[4]

(e) Brandon Moyse (associate/analyst);[5] and

(f) Lorne Creighton (analyst).[6]

23. Catalyst's deal teams typically consist of a partner, a vice-president and an analyst. This lean model requires each member of the deal team to participate in and be aware of nearly every aspect of a deal, including Catalyst's negotiation strategies.[7]

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[2] CCG0028716 - Affidavit of James Riley sworn February 18, 2015 ("Riley Feb 18 2015 Affidavit"), at ¶3 **(Compendium ("CPM") Tab 1)**.
[3] CCG0028710 - Affidavit of Gabriel de Alba, sworn May 27, 2016 ("de Alba Affidavit") at ¶4 **(CPM Tab 2)**.
[4] It is undisputed that the vice president position at an investment firm fulfills an analyst's duties, albeit at a more senior level. (Read-in from Griffin Examination for Discovery held May 10, 2016, p. 102, q. 237 – p. 103, q. 241) **(CPM Tab 3).**
[5] In February 2014, Moyse was told he would be promoted to the position of associate and began using that title on his resume and in correspondence with potential employers.
[6] BM0005359 - Affidavit of Brandon Moyse, affirmed June 2, 2016 ("Moyse June 2 2016 Affidavit"), at ¶14 **(CPM Tab 4)**.
[7] de Alba Affidavit, at ¶5 **(CPM Tab 5)**.

24. All analysts at Catalyst are aware of the status of all ongoing and prospective deals, even those on which the analyst is not a formal member of the deal team. Under Catalyst's co-investment program, Catalyst investment professionals are required to co-invest in every Catalyst deal. The co-investment program is intended to align the analyst's interests with those of Catalyst's limited partners (investors).[8]

25. Members of each Catalyst deal team have an additional interest in the success of a deal they work on. Under Catalyst's "60/40 Scheme", sixty per cent of the carried interest (Catalyst's income) from a particular deal is allocated to the deal team, and forty percent is allocated to Catalyst.[9] Given the small size of a typical Catalyst deal team, this amounts to a significant source of deferred income.[10] In Moyse's case, it is undisputed that Moyse accrued approximately $500,000 in carried interest as of May 2014.[11]

26. Catalyst hosts two meetings during the week for its professionals to share knowledge and updates regarding Catalyst's deal pipeline. Monday meetings are mandatory and last for up to two hours. Moyse admits that the deal pipeline was discussed at these meetings, that there was no formal agenda, and that the agenda, such as it was, was rarely updated.[12]

27. Catalyst professionals also attend Thursday meetings which are less formal and are focused on the execution of deals themselves.[13]

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[8] de Alba Affidavit at ¶8 **(CPM Tab 6)**.
[9] The "carried interest" refers to the twenty per cent profit participation in a Fund that Catalyst may enjoy, subject to certain conditions. Points in each deal as part of the 60% are allocated on a deal by deal basis.
[10] CCG0028719 - Affidavit of James Riley sworn June 26, 2014 (Riley June 26 2014 Affidavit), at ¶11–13 **(CPM Tab 7)**.
[11] Cross-Examination of Brandon Moyse, held July 31, 2014 ("Moyse 2014 Cross"), p. 30, q. 142 – p. 33, q. 161 **(CPM Tab 8)**.
[12] Moyse June 2 2016 Affidavit, at ¶ 18 **(CPM Tab 9)**.
[13] Glassman in chief, June 7, 2016, p. 315, ll. 22-25 - p. 316, ll. 1-5 **(CPM Tab 10)**.

28. Catalyst's investment professionals work in close quarters and are encouraged to discuss the matters they are working on outside of formal meetings.[14]

B. BRANDON MOYSE

29. Brandon Moyse commenced employment at Catalyst on November 1, 2012, as an analyst. Moyse came to Catalyst with excellent credentials. Prior to joining Catalyst, Moyse worked at Credit Suisse in New York and RBC Capital Markets in Toronto on their respective Debt Capital Markets desks. Moyse received a Bachelor of Arts in Mathematics from the University of Pennsylvania, an Ivy-league school.[15] It is undisputed in this action, or should be, in any event, that Moyse is a highly intelligent individual.

30. Pursuant to Moyse's employment agreement with Catalyst dated October 1, 2012 (the "Employment Agreement"), Moyse was paid a base annual salary of $90,000 and an annual bonus of $80,000. The Employment Agreement included three restrictive covenants – a non-competition covenant, a non-solicitation covenant, and a confidentiality covenant. The confidentiality covenant is reproduced below for ease of reference:

> Confidential Information
>
> You understand that, in your capacity as an equity holder and employee, you will acquire information about certain matters and things which are confidential to the protected entities, including, without limitation, (i) the identity of existing or prospective investors in the Fund and any such future partnership or fund, (ii) the structure of same, (iii) marketing strategies for securities or investments in the capital of or owned by the Fund or any such-partnership of or any such partnership or fund, **(iv) investment strategies, (v) value realization strategies, (vi) negotiating positions, (vii) the portfolio of investments, (viii) prospective acquisitions to any such portfolio,** (ix) prospective dispositions

[14] de Alba Affidavit at ¶9-10 **(CPM Tab 11)**; Cross-Examination of Thomas Dea held July 31, 2014 ("Dea 2014 Cross), p. 46, qq. 184-185 **(CPM Tab 12)**.
[15] Moyse June 2 2016 Affidavit, at ¶ 10-11 **(CPM Tab 13)**.

> from any such portfolio, and (x) personal information about [Catalyst] and employees of [Catalyst] and the like (collectively "Confidential Information"). Further, you understand that each of the protected entities' Confidential Information has been developed over a long period of time and at great expense to each of the protected entities. You agree that all Confidential Information is the exclusive property of each of the protected entities. For greater clarity, common knowledge or information that is in the public domain does not constitute "Confidential Information".
>
> You also agree that you shall not, at any time during the term of your employment with us or thereafter reveal, divulge or make known to any person, other than to [Catalyst] and our duly authorized employees or representatives or use for your own or any other's benefit, any Confidential Information, which during or as a result of your employment with us, has become known to you.
>
> After your employment has ended, and for the following one year, you will not take advantage of, derive a benefit or otherwise profit from any opportunities belonging to the Fund to invest in particular' businesses, such opportunities that you become aware of by reason of your employment with [Catalyst].[16] [Emphasis added.]

31. Moyse's evidence attempts to diminish the scope of his role at Catalyst. But his own contemporaneous document proves otherwise. As Moyse boasted in the *curriculum vitae* he sent Dea on March 27, 2015, Moyse led the initial analysis of over 25 potential distressed debt, undervalued equity and special situations investments and performed complex financial modelling, comprehensive due diligence and in-depth covenant assessments for Catalyst transactions.[17]

32. Moyse admitted during his cross-examination in 2014 that the description of his Catalyst duties on his c.v. was accurate, although his claim to have been promoted to the position of Associate in February 2014 was an "embellishment".[18]

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[16] CCG0018684 – the Employment Agreement, pp. 5-6 **(CPM Tab 14)**.
[17] WFC0108870 – Moyse *curriculum vitae* **(CPM Tab 15)**.
[18] Moyse 2014 Cross, p. 15, q. 57 – p. 17, q. 68 **(CPM Tab 16)**.

33. Likewise, Moyse's past employers describe a highly intelligent person who was able to take on a lot of responsibility:

> "Great kid, very smart and hard working.
>
> "He was the guy that did all my stuff when he was in my group. I was consistently impressed with his work."[19]
>
> "He was among the best analysts we've had and was given the lead on several high profile internal projects with senior management focus."[20]

34. It is submitted that Moyse's evidence on this issue lacks credibility when compared to the record of contemporaneous documents, both those authored by Moyse and how he was described by disinterested parties.

C. WEST FACE

35. West Face is a Toronto-based investment management firm specializing in event-oriented investments. West Face operates two principal investment funds: the Long Term Opportunities Fund, a hedge fund with a broad investment mandate; and the Alternative Credit Fund, a draw fund focussed on illiquid debt investments.[21]

36. West Face, like Catalyst, has a flat investment team that is slightly larger than Catalyst's team – West Face has four partners (Greg Boland, Peter Fraser, Tom Dea and Anthony Griffin) and four analysts, including Yu-Jia Zhu, a vice-president.[22]

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[19] WFC0109171 – Emails exchanged between Tom Dea and Thomas Mercein dated May 15, 2014 **(CPM Tab 17)**.
[20] WFC0109186 – Emails exchanged between Tom Dea and Rich Myers dated May 15-16, 2014 **(CPM Tab 18)**.
[21] Affidavit of Anthony Griffin sworn June 4, 2016 ("Griffin June 4 2016 Affidavit"), ¶18 **(CPM Tab 19)**.
[22] Read-in from Examination for Discovery of Anthony Griffin held May 10, 2016 ("Griffin Discovery"), p. 102, q. 237 – p. 103, q. 243 **(CPM Tab 20)**.

2. WIND MOBILE'S PRE-2014 REGULATORY HISTORY

37. Wind was founded in 2008 following the Canadian government's announcement that it would conduct an auction for Advanced Wireless Services ("AWS") spectrum licenses for new entrants to the Canada wireless market. Wind paid $442.5 million to acquire some of that set-aside spectrum (the "2008 Licenses"). Other new entrants, including Mobilicity, Eastlink and Videotron, also acquired AWS spectrum through this action.[23]

38. Shortly after the 2008 AWS auction, Wind and Mobilicity began providing wireless services to retail customers in urban Ontario, Alberta and British Columbia.[24]

39. At inception, Wind was wholly owned by Globalive Investment Holdings Corp. ("GIHC"). The two principal shareholders of GIHC were Globalive Capital Inc. ("Globalive"), a Canadian corporation, and Orascom Telecom Holdings ("Orascom"), a foreign corporation. In order to satisfy the Canadian government's foreign ownership regulations for telecommunications companies, the two Wind shareholders agreed to structure their equity so that Globalive controlled 67% of the voting interest and 34% of the financial interest in GIHC, while Orascom controlled 32% of the voting interest and 65% of the financial interest. A former Orascom employee held the remaining 1% of the voting interest and 1% of the financial interest in Wind.[25]

40. Orascom also provided Wind with significant debt financing to support the necessary capital expenditures to build out a new wireless network. In October 2009, the CRTC ruled that these debt holdings gave Orascom control over Wind and violated the foreign ownership rules.[26]

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[23] Affidavit of Simon Lockie, sworn June 6, 2016 ("Lockie June 6 2016 Affidavit"), at ¶6 **(CPM Tab 21)**; de Alba Affidavit at ¶17 **(CPM Tab 22)**.
[24] Lockie June 6 2016 Affidavit at ¶ 6 **(CPM Tab 21)**; de Alba Affidavit at ¶18 **(CPM Tab 23)**.
[25] Lockie June 6 2016 Affidavit at ¶ 9 **(CPM Tab 24)**; de Alba Affidavit at ¶19 **(CPM Tab 25)**.
[26] de Alba Affidavit at ¶19 **(CPM Tab 25)**.

41. At the time, Globalive approached Catalyst about a potential investment in Wind to rectify the situation, but before further discussions could take place, the Canadian government overruled the CRTC and approved Wind's ownership structure.[27]

42. In 2011, VimpelCom, a Dutch corporation, acquired the majority shareholder of Orascom, thereby stepping into Orascom's shoes as the beneficial owner of 65% of the financial interest and 32% of the voting interest in Wind. This left Globalive in control of Wind.[28]

43. In 2012, the Canadian government eliminated the foreign ownership restrictions for wireless companies holding less than 10% market share, which included Wind. In response to this regulatory change, VimpelCom and Globalive entered into negotiations to determine whether one could buy out the other's interest in Wind.[29]

44. At that time, Globalive approached Catalyst to seek financing to buy out VimpelCom.[30]

45. Instead, VimpelCom agreed to acquire Globalive's interest in Wind. The parties executed a share purchase agreement and VimpelCom applied for regulatory approval to assume control of Wind. However, the Canadian government refused to approve the transaction on the basis of foreign ownership restrictions under the *Investment Canada Act*. VimpelCom terminated the share purchase agreement and remained a shareholder with a majority financial interest but no voting control of Wind.[31]

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[27] de Alba Affidavit at ¶21-23 **(CPM Tab 26)**.
[28] Lockie June 6, 2016 Affidavit at ¶14 **(CPM Tab 27)**.
[29] Lockie June 6, 2016 Affidavit at ¶15 **(CPM Tab 28)**; de Alba at ¶24 **(CPM Tab 29)**.
[30] Lockie June 6, 2016 Affidavit at ¶15 **(CPM Tab 28)**; de Alba Affidavit at ¶24 **(CPM Tab 29)**.
[31] Lockie June 6, 2016 Affidavit at ¶16 **(CPM Tab 30)**.

46. Following the refusal of its application to buy out Globalive, VimpelCom sought an exit from Wind. It engaged UBS Securities ("UBS") to find a purchaser for its debt and equity interests in Wind or for Wind in its entirety.[32]

47. It is undisputed that it was well known within the investment community that VimpelCom was concerned about regulatory approvals. There is also no question that from the start of negotiations with VimpelCom, both Catalyst and West Face were acutely aware of VimpelCom's sensitivity to regulatory approvals.

48. At the same time, as explained in detail below, it is undisputed that every draft of the proposed share purchase agreement ("SPA") that VimpelCom circulated to potential purchasers and/or exchanged with potential purchasers prior to August 7, 2014, included a condition whereby closing of a transaction was conditional upon receipt of regulatory approval from Industry Canada and/or Investment Canada.

3. CATALYST'S EFFORTS TO BUILD THE FOURTH WIRELESS CARRIER

A. CATALYST INVESTS IN MOBILICITY

49. By 2014, Catalyst had a long-standing active interest and deep experience in the telecommunications industry. It previously held positions worth hundreds of millions in telecommunications companies, including investments in AT&T Canada, Call-Net, and Cable Satisfaction.[33]

50. In April 2011, Catalyst took a first lien position in Data & Audio Visual Enterprises Wireless Inc., a wholly owned subsidiary of Data & Audio Visual Enterprises Holdings Inc. (together, "Mobilicity"). Catalyst's investment in Mobilicity was its first step towards an attempt

[32] Lockie June 6, 2016 Affidavit at ¶17 **(CPM Tab 31)**.
[33] de Alba Affidavit at ¶12 **(CPM Tab 32)**.

to consolidate the Canadian wireless telecommunications sector. Internally, Catalyst planned to build Canada's "fourth wireless carrier" by combining the assets of Mobilicity and Wind.[34]

51. In 2012 or 2013, Industry Canada imposed severe restrictions on the 2008 Licenses held by new entrants, including a restriction on the ability to transfer spectrum licenses to the three "incumbent" wireless entities (Rogers, Telus and Bell). Catalyst's internal opinion was that a fourth wireless carrier could not survive in that commercial environment without changes to the existing regulatory structure. The issue of how to build the fourth wireless carrier and the related regulatory concerns was the subject of frequent discussion at Catalyst, both at Monday meetings and in less formal environments. Moyse was present during many of those discussions.[35]

52. On September 29, 2013, Mobilicity filed an application for an Initial Order under the *Companies Creditors Arrangement Act* ("CCAA") in order to restructure its business and complete a sale of its business and assets.[36]

53. Catalyst's plan to build a fourth wireless carrier involved a combination of Mobilicity and Wind. Each entity had assets the other needed to be successful. Joined together, the two companies had the potential to form the fourth wireless carrier the federal government sought to improve the Canadian wireless competitive landscape.[37]

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[34] de Alba Affidavit at ¶13 and 15 **(CPM Tab 33)**.
[35] de Alba Affidavit at ¶15 **(CPM Tab 33)**.
[36] de Alba Affidavit at ¶ 14 **(CPM Tab 34)**.
[37] de Alba Affidavit at ¶16 **(CPM Tab 35)**.

B. CATALYST'S INITIAL NEGOTIATIONS WITH VIMPELCOM

54. Catalyst began negotiating a potential investment in Wind with VimpelCom and UBS in late 2013. On January 2, 2014, Catalyst sent a letter of intent to Vimpelcom that set out proposed terms of a Wind transaction.[38]

55. The undisputed evidence is that at this point in time (January 2014), Catalyst's telecommunications deal team was primarily comprised of de Alba, Michaud and Yeh.

56. De Alba was the lead partner on the deal with primary responsibility for negotiations with VimpelCom. Glassman led Catalyst's negotiations with Industry Canada and the Prime Minister's Office concerning the regulatory issues.[39]

57. On January 4, 2014, VimpelCom informed Catalyst that it would not negotiate a transaction while VimpelCom and Catalyst were both involved in an upcoming 700-MHz spectrum auction.[40]

58. By January 13, 2014, Wind backed out of the 700-MHz spectrum auction, which communicated to potential purchasers that VimpelCom was unwilling to spend additional funds to build out Wind's wireless capability. This move heightened Catalyst's interest in Wind, as it believed it could capitalize on VimpelCom's disenchantment with Wind to acquire the company on better terms that those is proposed in the January 2, 2014 letter of intent.[41]

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[38] de Alba Affidavit at ¶26 **(CPM Tab 36)**.
[39] de Alba Affidavit at ¶3 **(CPM Tab 37)**.
[40] de Alba Affidavit at ¶27 **(CPM Tab 38)**.
[41] de Alba Affidavit at ¶28 and 30 **(CPM Tab 39)**.

59. Notably, on January 13, 2014, a link to the *Financial Post* article announcing Wind's withdrawal from the 700-MHz auction was circulated to the Catalyst telecom deal team by Moyse.[42]

60. In February 2014, Catalyst continued to negotiate potential terms of Catalyst's purchase of Wind with UBS. During these discussions, Catalyst proposed a merger of Wind and Mobilicity. Although VimpelCom was interested in a merger, it was only willing to contribute assets, not cash, to the proposed transaction.[43]

C. CATALYST CONTINUES ANALYZING WIND IN MARCH 2014 WITH MOYSE ON THE TEAM

61. The documentary evidence Catalyst produced in this proceeding clearly demonstrates that Moyse's knew that Catalyst was pursuing a potential Wind transaction by March 26, 2014, the day he met with Dea to discuss potentially moving over to West Face.

(i) March 6-8, 2014: The Combined Proforma

62. It is undisputed that in late January or early February 2014, Andrew Yeh gave notice of his resignation from Catalyst, effective early March 2014, and that by late February 2014, Moyse was assigned to the telecom deal team in anticipation of Yeh's pending departure.[44]

63. Contemporaneous emails in late February 2014 demonstrate that Michaud promptly brought Moyse up to speed on the status of the deal. For example, on February 25, 2014, Michaud emailed Moyse a Wind management presentation for his review.[45]

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[42] CCG0011410 – Email from Moyse to Michaud and Yeh dated January 13, 2014 **(CPM Tab 40)**.
[43] de Alba Affidavit at ¶30-31 **(CPM Tab 41)**.
[44] Moyse June 2, 2016 Affidavit, ¶22 **(CPM Tab 42)**.
[45] CCG0011506 – Email from Z. Michaud to B. Moyse dated February 25, 2014, attaching CCG0011507 – Wind Management Presentation **(CPM Tab 43)**.

64. On March 6, 2014, VimpelCom announced that it had written off its investment in Wind as a result of challenges it was facing in the Canadian market. As a result of this announcement, Catalyst realized that it could likely purchase Wind for a price at or less than the value of its critical spectrum assets. Early that morning, Moyse circulated the article from *The Globe and Mail* reporting on this development.[46]

65. The next day, Catalyst met with VimpelCom and UBS to discuss the terms of a purchase of Wind.[47] Moyse was asked to prepare a combined proforma that analyzed the combined metrics of Wind and Mobilicity, which he completed on March 8, 2014.[48]

66. Moyse's pro forma analysis formed the basis for Catalyst's internal analysis of Wind's intrinsic value. The analysis set out the value of the combined entities' spectrum, which Catalyst viewed as a critical asset and the main value driver in its proposal to VimpelCom.

67. Importantly, Catalyst never deviated from the analysis performed by Moyse. For example, it was carried forward in the PowerPoint presentations to Industry Canada in March and May 2014.

(ii) March 21, 2014: The Confidentiality Agreement

68. On March 21, 2014, Catalyst hosted a conference call with VimpelCom and UBS to update them regarding the terms and conditions that Catalyst would offer VimpelCom to acquire Wind.[49]

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[46] CCG0011509 – Email from B. Moyse dated March 6, 2014 **(CPM Tab 44)**.
[47] de Alba at ¶ 35 **(CPM Tab 45)**.
[48] CCG0011520 – Emails between Z. Michaud and B. Moyse dated March 7 & 8, 2014 **(CPM Tab 46)**; CCG0011536 – Email from B. Moyse dated March 8, 2014 **(CPM Tab 47)**.
[49] de Alba Affidavit at ¶36 **(CPM Tab 48)**.

On the same day, the Ontario Superior Court agreed to give Mobilicity until April 30, 2014 to complete a sales process. This event caused Catalyst to advance its timetable to acquire Wind.[50]

69. The next day, March 22, 2014, Catalyst executed a confidentiality agreement with VimpelCom (the "Confidentiality Agreement") and agreed that VimpelCom would provide Catalyst with information about its business plan, Wind's enterprise value and VimpelCom's equity structure in Wind, to allow the parties to negotiate a capital structure for the deal.[51]

70. The Confidentiality Agreement provided, among other things, that the existence and content of negotiations between Catalyst and VimpelCom were to remain confidential.[52]

71. De Alba communicated to the Catalyst telecom deal team that the Confidentiality Agreement had been reached and that negotiations were ongoing. Internally, Catalyst discussed the regulatory environment for a Wind transaction. Specifically, during its Monday meetings and meetings with the telecom team members, Catalyst discussed how it could mitigate its risk through discussions with Industry Canada and the Canadian government concerning a proposed merger of Wind and Mobilicity.

(iii) March 26, 2014: A Busy Day for Moyse on the Wind File

72. After Catalyst's meeting with VimpelCom and UBS on March 21, de Alba asked Michaud and Moyse to perform critical tasks relating to a potential Wind transaction.

73. First, Michaud organized a call with a telecommunications industry expert to discuss critical regulatory issues associated with building a fourth wireless carrier in Canada. The call took

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[50] de Alba Affidavit at ¶36-37 **(CPM Tab 48)**.
[51] de Alba Affidavit at ¶ 39 **(CPM Tab 49)**. The Confidentiality Agreement is CCG0023984 **(CPM Tab 50)**.
[52] de Alba at ¶ 43 **(CPM Tab 51)**.

place on March 26, 2014. Michaud asked Moyse to join the call and sent Moyse the PowerPoint presentation prepared by the expert for Moyse to review in advance of the call.[53]

74. The presentation summarizing the expert's conclusions on the technical requirements and possible regulatory issues associated with a fourth carrier. It outlined the need for spectrum to support LTE[54] and that lower roaming and tower sharing fees, both regulated by the CRTC, would be a major benefit to a small telecommunications player. The presentation estimated it would cost approximately $2 billion to build out a fourth wireless carrier.

75. That same day, Moyse prepared a critical PowerPoint presentation that Catalyst used in a meeting with Industry Canada scheduled for the next day (the "March 2014 IC Presentation"). In that meeting, Catalyst set out details of its plan and approach to a merger of Wind and Mobilicity and expressly referred to the regulatory conditions it required for the transaction to succeed.

76. Catalyst was especially concerned about the regulatory environment in which the wireless carriers operated. In order to build the fourth wireless carrier (a "retailer" if Catalyst's desired regulatory changes were made; a "wholesaler" otherwise), Catalyst's intended to merge the assets of Mobilicity and Wind. At the same time, Catalyst required assurance from Industry Canada that it would have a potential exit strategy from its investment if it was unsuccessful after five years.[55]

77. It is disputed as to whether Moyse "led" or merely "participated" in the preparation of the March 2014 IC Presentation. It is undisputed that Moyse was involved in its preparation, that the

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[53] CCG0011561 – Email from Z. Michaud to B. Moyse dated March 26, 2014, with attached CCG0011563 (Lemay PowerPoint presentation) **(CPM Tab 52)**.
[54] LTE stands for Long-Term Evolution.
[55] Affidavit of Newton Glassman sworn May 27, 2016 ("Glassman Affidavit") at ¶14 **(CPM Tab 53)**; de Alba Affidavit at ¶69-70 **(CPM Tab 54)**.

preparation was frantic, and that he emailed the final document to the deal team late at night on March 26, 2014.[56]

78. Catalyst's evidence is that the presentation went through at least four drafts, and that Moyse's contribution to the presentation included the combined proforma he created on March 8, 2014, further analyses regarding the telecommunications industry, and critical research regarding the federal government's policies concerning competition in the telecommunications industry.[57]

79. Moyse's evidence is that his role was merely "clerical" and "administrative". This evidence lacks credibility given Moyse's undisputed intellect and analytical ability, his considerable salary ($170,000), and his prior experience preparing presentations to regulators for Catalyst deals.

80. Notably, a couple of hours after he circulated the March 2014 IC Presentation to the deal team, Moyse sent his c.v. and "deal sheet" to Tom Dea. The deal sheet detailed Moyse's duties and responsibilities on a recently completed deal concerning Advantage Rent-A-Car, including:

> Created presentation for the Federal Trade Commission ("FTC") which ultimately helped to result in its approval of the transaction despite initial hesitation in allowing a sale to Catalyst.[58]

81. It is submitted that the contemporaneous evidence whereby Moyse described his duties on an important presentation to a regulator as more than "clerical" and "administrative", combined with the known facts about Moyse's experience and capabilities, belies the suggestion that Moyse was a mere "scribe" on March 26, 2014.

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[56] CCG0011564 – Email from B. Moyse dated March 26, 2014, with attached PowerPoint presentation **(CPM Tab 55)**.
[57] de Alba Affidavit at ¶62 **(CPM Tab 56)**.
[58] WFC0108870 – Moyse c.v. **(CPM Tab 15)** and deal sheet, p. 2 **(CPM Tab 57)**.

82. Ultimately, little turns on this disputed fact other than a small question of credibility, but it is notable that Moyse consistently tries to minimize his role in the creation of this document, as if to suggest that by merely acting as a "clerk", he did not recall or appreciate its contents.

83. The two facts are logically inconsistent – if Moyse was frantically working on this presentation for several hours, it is illogical to suggest he has no memory of its contents. Moreover, as discussed below, the fact that he revised this same document a few weeks later further strongly suggests that his memory of this document was stronger than he will admit.

(iv) The March 2014 IC Presentation Set Out Catalyst's Regulatory Strategy

84. In 2012 or 2013, Industry Canada imposed new restrictions on the 2008 Licenses held by the new entrants, including Wind. Catalyst did not believe that a fourth wireless carrier was viable without changes to the regulatory environment, including changing or reversing these restrictions. Catalyst believed that an industry participant who sued the government in connection with its restrictions on the 2008 Licenses would succeed, and that the Court would rule that the 2008 Licenses were property that the Court had the authority to order the sale of the 2008 Licenses to an incumbent in an insolvency proceeding.[59]

85. However, Catalyst could not lead that litigation. Catalyst's investments in other regulated businesses prevented it from directing any litigation against the government in relation to the 2008 Licenses. Instead, in order to successfully create and operate the fourth wireless carrier, Catalyst sought certain concessions from Industry Canada and the federal government.[60]

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[59] Glassman Affidavit at ¶11-13 **(CPM Tab 58)**.
[60] Glassman Affidavit at ¶13 **(CPM Tab 58)**.

86. Catalyst scheduled its meetings with Industry Canada, the Prime Minister's Office and the Privy Council Office for March 27, 2014. Catalyst's goal was to position itself as the only party capable of combining Wind and Mobilicity in order to pressure the government to support its efforts by re-shaping the regulatory environment.[61] The March 2014 IC Presentation set out Catalyst's detailed regulatory strategy with respect to the fourth carrier and its pursuit of Wind.

87. The March 2014 IC Presentation outlined Catalyst's concern that under the existing regulations, it would be difficult for Catalyst to obtain conventional arms-length financing to fund the $500 million to $1 billion of capital expenditures required to build out a fourth wireless carrier's LTE network.[62]

88. The March 2014 IC Presentation presented on the three "options" that Catalyst outlined for the federal government. These options contained Catalyst's requests of the federal government.

(a) **Option One** involved Catalyst merging Mobilicity and Wind to operate as a "retail" carrier. In order to pursue this option, Catalyst required regulations to guarantee wholesale and roaming costs, the ability to partner with or swap spectrum with an incumbent to fill spectrum requirements, freedom to use the incumbents' networks outside of the license areas to expand the fourth carrier's coverage area, and the ability to exit the investment with no restrictions in five years (subject to an undertaking to pursue an IPO or strategic sale before selling to an incumbent).[63]

[61] Glassman Affidavit at ¶33 **(CPM Tab 59)**; de Alba Affidavit at ¶60 **(CPM Tab 60)**.
[62] Glassman Affidavit at ¶21 **(CPM Tab 61)**.
[63] CCG0011565 (the March 2014 IC Presentation) at p. 7 **(CPM Tab 62)**.

(b) **Option Two** involved Catalyst merging Mobilicity and Wind to operate as a "wholesale" operator that would rent spectrum to incumbents through a competitive bidding process. In order to pursue this option, Catalyst required the freedom to partner with or swap spectrum with an incumbent to fill spectrum requirements and the ability to exit the investment with no restrictions in five years (subject to an undertaking to pursue an IPO or strategic sale before selling to an incumbent).[64]

(c) **Option Three** involved no merger of Wind and Mobilicity. Instead, Catalyst anticipated that an investor in Wind and/or Mobilicity would to attempt to force through insolvency litigation the sale of one or more of the new entrants to an incumbent. This option did not require any regulatory concessions but it was simply not possible for Catalyst to lead any such litigation given its investments in other regulated industries.[65]

89. All of the concessions outlined in the March 27 presentation were important. However, Catalyst's request to sell the fourth wireless carrier without restriction after five years was critical. Catalyst was concerned that if Wind was not successful, any purchaser would be stranded with a worthless asset and no exit strategy.[66]

4. MOYSE'S REFUSAL TO ADMIT THE TELECOM DEAL TEAM INCLUDED WIND IN MARCH 2014

90. Moyse has claimed in sworn evidence on five separate occasions that his role on Wind was limited to a brief period immediately preceding his resignation from Catalyst:

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[64] CCG0011565 at p 8 **(CPM Tab 63)**.
[65] CCG0011565 at p 9 **(CPM Tab 64)**; Glassman Affidavit at ¶27 **(CPM Tab 65)**.
[66] Glassman Affidavit at ¶29 **(CPM Tab 66)**.

July 7, 2014:

I was privy to very little, if any confidential information about the [Wind] transaction and played a minor role, essentially limited to contributing to a memo. I was only assigned to work on Wind Mobile the week before I left on vacation (two weeks before my resignation), and, as such, did not have extensive knowledge of the transaction.[67]

July 31, 2014:

Q. So you had – you're going back to your evidence that you had very limited to no involvement in Wind?

A. My evidence is that I was only involved in Wind beginning in May.

Q. And your involvement was – I'm just trying to remember. Your involvement was restricted to transposing some sort of bar graph into a presentation?

A. Yeah. Mm-hmm.[68]

April 2, 2015:

My involvement on the Wind file was limited to a period of approximately three weeks, which led up to the date of my resignation on May 24, 2014. For the first few days, I attended an introductory due diligence meeting and helped work on the initial draft of the investment memorandum, which was still not complete at the time of my resignation. For the last ten days of that three week period, from May 16, 2014, to May 25, 2014, I was on vacation in Southeast Asia and had almost no direct involvement on the file. I believe I continued to be copied on emails, and on one occasion looked at a preliminary model, which was not complete in terms of scenario analysis and business drivers, and gave cursory comments on it to Zach Michaud, a Vice President at Catalyst.[69]

May 11, 2015:

Q. All right. So whereas in July of 2014 you indicated that your involvement in Wind was essentially limited to contributing a

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[67] BM000624 – Affidavit of Brandon Moyse affirmed July 7, 2014 ("Moyse July 7 2014 Affidavit), at ¶11 **(CPM Tab 67)**.
[68] Moyse 2014 Cross, p. 155, qq. 736 – 737 **(CPM Tab 68)**.
[69] BM001935 – Affidavit of Brandon Moyse affirmed April 2, 2015 ("Moyse 2015 Affidavit"), at ¶14 **(CPM Tab 69)**.

> memo, that wasn't entirely the case, was it? You have just described a number of other things you were doing.
>
> A. This model would have been part of a contribution to a memo.
>
> Q. Okay. Listen to my question. Whereas on July 4th you indicated to the Court that your involvement in Wind was essentially limited to contributing a memo, your paragraph 14 indicates that you had more involvement than just that.
>
> A. I believe all that involvement was related to the memo.[70]
>
> **June 2, 2016:**
>
> My involvement on the Wind file was limited to a period of approximately three weeks from May 6 until May 24, 2014, when I resigned. For the last ten days of that three week period, starting May 16, 2014, I was on vacation in Southeast Asia and had almost no direct involvement on the file. My active work on the WIND file was, therefore, largely limited to the ten day period between May 6, 2014 and May 16, 2014, during which time I:
>
> (a) attended two due diligence meetings with WIND management, Catalyst's internal team, and Catalyst's external advisors;
>
> (b) assisted with crafting Catalyst's due diligence requests, which were based on information available in the WIND data room and otherwise publicly available;
>
> (c) briefly worked on Catalyst's operating model, before the task was outsourced to Morgan Stanley; and
>
> (d) helped Creighton on the initial draft of Catalyst's investment memorandum, which was still not complete at the time of my resignation.[71]

91. It is noteworthy that Moyse's ability to "recall" his work on the Wind deal in May 2014 improves over time, and his recollection of the work he performed in May 2014 "improves" as he is confronted with documentary evidence that contradicts his July 7, 2014 affidavit. By June 2016, Moyse is able to recall his work on the Wind file in May 2014 to a much greater level of particularity than he was capable of in 2014, mere weeks after that work was performed. This

[70] Moyse 2015 Cross, p. 15, qq. 59-60 **(CPM Tab 70)**.
[71] Moyse June 2 2016 Affidavit at ¶64 **(CPM Tab 71)**.

unusual improvement in his memory calls into question the credibility of Moyse's 2014 evidence generally and his credibility as a witness in general.

92. Likewise, in 2014 and 2015, in response to injunctions centering on Catalyst's concerns about Moyse transferring confidential information about Wind to West Face, Moyse denied that the presentation related to Wind.[72] His evidence was that it related to Mobilicity. Only when copies of the presentations surfaced did Moyse admit that the presentation concerned Wind and that he was mistaken in his prior testimony.[73]

93. This is another example of Moyse's alleged memory of events improving over time: in July 2014, he allegedly could not recall the contents of presentations he frantically worked on for hours in late March and mid-May 2014. This faulty memory, which is endemic to Moyse's evidence, lacks credulity and is inconsistent with Moyse's allegedly strong and detailed memory of other events from this same time period, including on the same day as he prepared the March 2014 IC Presentation.

94. This Court cannot accept Moyse's evidence that after he turned multiple drafts of the March 2014 IC Presentation, he did not understand or recall the three options Catalyst presented to the government, or even recall that the presentation concerned Wind. This faulty memory is important. Moyse stubbornly insists that he was unaware before May 6, 2014, that Catalyst was pursuing a Wind transaction, even though logic, reason, and the contemporaneous documents from March 2014 demonstrate otherwise. It is contrary to everything that is known about Moyse,

[72] Moyse July 7 2014 Affidavit, ¶12 **(CPM Tab 72)**, and Moyse 2015 Cross, p. 26, q. 118 – p. 28, q. 130 **(CPM Tab 73)**.
[73] Moyse June 2 2016 Affidavit, ¶53 **(CPM Tab 74)**.

including his intelligence and his curiosity about the goings-on at Catalyst, to accept that he was ignorant of this obvious fact.[74]

95. Moyse's refusal to admit that which is easily demonstrated through contemporaneous documents, which one would think would be an innocuous admission if he did not do anything wrong with this information, raises the question of why it is so important for him to steadfastly deny, in the face of convincing documentary evidence to the contrary, that he knew Catalyst was pursuing Wind in March 2014.

96. Finally, Moyse now admits that even before he was assigned to the Catalyst telecom deal team, he was aware that Catalyst was considering the possibility of building the fourth carrier, which involved the potential involvement of Wind.[75] He claims that this knowledge was derived from media reports and not internal Catalyst discussions. Catalyst submits that it defies logic and reason for Moyse to stubbornly maintain that he was unaware in March 2014, when he reached out to Tom Dea to explore a move to West Face, that Catalyst was pursuing a potential Wind transaction.

5. MOYSE MEETS WITH DEA ON MARCH 26, 2014, AND MOYSE EMAILS DEA CATALYST'S CONFIDENTIAL INFORMATION

97. On March 26, 2014, the same day that he frantically worked on the March 2014 IC Presentation, Moyse met with Tom Dea of West Face. For Moyse, this meeting came after he had already been attempting to find another job for months.

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[74] See, e.g., Moyse 2014 Cross at p. 80, q. 370 – p. 82, q. 378 **(CPM Tab 75)**. Moyse admits to reviewing "old" Catalyst transactions out of "curiousity", including the Stelco deal that involved West Face, which he reviewed in April 2014.

[75] Moyse June 2 2016 Affidavit, at ¶25(b) **(CPM Tab 76)**.

98. A couple of weeks earlier, on March 14, 2014, Moyse emailed Dea to expressly ask for a job.[76] Dea responded that day to inform Moyse that he was away for two weeks and they would discuss when Dea returned. On March 24, 2014, Dea and Moyse planned to meet on March 26 at 11 a.m.

99. On March 26, Moyse informed Dea that a call came up and pushed the meeting back to the afternoon. (This was the call with the telecommunications industry expert that Michaud asked Moyse to join.) The meeting took place around 1:45 pm at an Aroma coffee shop in downtown Toronto.

100. Moyse and Dea both claim that they did not discuss the Wind opportunity at this meeting. But this is incredibly unlikely given the nature of their discussion, and the fact that Moyse had just come off a telecom call and was working frantically on the March 2014 IC Presentation.

101. Although both parties denied talking about specific files, the discussion during Moyse's interview was more specific than Dea suggested in his trial evidence. After the interview with Moyse, at 9:31 pm on March 26, Dea sent an email to Moyse which is obviously in reference to something they discussed during the interview:

> Hey, Brandon, thanks. What is the name of the Cerberus entity that Callidus is modelled after?[77]

102. Both Moyse and Dea admit that Moyse responded to this email, as would be expected from a young professional trying to impress a potential employer. But neither Moyse nor West Face can

[76] WFC0031084 – Emails between Dea and Moyse sent March 14-26, 2014 **(CPM Tab 77)**.
[77] WFC00301090 – Emails between Dea and Moyse sent in March 2014 **(CPM Tab 78)**.

produce a copy of the response. Moyse admitted he deleted his response, and Dea must have done the same.[78]

103. It is submitted that both Moyse and Dea deleted the response because the content of the message involved disclosure by Moyse of Catalyst's confidential information, and that both parties wanted to destroy the record of his having done so.

104. When cross-examined on July 31, 2014, Dea was asked direct questions about what was discussed at the March 26, 2014 meeting:

> Q. Did you talk about past deals he worked on?
>
> A. I was interested, and it's very typical in these situations when you're trying to get a handle of particularly a young candidate to just get a handle of what the breadth of their experience is. So I would have asked him questions about his academic record, what he did at RBC, what he did at Credit Suisse, the kinds of things he was working on. Without mentioning names, what sorts of things he was working on and so forth. The kinds of -- actually I would have been asking him the kinds of or opportunities he's worked on in the past, and if he could generically describe his contribution.
>
> Q. Did he use any names to describe the opportunities he had worked on?
>
> **A. I don't recall what the answers were.[79]**

105. This interview was very important to Moyse. He had been pursuing an exit from Catalyst for over two months, with no success. He had already demonstrated a tendency to "bluster" about Catalyst files in his communications with outside parties.[80] Moreover, in 2014, Moyse believed

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[78] Moyse Trial In-Chief, June 13, 2016, p. 1375, ll. 12-18 **(CPM Tab 79)**.
[79] Dea 2014 Cross, p. 68, qq. 287-88 (emphasis added) **(CPM Tab 80)**.
[80] See CCG0018687 – Emails between B. Moyse and E. Dreyer sent February 8, 2013 **(CPM Tab 81)**, and Moyse 2014 Cross, p. 85, q. 394 – p. 86, q. 395 **(CPM Tab 82)**.

that the fact that Catalyst was pursuing Wind was not a confidential fact and was widely known throughout the industry.[81]

106. In that context, it is very likely that Moyse would boast to his prospective employer that he was working on a PowerPoint presentation that Newton Glassman would be showing to Industry Canada, the PMO and the PCO the next day. Having discussed the fact that the deal pipeline at Catalyst was "not great",[82] it is also unlikely Moyse would fail to mention that he was working on a new deal, namely Wind. Indeed, Moyse's evidence was that he believed that Catalyst's interest in Wind was public knowledge at the time.

A. MOYSE EMAILS CONFIDENTIAL INFORMATION TO DEA

107. Dea's evidence is that at the conclusion of the March 26, 2014 interview, he asked Moyse to provide a copy of his resume, a deal sheet and some writing samples to demonstrate his writing skills. Dea claims in his evidence in chief that he expressly "instructed" Moyse to redact confidential information as necessary, and assumed Moyse would not breach any confidentiality obligations.[83]

108. Dea's in chief evidence is that he did not specify the type of sample required. But his contemporaneous report on the meeting to his partners by email sent March 26, 2014, confirms that he understood Moyse "[would] send updated c.v., deal sheet, **sample internal output**."[84]

109. When challenged on this point during his cross-examination, Dea tried to parse the word "internal" out of his request:

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[81] Moyse 2014 Cross, p. 47, q. 222 – p. 48, q. 227 **(CPM Tab 83)**.
[82] WFC0079574 – Email from Dea to Boland, Fraser and Griffin sent March 26, 2014 **(CPM Tab 84)**.
[83] WFC0112266 – Affidavit of Thomas Dea sworn June 3, 2016 ("Dea 2016 Affidavit"), ¶12 **(CPM Tab 85)**.
[84] WFC0079574 – Email from Dea to Boland, Fraser and Griffin, sent March 26, 2014 (emphasis added) **(CPM Tab 84)**.

> Q. All right, we'll come to that point in a minute, but when you refer to it to your partners just very shortly after you meet with Mr. Moyse, you don't say any writing sample. You say "sample internal output," right?
>
> A. What I say here, Mr. DiPucchio, I'm giving a summary, a very quick summary of an interview, and I'm listing all the points and I'm noting what he is going to provide as a follow-up. And I think the emphasis is on sample output. What I provide in shorthand to my partners is not what I asked Mr. Moyse to provide me.
>
> Q. All right. Well, it is interesting to me that you have just referred to sample and output, but you have left out the word "internal." Was that something that you just did deliberately?
>
> A. I can only tell you what I did. I was summarizing the interview. I have told you what I asked Mr. Moyse. I can read the email and I can tell you what I was trying to convey.
>
> Q. All right. I'm going to suggest to you, sir, that this contemporaneous document records exactly what you asked Mr. Moyse for, which was sample internal output that he prepared on behalf of Catalyst? That is what I am suggesting to you.
>
> A. As I said, I asked him to provide me with a writing sample and he had a broad latitude. I certainly did not ask for anything approaching 200 pages of material. He could have provided me, if he wished, with, you know, a four or five-page summary of anything. It was really entirely up to him.[85]

110. After the interview, Moyse returned to Catalyst and continued to work on the March 2014 IC Presentation. He emailed the presentation to Glassman, De Alba and Riley, copying Michaud and himself at 11:17 p.m.[86]

111. After sending that email, Moyse went home and sent an email to Dea at 1:47 am the morning of March 27, two and a half hours after he emailed the March 2014 IC Presentation.[87]

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[85] Dea Trial Cross, p. 1238, l. 17 – p. 1239, l. 25 **(CPM Tab 86)**.
[86] CCG0011564 – email from B. Moyse dated March 26, 2014, with attached presentation (CCG0011565) **(CPM Tab 55)**.
[87] There are at least two different copies of this email in the trial record. The easiest copy to review is WFC0108736, which only contains the cover email and which attaches the attached documents as separate documents: WFC0108737

112. Moyse gives a detailed description of the material he attached to the email, including his c.v., deal sheet and investment memos. Moyse's description of the deals on his deal sheet is further evidence of his disregard for Catalyst's confidential information. He expressly informed Dea that these deals were still active and named them by name.[88]

113. The covering email also informed Dea that Moyse attached "a few investment write-ups" in order to "give [Dea] a better idea of the broader scope of work [he's] done on the pure investment analysis side". Then, despite Dea's apparently clear instruction that he redact names and confidential information, Moyse listed the names of the companies in the memos – Homburg, NSI, RONA and Arcan Resources.[89]

114. The four investment memos consist of 146 pages of Catalyst's confidential and proprietary analysis of completed and potential deals, which Moyse admitted in July 2014 he was not solely responsible for creating.[90] Notably, each memo contains the same header on the first page:

Catalyst Capital Group (For Internal Discussion Purposes Only)
CONFIDENTIAL – INITIAL REVIEW

115. In his cross-examination in July 2014, Moyse refused to accept that these investment memos were confidential, even when thoroughly questioned on this point:

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

(the "Homburg Memo"), WFC0108789 (the "Arcan Memo"), WFC0108810 (the "Rona Memo"), WFC0108834 (the "NSI Memo"), and WFC0108870 (Moyse's c.v. and deal sheet) **(CPM Tab 87)**.

[88] See WFC0108736 **(CPM Tab 87)**.

[89] WFC0108736 **(CPM Tab 87)**.

[90] Moyse 2014 Cross, p. 17, qq. 69-71 **(CPM Tab 88)**.

A. I don't agree.

Q. So you're saying that those analyses that were performed, those research pieces that were performed were not proprietary to Catalyst?

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

Q. I don't understand the distinction.

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

Q. So what makes the memo confidential?

A. I'm not really sure actually.

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

A. I agree with that.

Q. Okay. And in terms of the actual confidential information, you say it didn't include any confidential information, you don't mean to suggest again that the analysis that you're performing is not confidential?

A. **I don't believe it is.** It was based on publicly available information.

Q. Right. But lots of things are based on publicly available information, but the fact that you're performing an analysis that may not be readily available to the public is what makes it confidential. That's your work product is analyzing.

A. I agree it's a work product and proprietary.

Q. And that's what makes it confidential. That's what you're being paid for, to perform this analysis that's not publicly available.

A. I multiply publicly available numbers by publicly available numbers. Like-minded people would have done the same thing.

Q. You do far more than multiply, Mr. Moyse. Let's be fair. Anybody can take a calculator. You're not hired to be a calculator.

You're hired to bring your experience and expertise in performing an analysis, right? That's why you're being paid $200,000 a year.

A. One sixty-two.

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

A. Yes.

Q. And that's what makes it confidential.

A. I don't know.

Q. Do you disagree with that?

A. I don't know what makes it confidential.

[…]

Q. And it's also marked "confidential", right?

A. Yeah. Part of the template. But yes, that's what it says.

Q. So that's only a template so far as you're concerned. It means nothing.

A. I never gave it any thought.

[…]

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

A. Yes.

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

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

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

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

> Q. Is it publicly available?
>
> A. No.
>
> Q. And therefore do you accept that it's confidential?
>
> **A. I don't know.**[91]

116. Despite his difficulty recognizing that the investment memos were confidential, Moyse deleted the email he sent to Dea within days of having sent it.[92]

117. When asked why he did not redact the investment memos as supposedly instructed by Dea, Moyse responded, "It would have been, as Mr. Riley has said, a very extensive undertaking to redact them."[93]

118. For his part, Dea reviewed the material sent by Moyse on the morning of March 27. In his direct examination at trial, Dea testified that he reviewed the investment memos (notwithstanding that they were clearly marked "confidential") and concluded that they were "fairly perfunctory assessments of companies based on public information". Dea paid "little attention" to one of the investment memos because it was "very far away from anything that [West Face] would be involved in", as if that were somehow relevant to the ethical question of whether he ought to be reading it.[94]

119. In cross-examination, Dea's evidence suggests that his understanding of "confidential information" is not so dissimilar from Moyse's:

> Q. Let's just back up for a second. What I asked you was you understand that an investment memo by definition is confidential

[91] Moyse 2014 Cross, pp. 92-94, qq. 426-37, p. 141, qq. 664-665, and p. 151-52, qq. 716-722 **(CPM Tab 89)**.
[92] Moyse 2014 Cross, pp. 90-91, q. 420 **(CPM Tab 90)**.
[93] Moyse 2014 Cross, pp. 138-39, q. 653 **(CPM Tab 91)**.
[94] Dea Trial In-Chief, June 10, 2016, p. 1214, ll. 10-22 **(CPM Tab 92)**.

> and proprietary because it sets out an investment thesis for an investment?
>
> A. It could.
>
> Q. West Face certainly considers its investment memos confidential?
>
> A. Some of them for sure.
>
> Q. And those some that you consider confidential might actually contain public information?
>
> A. Yes, but I think, and going back to our prior cross-examination, you could have a summary, a rather benign summary of a memo that contains information on a public company based entirely on that public information that could be rather benign.
>
> Q. Well, who is making the determination that something is benign at this stage? Is that a determination for you to make or for the company that has had the memo prepared for it?
>
> A. In what context?
>
> Q. Well, benign, what does benign mean?
>
> **A. Well, by benign, what I mean is there is a spectrum of confidential information. If someone were to pass on information a day ahead of a public takeover and it went up 50 percent the next day, that would be one end of the spectrum. At the other end you could have an internal memo that contains a summary of a company based on a few hours of work that summarizes information from their publicly disclosed financial documents. There is a spectrum to these things.**[95]

120. Dea's "spectrum" was not a new invention. He provided a similar answer during his cross examination in July 2014:

> Q. So when you received the documents that he attached to his email, and you saw they were marked confidential, for internal discussion purposes only, you understood that Brandon may not have understood what you were asking for, correct?
>
> A. I didn't read his attachments right away.

[95] Dea Trial Cross, June 10, 2016, p. 1247, l. 4 – p. 1248, l. 14 (emphasis added) **(CPM Tab 93)**.

Q. You read them eventually?

A. Eventually I did, yeah.

Q. And you saw those markings on them, correct?· That they were confidential and for internal purposes only?

A. I did.

Q. Did you send them back to him?

A. Did I send them back?

Q. Like return them back? Did you destroy them?

A. I did not destroy them.

Q. No.· You did not tell Catalyst that he'd sent them?

A. I did not.

Q. When you reviewed them you saw that he hadn't redacted any information?

A. I don't remember exactly when I reviewed them, but when I reviewed them, as I recall, there were four examples. I was really just looking for, you know, how was the wording put together. You know, was it logical. They all were fairly rather pedestrian analyses. It seemed to be just a collection of, you know, gathering of public information.

Q. Is it just a gathering of public information, or does it also include some analysis by the author of the memos?

A. Our conclusion was that the analysis was very pedestrian.· That it was really primarily just, you know, recitation of public information. In one of the circumstances, one of the examples, I believe it was -- I don't remember exactly, but I think it was something that was -- that he had not done himself, he said he contributed to, that was -- that he said was circulated -- that was used to circulate to their limited partners. So I actually didn't read it too intently. I didn't really spend much time on the information.

[…]

Q. So what obligation does West Face have to keep any information it receives confidential?

> A.What I mean by that is that I felt -- although I recognized that this was information that was -- that was confidential to Catalyst, I felt that I could show it to my partners. Only as a writing sample. Because it concluded that it was very benign, you know, analyses.
>
> Q. That was your conclusion?
>
> A. Mm-hmm.
>
> Q. Yes?
>
> A. Yes.
>
> Q. Upon reviewing the documents you concluded that it was benign analysis?
>
> A. Mm-hmm.
>
> Q. Yes?
>
> A. I did.[96]

121. Notably, West Face never asked Moyse to provide it with a replacement writing sample in order to assess his writing and analytic abilities, nor did it return these memos to him or otherwise criticize him for sharing Catalyst's confidential information with him. Instead, that morning, Dea forwarded the memos to his partners and a senior analyst.[97]

122. Griffin's evidence is that he opened the first memo (the Homburg memo) within a few days of Dea having forwarded the email to him, but he did not go any further than the title page, which was marked "confidential", before he stopped. Griffin's evidence is he then went to Dea and orally brought up a concern with Dea about what Moyse had done.[98] Griffin's evidence was that Dea

[96] Dea 2014 Cross, p. 72, q. 305 – p. 74, q. 312 & p. 77, qq. 328 – 332 **(CPM Tab 94)**.
[97] WFC0075126 – Email from T. Dea to G. Boland, P. Fraser, T. Griffin and Y-J Zhu sent March 27, 2014 **(CPM Tab 95)**.
[98] Griffin Trial Cross, June 8, 2016, p. 778, l. 17 – p. 779, l. 15 **(CPM Tab 96)**.

understood Griffin's concern and Griffin "knew" Dea shared the same respect for confidentiality of information "that we all do".[99]

123. Despite Griffin having supposedly told Dea that he had concerns about Moyse's conduct shortly after Dea distributed the investment memos to his partners on March 27, 2014, Dea saw no issue with resending the investment memos to Fraser and Zhu on April 15, 2014, just prior to Moyse's internal interview.[100]

124. Moyse met with Griffin, Fraser and Zhu consecutively on April 15. Zhu's interview notes, which were only produced approximately two weeks before this trial commenced, indicate that he and Moyse discussed "live deals", but Zhu and the others deny discussing Wind at this interview.[101]

6. MOYSE'S REVIEWS CATALYST'S CONFIDENTIAL INFORMATION OUT OF "CURIOSITY"

125. On March 28, 2014, two days after he met with Dea, Moyse started exhibiting behaviour that Catalyst's expert concluded is consistent with a person removing confidential information from his or her employer.[102]

126. On March 28, 2014, Moyse accessed Catalyst's letters to its investors in Catalyst Fund Limited Partnership II ("Fund II") sent between 2006 and 2011. These "Investor Letters" report to Catalyst's investors on events that transpired with respect to Fund II's investments.

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[99] Griffin Trial Cross, June 8, 2016, p. 782, ll. 9 – 19 **(CPM Tab 97)**.
[100] WFC0108736 – Email from Dea to Fraser and Zhu sent April 15, 2014 **(CPM Tab 87)**. As this email demonstrates, the four investment memos and the c.v./deal sheet were attached as five separate files. If Dea was concerned about circulating confidential information after his conversation with Griffin, he could have easily deleted the investment memos from the April 15 email. He did not do so.
[101] WFC0109978 – Zhu's interview notes **(CPM Tab 98)**.
[102] Cross-Examination of Martin Musters held August 1, 2014 ("Musters 2014 Cross"), pp. 64-66, q. 188 **(CPM Tab 99)**.

127. There was no legitimate business reason for Moyse to be reviewing these Investor Letters. Notably, Moyse accessed several Investor Letters over an eleven-minute period, between 6:28 p.m. and 6:39 p.m., which is not enough time to actually read the letters but which is sufficient time and is consistent with copying files to a cloud-based file storage service such as Dropbox.[103]

128. Moyse's admits that he did not access the letters as part of his duties at Catalyst. His evidence is that he was reviewing the letters to look for statements made by Newton Glassman about employees who left the Catalyst.[104] This explanation makes no sense, considering he opened several letters over an 11-minute time span, Moyse had only met Dea for coffee two days earlier, had not interviewed at the firm yet, and did not have a job offer from West Face or any other firm despite being several weeks into a job hunt.

129. A few weeks later, on April 24, 2014, Moyse was told to schedule an interview with Boland.[105] The next day, April 25, 2014, Moyse transferred dozens of files on Catalyst's internal server regarding Stelco, an investment that pitted West Face against Catalyst, to his personal Dropbox account.[106]

130. Moyse admits he had no business reason for accessing these files. His evidence is that he was just "curious" about this old deal, and that he had also reviewed other old Catalyst deals.[107] Moyse's curiosity about these old Catalyst deals belies his apparent ignorance about deals for which he was on the actual deal team. If the maxim "actions speak louder than words" means

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[103] Riley June 2014 Affidavit at ¶ 55-57 **(CPM Tab 100)**. Affidavit of Martin Musters sworn June 26, 2014 ("Musters 2014 Affidavit"), ¶17 **(CPM Tab 101)**.
[104] Moyse July 7 2014 Affidavit, ¶45 **(CPM Tab 102)**.
[105] WFC0031131 – emails between B. Moyse and N. Markovic sent April 24, 2014 **(CPM Tab 103)**.
[106] Riley June 2014 Affidavit at ¶58-59 **(CPM Tab 104)**. Moyse July 7 2014 Affidavit at ¶48 **(CPM Tab 105)**.
[107] Moyse 2014 Cross, p. 81, q. 375 – p. 82, q. 379 **(CPM Tab 106)**.

anything, then Moyse is clearly thirsty for knowledge about any deal, including the deals he's working on, and is not just a clerk who inputs information and knows nothing else about the deal.

7. WEST FACE'S PROPOSALS FOR WIND

131. On November 4, 2013, West Face connected with Anthony Lacavera, Wind's CEO and the head of Globalive. During the conversation with Lacavera, West Face learned that VimpelCom was interested in selling its debt and equity interests in Wind.[108]

132. West Face delivered an expression of interest to VimpelCom and Globalive on November 8, 2013. The expression of interest contemplated an enterprise value for Wind of between $450 to $550 million. It requested that West Face be granted access to the data room to conduct due diligence.[109]

133. On December 7, 2013, West Face entered into a confidentiality agreement with VimpelCom and Orascom to gain access to the Wind data room.[110]

134. West Face's evidence is that between January and March of 2014, it carried out diligence and analyzed the Wind opportunity. During this period of time, West Face did not make an offer to VimpelCom. Further, West Face "did not have much contact with either [Lacavera] or VimpelCom" during this period.[111]

A. WEST FACE'S FIRST PROPOSAL

135. On April 21, 2014, Griffin informed Boland that he was speaking with Lacavera about doing a deal with VimpelCom in two stages. The first stage would involve taking out the $150

[108] Griffin June 4 2016 Affidavit, at ¶ 29 **(CPM Tab 107)**.
[109] WFC0080889 – West Face expression of interest to VimpelCom and Globalive dated November 8, 2013 **(CPM Tab 108)**.
[110] Griffin June 4 2016 Affidavit at ¶ 31 **(CPM Tab 109)**.
[111] Griffin June 4 2016 Affidavit at ¶ 33 **(CPM Tab 110)**.

million of Wind vendor debt. The second stage would involve negotiating a purchase of VimpelCom's equity interest. In effect, West Face would refinance Wind's debt and then negotiate with VimpelCom for its exit from Wind. Griffin told Boland that he thought they could "turn around and take this public in short order".[112]

136. Boland, in response, asked Griffin if West Face could negotiate an exclusive negotiating arrangement with Wind to tie it up. Griffin responded and explained that his plan was to secure exclusivity with VimpelCom.

137. At this point, the plan was to pursue Mobilicity at the same time as West Face was negotiating for Wind, with the goal of merging the two entities. However, at this time, Telus had already applied to Industry Canada to purchase Mobilicity.

138. Boland made a telling comment to Griffin regarding the proposed Telus-Mobilicity transaction:

> The only tweak I am thinking about is how to pooch the Mobi deal just in case Telus is successful.[113]

139. It is notable that Boland did not swear an affidavit throughout this proceeding's two-year history and did not testify at trial.

140. On April 23, West Face submitted its first proposal to VimpelCom to purchase Wind. At the time this proposal was submitted, West Face knew that VimpelCom was concerned about regulatory risk, but its proposal was nonetheless conditional on receipt of necessary and desireable regulatory approvals. When cross-examined, Griffin could provide no explanation for why the phrase "desirable" regulatory approvals was included in the proposal.

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[112] WFC0060279 – Emails exchanged between G. Boland and A. Griffin dated April 21, 2014 **(CPM Tab 111)**.
[113] *Ibid.*

141. The April 23 West Face proposal anticipated providing $200 million in first-lien debt financing to Wind. After the financing transaction was complete, West Face and VimpelCom would enter into a 90-day exclusivity period during which they would negotiate a definitive agreement whereby West Face would acquire $200 million of second-lien convertible notes which would give it the right to acquire two-thirds of Wind's fully-diluted equity, including two-thirds of the total number of voting shares. VimpelCom would directly and indirectly retain its existing interest for one-third of the fully diluted equity of Wind. The enterprise value of Wind under this April 23 proposal was $500 million.[114]

B. WEST FACE'S SECOND PROPOSAL

142. On May 4, 2014, West Face sent a revised proposal to VimpelCom. Under the May 4 proposal, West Face would provide $200 million of first lien financing and enter into a letter of understanding setting out the terms of a sale transaction. The sale transaction would involve West Face acquiring 100% of the shares of Wind. According to the May 4 proposal, the sale transaction would again be conditional on the receipt of necessary and desirable regulatory approvals.[115]

143. De Alba's evidence is that he and Glassman believed it was likely that West Face would bid on Wind and that they discussed this belief with the deal team, including Moyse, on many occasions, both at Monday meetings and during deal team meetings.[116]

8. CATALYST'S NEGOTIATIONS FOR WIND IN MAY 2014

144. During April 2014, Catalyst continued to negotiate with VimpelCom and UBS.[117]

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[114] WFC0066640 – April 23, 2014 West Face Proposal to VimpelCom **(CPM Tab 112)**.
[115] WFC0106772 – May 4, 2014 West Face Proposal to VimpelCom **(CPM Tab 113)**.
[116] de Alba Affidavit, ¶121 **(CPM Tab 114)**.
[117] de Alba Affidavit, at ¶ 73 **(CPM Tab 115)**.

A. GLASSMAN AND DE ALBA DISCUSS REGULATORY STRATEGY WITH THE DEAL TEAM

145. On May 7, 2014, after further discussions between UBS, VimpelCom and Catalyst, the parties reached a preliminary agreement on essential terms of a share purchase transaction. De Alba announced these terms to the Catalyst deal team, including Moyse:

(a) Catalyst would purchase Wind in a cash transaction based on an enterprise value of $300 million; and

(b) The parties would sign a share purchase agreement by May 30, 2014.[118]

146. On May 6, Glassman confirmed to the entire deal team, including Moyse, that the focus of the transaction was Wind's spectrum assets and that diligence could be confined to spectrum ownership. Glassman also wrote, "Need a condition of [governmental] approval…".[119]

147. On May 7, 2014, de Alba made it clear to the Catalyst deal team that vendors needed clarity on how spectrum could be sold. De Alba outlined the argument Catalyst would make to the federal government:

> [W]e are the Canadian solution, we will focus [on] building the standalone 4th player, …….but even from a debt financing/capital markets perspective no lender will provide funding unless there is clarity on how the collateral and ultimately the business can be sold and when…" At minimum, it adds to the pile [of] reasons why the government needs to give us clarity.[120]

148. In the same email chain, Glassman updated the Catalyst deal team with a critical piece of information concerning Catalyst's negotiations with the government:

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[118] de Alba Affidavit at ¶74 **(CPM Tab 116)**.
[119] CCG0009482 – Emails between Glassman and de Alba dated May 6 and 7, 2014 **(CPM Tab 117)**.
[120] *Ibid.*

> Govt has told us today via bruce d that they will not give us in writing the right to sell spectrum in 5 yrs. My response is that such takes 'option 1' off the table and we would only be willing to build a 'wholesale/leasing business' specifically with incumbents as the customers. They know this. We r going to ottawa early next wk. They also asked for our help to understand who really is controlling v-com's decision making and to get our input prior to next wk's mobilicity mediation.[121]

149. This email is consistent with Glassman's oral comments to the deal team throughout the negotiations with VimpelCom. The entire Catalyst team, including Moyse, knew that Glassman was adamant that any share purchase agreement with VimpelCom had to include a condition of government approval so that Catalyst could seek required concessions from the regulators.

150. Glassman believed that Industry Canada, the PCO, and the PMO would soften their position concerning the transferability of the 2008 Licenses. Catalyst's strategy was to offer to deliver to Industry Canada and the federal government the "dream deal" of merging Mobilicity and Wind, but to pressure the government to provide Catalyst with the regulatory concessions required for option 1 or 2 to succeed.[122]

151. In 2015, Moyse described this email exchange as "generic statements" about generalized views that were public knowledge.[123] He did not understand that Catalyst's internal discussions concerning its approach to negotiations with Industry Canada and the federal government were in fact highly confidential and not publicly known.

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[121] *Ibid.*
[122] Glassman Affidavit, at ¶33 **(CPM Tab 59)**.
[123] Moyse 2015 Cross, p. 21, q. 94 – p. 22, q. 100 **(CPM Tab 118)**.

B. MOYSE CONTRIBUTES TO WIND DUE DILIGENCE, AN OPERATING MODEL AND THE WIND INVESTMENT MEMO

152. Between May 6 and May 16, Moyse continued to be an integral member of Catalyst's Wind deal team. A significant portion of work on the transaction was compressed into a short time frame because Catalyst was planning on bidding by May 23.[124]

153. Catalyst met with Wind's management on May 9. Moyse attended this presentation and contributed extensively to the list of diligence issues that Catalyst presented to Wind's management.[125]

154. Between May 7 and 13, Michaud, Moyse and Creighton reviewed and refined the due diligence lists. In addition, Michaud, Moyse and Creighton began building an operating model and drafting an investment memorandum for a Wind transaction. They worked with Morgan Stanley to build the operating model and to evaluate the model prepared by Wind's management.

155. Between May 9 and 11, 2014, Michaud, Moyse and Creighton worked on multiple drafts of the investment memorandum.[126]

C. MOYSE PREPARES A SECOND PRESENTATION TO INDUSTRY CANADA

156. On May 12, 2014, Glassman, Riley, and Drysdale met for a second time with Industry Canada and the federal government to discuss Catalyst's efforts to acquire VimpelCom's interest in Wind.[127]

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[124] de Alba Affidavit, at ¶86 **(CPM Tab 119)**.
[125] de Alba Affidavit at ¶85 **(CPM Tab 120)**.
[126] de Alba Affidavit at ¶91-94 **(CPM Tab 121)**. CCG0011118 – Emails between Z. Michaud and B. Moyse dated May 7, 2014 **(CPM Tab 122)**. CCG0011618 – Emails between L. Creighton and B. Moyse dated May 7, 2014 **(CPM Tab 123)**. CCG0011123 – Emails between G. Yao (Morgan Stanley) and B. Moyse dated May 9, 2014 **(CPM Tab 124)**. CCG0005254 – Emails between L. Creighton and B. Moyse dated May 11, 2014 **(CPM Tab 125)**. CCG0011171 – Emails between D. Batista (Faskens) and Z. Michaud dated May 12, 2014 **(CPM Tab 126)**. CCG0011631 – Emails between B. Moyse, Z. Michaud and L. Creighton dated May 8, 2014 **(CPM Tab 127)**. CCG0011194 – Emails between D. McGuire (Morgan Stanley) and Z. Michaud dated May 13, 2014 **(CPM Tab 128)**.

157. Prior to the meetings in Ottawa, Moyse was asked to rebuild and update the PowerPoint presentation that he had created for the March 2014 meetings. The updated presentation (the "May 2014 IC Presentation") was drafted to allow Glassman to update the government with Catalyst's analysis of the risks and consequences associated with the restrictions imposed on the 2008 Licenses.[128]

158. The presentation was similar to the March 2014 IC Presentation. However, Catalyst updated its analysis to state that by May 2014, given the continued uncertainty with respect to Mobilicity and other developments, the most viable operating model for a fourth carrier was as a wholesaler that would lease spectrum to the incumbents. Additionally, Catalyst's further diligence of Wind revealed that without new spectrum to support LTE services, Wind would cease to be "relevant" by 2018.[129]

159. Importantly, Glassman testified that during the meetings, the government maintained its "official" position that it would not agree to a five-year exit strategy through a sale to an incumbent, but that the government's representatives' "body language", and the status of the people in attendance, signalled to Glassman that the government would change its official position if Catalyst were to present it with a deal to combine Mobilicity and Wind.[130]

160. Glassman was cross-examined very extensively on this last point, and did not waiver in his conviction that the government was signalling a softening of its position and openly acknowledged the very real litigation risk if it refused to grant necessary concessions on the ability to transfer spectrum.

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[127] Glassman Affidavit at ¶35 **(CPM Tab 129)**.
[128] Glassman Affidavit at ¶ 35 **(CPM Tab 129)**. See also CCG0009516 **(CPM Tab 130)**.
[129] Glassman Affidavit at ¶ 36 **(CPM Tab 131)**.
[130] Glassman Affidavit at ¶ 38-39 **(CPM Tab 132)**.

161. One thing cannot be denied: Glassman passionately believed that in 2014, he would have been able to force the government to grant him the concessions Catalyst believed it required to make a purchase of Wind viable as a retail wireless fourth carrier, because the government had effectively been backed into a corner and faced significant and embarrassing litigation risk if it stood in the way.

162. Glassman reported back to the Wind deal team on the meetings with Industry Canada shortly after May 12, 2014.

9. MOYSE TRAVELS TO ASIA BETWEEN MAY 16 AND 25, 2014

163. On May 16, 2014, Moyse left for a trip to southeast Asia. While he was in Taipei, Moyse received an oral job offer from West Face, to be followed shortly thereafter by a written offer.

164. While he was away, Moyse continued to assist Michaud and Creighton. For example, on May 19, 2014, Michaud sent Morgan Stanley's model to Moyse and Creighton and asked them for their comments.

165. Moyse reported back with comments about the model that demonstrated a deep knowledge of the structure of the deal:

> In the "LBO" tab, aren't we buying this debt-free? I thought $300MM buys out all the vendor financing and the shareholder loans go away as well. But the current case is keeping them in place and subtracting those from EV to calculate equity returns. Unless I'm misunderstanding they should run a 2nd base case which better reflects how the transaction would actually be structured (maybe a 1a and 1b depending on if we roll vendor financing or not).[131]

[131] CCG0011275 – Emails between Z. Michaud, L. Creighton and B. Moyse dated May 19, 2014 **(CPM Tab 133)**.

166. Notably, Moyse's analysis of the model mirrored exactly what Glassman wrote in his May 6, 2014 email to the deal team. That was the same email chain in which Glassman and de Alba also summarized their negotiation strategy with the federal government and Industry Canada.

167. On May 20 and 21, 2014, Moyse and Creighton exchanged emails using their personal email accounts.[132] Amidst a discussion concerning when Moyse intended to inform Catalyst of his intention to resign, Moyse asked Creighton on May 20, 2014, "What's the story with Wind?"

168. Creighton replied on May 21, "On Wind, Zach said as far as he knows the plan is to submit and offer Friday…I'm continuing to work on the memo, and Zach asked for more diligence questions that we can bombard them with…no real idea what's going on or if we are actually going to do the deal."

169. On May 22, 2014, Moyse received a written offer of employment from West Face.

170. On May 23, 2014, Moyse spoke with Dea by phone using his Catayst-issued Blackberry. The call lasted 16 minutes.[133]

171. Notably, after he spoke to Dea, Moyse emailed Creighton to ask, among other things, if Catalyst made a Wind bid.[134] Moyse claims that he was "just curious" about the status of the deal, but this curiosity is inconsistent with the fact that at the same time, Moyse knew he was giving notice of his resignation a day later.

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[132] BM0004981 – Emails between Creighton and Moyse dated May 20 & 21, 2014 **(CPM Tab 134)**. Moyse produced dozens of emails, some of which expressly concerned the circumstances of his resignation and the Wind transaction, in April and May 2016 after a demand from Catalyst and a 9:30 appointment with the Court.
[133] WFC0109530 - Log of phone calls between Moyse and West Face's office telephone system **(CPM Tab 135)**.
[134] BM0004983 – Emails exchanged between Moyse and Creighton on May 23 and 24, 2014 **(CPM Tab 136)**.

172. Moreover, this question followed shortly after Moyse spoke with Dea by telephone for 16 minutes.

10. MOYSE RESIGNS FROM CATALYST

173. On Saturday, May 24, 2014, while he was still on vacation, Moyse emailed de Alba to give the contractually required 30-days' notice of his resignation from Catalyst. Moyse deliberately did not tell de Alba where he was going. Catalyst submits this is because Moyse knew he was going to a competitor on the Wind deal and he was hoping to upset de Alba with the news in person.

174. De Alba spoke with Moyse when he returned from vacation to Catalyst's office on Monday, May 26, 2014. Only after de Alba asked did Moyse tell him that he had accepted a job with West Face. De Alba informed Moyse that he thought West Face could be bidding on Wind and pursuing the fourth wireless carrier strategy.[135]

175. Later that day, Riley arranged for Moyse to go on "garden leave" for the remainder of his thirty-day notice period.

11. WEST FACE LOSES CREDIBILITY WITH VIMPELCOM IN JUNE AND JULY 2014

A. WEST FACE'S THIRD PROPOSAL TO VIMPELCOM

176. While Catalyst was working intensely in May 2014 to send VimpelCom a proposed SPA, West Face did not make any further proposals to VimpelCom after its May 4, 2014 proposal for the rest of the month of May.

[135] de Alba Affidavit, at ¶122 **(CPM Tab 137)**.

177. On June 3, 2014, West Face delivered its third proposal to VimpelCom.[136] That proposal did not conform at all to the draft SPA that UBS had circulated to interested bidders on or about May 9, 2014.

178. Instead, West Face's June 3, 2014 proposal was similar in structure to the May 4, 2014 proposal, which VimpelCom had already rejected. West Face proposed to provide bridge financing to repay Wind's existing vendor debt (estimated to amount to $150 million) and then negotiate an SPA with VimpelCom that would provide for deferred contingent consideration of $100 million payable upon obtaining sufficient spectrum within twelve months to support Wind's LTE roll-out strategy.

179. The June 3 Proposal was conditional, among other things, on receipt of required regulatory approvals.

180. Thus, even after VimpelCom had repeatedly told West Face that it wanted a "clean exit" from Wind, West Face proposed a deal structure that only included contingent consideration for VimpelCom's equity in Wind and regulatory approval.[137]

B. WEST FACE'S FOURTH PROPOSAL TO VIMPELCOM

181. On June 19, 2014, West Face delivered its fourth proposal to VimpelCom.[138] This proposal was the first West Face proposal that contemplated repaying the vendor debt and purchasing all of VimpelCom's shares for an enterprise value of $311 million. The proposal still included a provision that closing was conditional upon receipt of regulatory approval.

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[136] WFC0106765 – West Face June 3 2014 Proposal **(CPM Tab 138)**.
[137] Griffin Trial Cross, June 9, 2016, p. 995, l. 20 – p. 998, l. 1 **(CPM Tab 139)**.
[138] WFC0059316 – West Face June 19 2014 Proposal **(CPM Tab 140)**.

182. However, this proposal did not use the draft SPA that VimpelCom had circulated to the parties on or about May 9, 2014. Instead, West Face used its own SPA, which did not follow the same deal structure.

183. On June 23, 2014, UBS informed Griffin that the SPA West Face sent was "not helpful" and that what VimpelCom was looking for was an SPA that was very close to what it sent potential bidders in May.[139]

184. As noted previously, the SPA VimpelCom circulated to bidders included as a standard term that closing of the transaction was conditional on receipt of necessary regulatory approval.[140]

C. STRATEGIC PARTNER DISCUSSIONS GO NOWHERE

185. For many weeks spanning from late June 2014 to mid-July 2014, West Face attempted to partner with a confidential "strategic partner". Those efforts ultimately failed, which meant that by late July 2014, after several months of due diligence and negotiations, West Face had lost credibility with VimpelCom. The undisputed evidence is that West Face was not a credible bidder in VimpelCom's eyes by this point.

12. GRIFFIN'S KNOWLEDGE ABOUT CATALYST'S BID – "A LOT OF AIR"

186. The day after West Face delivered its third proposal to VimpelCom, Griffin exchanged a very telling set of emails with Lacavera.[141]

187. The exchange begins with Griffin asking Lacavera on June 4 for information about Catalyst's and Tennebaum's bids:

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[139] WFC0067814 – Emails between Francois Turgeon and T. Griffin dated June 23, 2014 **(CPM Tab 141)**.
[140] Lockie Trial Cross, p. 1192, ll. 3 – 9 **(CPM Tab 142)**.
[141] WFC0068142 – Emails between Griffin and Lacavera dated June 4, 2014 **(CPM Tab 143)**.

> What is your change of control payment under a catalyst or tennenbaum deal – ie. What do we have to work with in our bid. Is it a fixed number [or] you have a negotiated deal?

188. This email demonstrates that Griffin knew by June 4, 2014 that Catalyst was bidding on Wind. Griffin's evidence on cross-examination is weak and his inability to get his story straight speaks to his overall credibility:

> Q. And, Mr. Griffin, I suggest to you that you well understood at that time that Catalyst had negotiations ongoing with VimpelCom, which is why you referred to a Catalyst deal?
>
> A. We had certainly read in the press that they would have potentially been involved, and then in May, before Brandon joining, there was this reference in some correspondence between counsels about concern on the telecom deal that Brandon had been working on, and by process of elimination, we only had one telecom file ongoing.
>
> And so we had always assumed that Catalyst was a potential participant.
>
> Q. I think you are referring there, Mr. Griffin, to a telephone call that occurred, but I can tell you that that telephone call occurred on June 18th.
>
> A. I wasn't party to it, so --
>
> Q. I understand you weren't a party to it, but I'm suggesting to you that what you've just said, i.e., that there was a telecom deal which therefore alerted you to the fact that Catalyst might be submitting a bid or was in the process of submitting a bid, didn't occur until well after this email chain.
>
> A. That could be.
>
> Q. Okay. So what I am suggesting to you is whatever you say about a telephone call that alerted you to a telecom deal, you had knowledge before then, as of June 4th, that Catalyst had submitted a proposal?
>
> A. No, I didn't know that they had submitted a proposal.
>
> Q. So it is purely --

> A. We had assumed that they were involved in looking at Wind and we knew that Tennenbaum was involved in looking at Wind.
>
> Q. Well, there were any number of companies looking at Wind at that period of time, Mr. Griffin.
>
> A. Well, these had been ones that had been specifically reported in the press.
>
> Q. No, but there were others that were reported in the press as well?
>
> A. Yes, and they could have also been involved.
>
> Q. Right, but you specifically mentioned Catalyst or Tennenbaum, and I am suggesting to you the reason you specifically mentioned Catalyst is not because it is purely coincidental or you are an imprecise person, but because you knew at that time that Catalyst had submitted a proposal?
>
> A. No, that is not factually correct.
>
> Q. And I am going to further suggest to you that the reason you knew it is because you were told it by Mr. Moyse?
>
> A. No, that is categorically incorrect.[142]

189. What is notable about this exchange is that Griffin's initial explanation as to why he knew that Catalyst was bidder – that there was reference in correspondence between counsel concerning a telecom deal – is wholly incorrect. The only mention of a telecom deal between counsel occurred on June 18, 2014.

190. Faced with the loss of a credible explanation based on verifiable fact, Griffin reverted to the usual "reported in the press" excuse, but West Face has not produced a single press report that either confirmed or suggested that Catalyst had submitted a bid for Wind.

[142] Griffin Trial Cross, p. 1001, l. 21 - p. 1004, l. 4 **(CPM Tab 144)**.

191. It is undisputed that by June 4, 2014, West Face **definitively** knew that Tennenbaum was bidding. Griffin's inclusion of Tennenbaum and Catalyst in the same sentence demonstrates that Griffin did not assume, but **had actual knowledge** that Catalyst had submitted a bid.

192. The June 4, 2014 emails between Griffin and Lacavera continued. In response to Griffin's pointed questions about the Tennenbaum and Catalyst bids, Lacavera proposed to take the discussion off of email. He wrote, "tried you on I'm mobile Thanks".[143]

193. Later that night, Griffin wrote:

> I think it might make the most sense for us to pick up the conversation with the Tennenbaum group and discuss the possibility of joining the syndicate. We're not going to be able to better them on value and I think theirs is the only real proposal in front of the company outside of ours – **Catalyst seems to be a lot of air**.[144]

194. Griffin's testimony in chief on this email made no sense:

> What did you mean by that, "Catalyst seems to be a lot of air"?
>
> A. Well, I guess to put it in layman's terms, for all the smoke and discussion about their potential involvement, we had nothing to substantiate that they were there, that they were serious or credible. I didn't know.[145]

195. Griffin's suggestion that West Face had "nothing to substantiate that they were there" lacks all credibility in a **blind auction**, where the bidders are not supposed to know who they are bidding against. Yet at trial, Griffin suggested that his comment "Catalyst seems to be a lot of air" referred to the fact that he did not have any information about Catalyst's bid, as if this was something he expected to have when, in fact, the opposite is true.

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[143] WFC0068142 – Emails exchanged between Griffin and Lacavera on June 4, 2014 **(CPM Tab 143)**.
[144] *Ibid.* (emphasis added).
[145] Griffin Trial In-Chief, June 8, 2016, p. 752, ll. 2-8 **(CPM Tab 145)**.

196. Moreover, the placement of Griffin's comment about Catalyst is telling. It comes immediately after his comment that he thought Tennenbaum's proposal was the only "real" proposal in front of VimpelCom, other than West Face's proposal. Griffin is clearly comparing information he possesses about the three parties' bids, and is confident that West Face and Tennenbaum's proposals were "real" while Catalyst's was "a lot of air".

197. This comment is consistent with Griffin having general knowledge of Catalyst's regulatory strategy of seeking concessions from Industry Canada prior to closing on a deal with VimpelCom. West Face thought that Catalyst's strategy of seeking regulatory concessions as a condition of closing was a non-starter, or, to put it another way, "a lot of air".

13. COMMUNICATIONS BETWEEN COUNSEL IN JUNE 2014

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

199. In this exchange of correspondence, counsel for both defendants claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality. In addition, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is […] baseless."[146]

200. This statement is difficult to reconcile with the facts known to West Face, especially after West Face's general counsel apparently chastised Moyse for emailing Catalyst's investment memos to Dea on May 22, 2014.

[146] CCG0018693 – Letter from A. Miedema to R. DiPucchio dated June 3, 2014 **(CPM Tab 146)**.

201. In his reply dated June 5, 2014, Moyse's counsel wrote:

> With regard to Mr. Moyse's knowledge of "prospective acquisitions", Mr. Moyse is only aware of 3 to 5 such prospects at least 2 of which are well known publicly as they have been disclosed by [Catalyst] in public statements. In any event, Mr. Moyse has no intention of disclosing these "prospective acquisitions" or any information which could reasonably be considered confidential or proprietary in nature.[147]

202. This statement is wrong on two counts: Moyse's allegation through counsel that the Wind prospect was "disclosed" by Catalyst in public statements was untrue, and later, in his July 7, 2014 affidavit, Moyse identified the Wind and Mobilicity deals by name.[148]

203. On June 13, Catalyst wrote to West Face and Moyse to offer again to attempt to come to terms about the terms of Moyse's non-competition clause. Again, these efforts were rebuffed by the defendants' lawyers.

204. On June 19, 2014, Moyse's counsel communicated Moyse's intention to commence employment at West Face effective June 23, 2014. Moyse and West refused to preserve the status quo while Catalyst sought to enforce the non-competition covenant.

205. In its June 19 correspondence, West Face's counsel stated that "[Catalyst] has not provided any evidence that Moyse has breached any of his confidentiality obligations to Catalyst".[149]

206. Before Catalyst issued a claim on June 25, 2014, de Alba called Boland in an effort to negotiate a resolution of the dispute. Boland responded by telling de Alba to "go fuck [himself]".[150]

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[147] CCG0018694 – Letter from J. Hopkins to R. DiPucchio dated June 5, 2014 **(CPM Tab 147)**.
[148] Moyse July 7 2014 Affidavit, ¶10 and 12 **(CPM Tab 148)**.
[149] CCG0018698 – Letter from A. Miedema to R. DiPucchio dated June 19, 2014 **(CPM Tab 149)**.

14. MOYSE COMMENCES WORKING AT WEST FACE – CATALYST COMMENCES LITIGATION

A. CATALYST'S FORENSIC EXPERT DISCOVERS SUSPICIOUS BEHAVIOUR

207. On June 23, Moyse commenced his employment with West Face, even though there was no apparent need for his services at that time. When asked in July 2014 what he worked on during his brief tenure at West Face, Moyse replied, "Not much. For the first – **I want to say for the first two weeks I didn't have anything to work on.**"[151]

208. The fact that West Face was in such a hurry and so adamant about employing Moyse when it had no immediate need for his services is another telling feature of this action. In the absence of a legitimate need for Moyse's services, it is open to this Court to infer that the rush to hire Moyse was related to an illegitimate pursuit related to the Wind transaction.

209. Moyse's and West Face's stubborn refusal to preserve the status quo aroused suspicions at Catalyst. Catalyst retained Martin Musters, an expert in computer forensic investigations and cell phone forensic investigations, to image and review Moyse's work computer.

210. Musters found a recurring pattern of suspicious behaviour between March 26 and May 26, 2014 that led him to suspect that Moyse had transferred Catalyst's confidential information to his personal computer via a Dropbox account.

211. Catalyst brought an injunction motion on June 26, 2014.

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[150] de Alba Affidavit, at ¶124 **(CPM Tab 150)**.
[151] Moyse 2014 Cross, p. 171, q. 794 (emphasis added) **(CPM Tab 151)**.

B. MOYSE WIPED HIS CATALYST BLACKBERRY

212. Around this time period, Moyse returned his Catalyst-issued Blackberry, which Musters also reviewed. Musters quickly determined that Moyse had wiped his Blackberry by resetting it to its original factory settings, thereby deleting all of the information contained on the device.[152]

213. Moyse admitted on cross-examination that he wiped his Blackberry in circumstances where he knew it was a possibility that Catalyst would bring an action against him.[153]

214. In response to Catalyst bringing this conduct to the Court's attention in July 2014, Moyse's sworn evidence was that he did not use his Blackberry to communicate with West Face.[154] Notably, this affidavit was sworn on July 16, 2014, on the morning the parties attended at Court to argue a motion for interim relief. This evidence was also incorrect, as it turns out.

15. MOYSE SCRUBS DOCUMENTS AND DELETES HIS WEB BROWSING HISTORY

A. MOYSE DOWNLOADED DELETION SOFTWARE THE MORNING OF THE INTERIM MOTION

215. On July 16, 2014, at the hearing of Catalyst's motion for interim relief, the parties consented to an order (the "Interim Order"), pursuant to which:

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

(b) The defendants agreed to preserve their records, whether electronic or otherwise, that relate to Catalyst, and/or relate to their activities since March 27, 2014 and/or relate to or are relevant to any of the matters raised in the action, except as otherwise agreed to by Catalyst;

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

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[152] CCG0018679 – Musters Report dated July 9, 2014 **(CPM Tab 152)**.
[153] Moyse Trial Cross, June 13, 2016, p. 1450, ll. 1 – 8 **(CPM Tab 153)**.
[154] BM000639 - Moyse July 16, 2014 Affidavit, ¶4 **(CPM Tab 154)**.

(d) Moyse agreed to swear an affidavit of documents setting out all documents in his power, possession or control that relate to his employment at Catalyst.[155]

216. The images of Moyse's devices were made on Monday, July 21, 2014.

217. On November 10, 2014, Justice Lederer granted Catalyst's motion for an Order authorizing an ISS to analyze the forensic images created pursuant to the Interim Order.

218. The ISS retained an independent forensic IT expert to assist with its analysis and review of the Images. In the Report, the ISS revealed that at 8:50 a.m. on July 16 (the morning of the Interim Motion), Moyse installed registry cleaning software ("RegCleanPro") and at 8:53 a.m., Moyse installed military-grade deletion software (known colloquially as "scrubbing software" and referred to herein as the "Scrubber") on his personal computer ("Advanced System Optimizer").

219. The ISS also determined that at 8:09 p.m. on July 20, 2014, the night before he was scheduled to have forensic images of his devices made, Moyse launched the Scrubber.[156]

B. MOYSE ADMITS TO DELETING HIS WEB BROWSING HISTORY

220. In response to the ISS report, Moyse admitted (as he had to in the face of the conclusive evidence) that he downloaded the Scrubber, but claimed that he did not run the Scrubber. Moyse claimed that he only deleted his web browsing history, which he unilaterally determined was "irrelevant" and therefore outside the scope of the Interim Order.[157]

221. Moyse's evidence is that he did not run the Scrubber, but he has no explanation for why a "Secure Delete" folder was created on his computer the night before he turned it over to be imaged, and the same night that he ran the Registry Cleaner software. Moyse claims that he purchased and

[155] CCG0028703 - Order of Justice Firestone dated July 16, 2014 **(CPM Tab 155)**.
[156] CCG0018671 – Draft Report of the ISS, pp. 41-43, ¶44-48 **(CPM Tab 156)**.
[157] Moyse April 2 2015 Affidavit, ¶38-41 **(CPM Tab 157)**.

installed the Advanced System Optimizer software on the morning of the Interim Motion because his computer was running slowly and he wanted to "optimize" it.[158]

222. It is beyond controversy that by deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014, as his web browsing history would have included evidence of his efforts to access Dropbox and his web-searching activity, including, for example, the searches Moyse ran in July 2014 when he was looking for deletion software.

C. EXPERT EVIDENCE SUPPORTS THE FINDING THAT MOYSE RAN THE SCRUBBER ON JULY 20, 2014

223. Musters ran independent tests on the operation of the Scrubber. Through his analysis, Musters determined that:

(a) Merely downloading and installing the Scrubber does not lead to the creation of a "Secure Delete" folder on one's computer;

(b) A "Secure Delete" folder is only created when a user launches the Scrubber function on the Advanced System Optimizer software suite;

(c) Although the Scrubber includes a summary log recording a user's deletion activity, it is possible to reset the log through the registry to make it appear as if the Scrubber was never used.[159]

224. The steps required to erase evidence of one's use of the Scrubber are not technically complicated. A user with knowledge of the computer's registry editor software can follow publicly available information to erase the "Secure Delete log" on the computer associated with the Secure Delete software, at which point the summary resets to zero.[160]

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[158] Moyse 2015 Cross, qq. 338-345 **(CPM Tab 158)**.
[159] CCG0028713 – Affidavit of Martin Musters, sworn February 15, 2015 ("Musters February 15 2015 Affidavit"), ¶12 **(CPM Tab 159)**. CCG0028712 - Supplementary Affidavit of Martin Musters, sworn April 30, 2015 ("Musters April 30 2015 Affidavit"), ¶10-19 **(CPM Tab 160)**.
[160] Musters April 30 2015 Affidavit, ¶17-19 **(CPM Tab 160)**.

225. Musters, who has significant experience in computer forensic investigations, and who was aware of certain objective background facts about Moyse (his intelligence, awareness of the registry, past conduct of wiping his Blackberry, the Scrubber was launched the night before the computer was imaged) concluded that in his opinion the most likely explanation for presence on Moyse's computer of Scrubber software that had been launched on July 20, 2014, is that Moyse ran the Scrubber that night to delete files or folders.[161]

(vi) Lo's Corrected Evidence Supports the Finding that Moyse Ran the Scrubber

226. Moyse retained Kevin Lo, an IT expert ("Lo"), to respond to Musters' evidence. Lo reviewed a copy of the Image that was provided to him by Moyse's counsel.[162]

227. Lo noted, correctly, that the "Secure Delete" folder is created when a user launches the Scrubber, whether or not the user actually deletes data. Lo also noted that he could not find a log for Secure Delete on Moyse's computer. Lo concluded from the absence of the Secure Delete log that the Scrubber was not used to delete data from Moyse's computer.[163]

228. At trial, Lo acknowledged that it is possible to alter the Secure Delete log to make it appear as if the program did not delete files or folders.[164] Lo's explanation during his examination-in-chief for why he thought it was not a "simple" matter to delete the Secure Delete log supports a finding that Moyse was able to do so:

> Q. And, Mr. Lo, I think you said you disagreed with Mr. Musters' opinion it was a relatively simple matter. Why do you say that?

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[161] Musters April 30 2015 Affidavit, ¶20-21 **(CPM Tab 161)**.
[162] Moyse refused to provide a copy of the Image to Catalyst, so it was impossible for Musters to verify the accuracy of Lo's information by replicating his analyses.
[163] BM000026 - Affidavit of Kevin Lo, affirmed April 2, 2015, ¶11-20 ("Lo April 2 2015 Affidavit") **(CPM Tab 162)**.
[164] Lo Trial In-Chief, June 10, 2016, p. 1312, ll. 17-20 **(CPM Tab 163)**.

> A. That is because a Windows registry is a pretty hidden, obscure part of a Windows operating system. A regular computer user would really have no reason why he or she would need to visit that place to make any alteration or even to look at it.
>
> So in order for someone to go and make changes, especially pertaining to this Secure Delete program, one ought to know or have pretty good computer knowledge to know exactly where to go, to know exactly what to alter or to make the change to make that proposed changes.[165]

229. Notably, during his cross-examination, Lo admitted that he had no appreciation as to Moyse's ability to use his computer and no insight into Moyse's intelligence and general sophistication.[166] However, he admitted (as he had to based on the technical evidence) that Moyse ran his registry cleaner software on July 20, 2014, the same day that he ran the Scrubber.[167]

230. Lo would not confirm that Moyse had knowledge that the registry existed (thereby putting him, in Lo's opinion, in the select group of users who are capable of resetting the Secure Delete log), even though Lo knew that Moyse had purchased registry cleaner software. Lo's evidence is that he did not know why Moyse bought the registry cleaner software.[168]

231. What the Court knows, even if Lo did not know, is that Moyse admits he bought the registry cleaner software on the understanding that he needed to clean his computer's registry in order to effectively delete his web browsing history to the point where it would be unrecoverable by a forensic expert.[169]

232. To the extent there is any dispute between Lo's evidence and Muster's evidence, Muster's evidence should be preferred. On multiple occasions during this cross-examination, Lo attempted

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[165] Lo Trial In-Chief, June 10, 2016, p. 1316, l. 18 – p. 1317, l. 7 **(CPM Tab 164)**.
[166] Lo Trial Cross, June 10, 2016, p. 1339, ll. 4-13 **(CPM Tab 165)**.
[167] Lo Trial Cross, June 10, 2016, p. 1340, ll. 6 – 18 **(CPM Tab 166)**.
[168] Lo Trial Cross, June 10, 2016, p. 1338, ll. 7-24 **(CPM Tab 167)**.
[169] Moyse April 2 2015 Affidavit, ¶42-43 **(CPM Tab 168)**.

to change his evidence from that which he gave a year earlier at a previous cross-examination, and had to be impeached to re-affirm his earlier evidence. The attempted changes in Lo's evidence included the basis for his conclusion that Moyse did not run the Scrubber and the fact that he did not try to replicate Musters' exercise in deleting the Secure Delete log.

233. It is noteworthy that Moyse's evidence that he was just randomly clicking buttons on the Advanced System Optimizer program does not accord with the experts' evidence that a user has to click through to a second screen, and then click on a button that clearly explains what Secure Delete does, before launching the program. The design of the software, as agreed upon by the experts, strongly suggests that any user who clicked on Secure Delete intentionally did so for the purpose of deleting files or folders.

234. Moreover, Moyse's version of events (quite apart from the astounding coincidence of it all) makes no technical sense. Moyse claims that he did internet research and then determined, **based on that research**, that he needed to run RegCleanPro in order to permanently delete his web browser history. However, this is technically incorrect. The browser history is not connected to the registry.[170]

235. Moyse has never produced the web pages that support his story. The far more likely scenario that occurred is the one posited by Musters.

16. CATALYST ENTERS INTO EXCLUSIVITY WITH VIMPELCOM, CANNOT CLOSE A "DONE" DEAL

236. On July 23, 2014, Catalyst and VimpelCom entered into an exclusive negotiating agreement. Catalyst was convinced that a deal would be concluded during this exclusive

[170] Musters April 30 2015 Affidavit, ¶3-5 **(CPM Tab 169)**.

negotiating period. Between July 23 and August 3, 2014, the parties exchanged multiple drafts of an SPA.

237. On August 3, 2014, the parties agreed that the SPA was "substantially settled" and only a handful of small issues were left to be resolved. The last step was for VimpelCom to obtain approval from its Board of Directors.[171]

238. On August 11, VimpelCom and Catalyst had a joint call with Industry Canada to tell the regulator that a Wind deal "was done".[172]

239. By August 15, VimpelCom came back to Catalyst with new, substantial demands concerning regulatory approvals. VimpelCom insisted on shortening the approval period to two months (from three months with an automatic one-month extension), and it asked for a $5-20 million break fee if the deal did not close.[173]

240. These new proposed terms, which were sought by VimpelCom more than 10 days after it had previously told Catalyst that the SPA was substantially settled and 4 days after the parties had told Industry Canada that the deal was done, confused Catalyst.

241. At the time, Catalyst could not understand why the deal fell apart after the parties had reached an agreement in principle on the deal terms.[174]

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[171] de Alba Affidavit, at ¶133-145 **(CPM Tab 170)**.
[172] de Alba Affidavit, at ¶156 **(CPM Tab 171)**.
[173] de Alba Affidavit, at ¶157-159 **(CPM Tab 172)**.
[174] de Alba Affidavit, at ¶159-160 **(CPM Tab 173)**.

17. THE CONSORTIUM SUCCESSFULLY BUYS WIND

A. WEST FACE JOINS THE CONSORTIUM, FINDS OUT CATALYST IS IN EXCLUSIVITY

242. By July 21, 2014, West Face's negotiations with the confidential strategic partner had ended. West Face sought instead to join forces with Tennenbaum, LG Capital and Oak Hill to form a consortium that would bid on Wind. On that date, Michael Leitner, the managing partner of Tennenbaum, and Boland exchanged emails about Catalyst seeking exclusivity from VimpelCom.[175]

243. On July 22, 2014, Leitner informed Griffin, Fraser and Boland that Catalyst "may have this in exclusivity by the end of the week".[176]

244. On July 23, 2014, Jonathan Friesel of Oak Hill Capital, an entity that dropped out of the consortium at the last minute, informed Boland that he was informed by UBS that VimpelCom had entered into exclusivity at the "reserve price" and was tied up for 5-7 days. Boland forwarded this email to his partners Griffin, Fraser and Dea.[177]

245. Griffin's evidence that he "assumed," but did not "know," that VimpelCom had entered into exclusivity with Catalyst is an exercise in metaphysical sophistry. Griffin's refusal to acknowledge that he "knew" Catalyst was in exclusivity is akin to Moyse's refusal to admit that he "knew" Catalyst was interested in pursuing a Wind deal in March 2014 – it is not based on documents, but based on an unrealistic philosophical inquiry into what it means to "know" anything.

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[175] WFC0069995 – Emails between Leitner and Boland dated July 21, 2014 **(CPM Tab 174)**.
[176] WFC0059172 – Emails between Leitner, Griffin and Boland dated July 22, 2014 **(CPM Tab 175)**.
[177] WFC0048724 – Emails dated July 23, 2014 **(CPM Tab 176)**.

246. The more credible finding is that by July 23, 2014, West Face knew, for certain, that Catalyst was in exclusivity with VimpelCom at the reserve price.

B. THE CONSORTIUM PLANS TO BLOCK CATALYST'S OFFER

247. As of July 30, 2014, the Consortium's plan contemplated a purchase of both Wind and Mobilicity.[178] That plan was abandoned when the Consortium learned on Friday, August 1, 2014, that VimpelCom's board of directors was going to consider a Catalyst SPA. On that date, Leitner wrote to the other Consortium members:

> I just heard that VimpelCom is taking the Catalyst SPA to the board this weekend. There has been no retrade as of yet, but parties are bracing for it. Suggest we get on a call to discuss. Have some feedback on price levels as well.[179]

248. The Consortium was determined not to give up on Wind just yet. Using the only option available to them, namely, putting in an offer that Catalyst could not match, the Consortium elected to waive the regulatory approval condition.

249. West Face knew, from Moyse, that a proposal that waived regulatory approval would give it an advantage over Catalyst, because Catalyst could not, and would not, waive regulatory approval. By waiving this condition, West Face and the Consortium knew that their offer would be considered superior to Catalysts.

250. For this reason, even though they were bidding against a party that had been in exclusivity for over a week at the reserve price, the Consortium constructed a "superior" proposal that did not increase the price offered for VimpelCom's interest in Wind. This is completely illogical bidding

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[178] Griffin Trial Cross, June 9, 2016, p. 1055, l. 8 – p. 1056, l. 4 **(CPM Tab 177)**. See also WFC0070195 – emails dated July 30, 2014 re. Mobilicity Term Sheet **(CPM Tab 178)**.
[179] WFC0047832 – Emails dated August 1, 2014 between Leitner and others **(CPM Tab 179)**.

behaviour in a supposedly "blind" auction, unless one infers that the Consortium had knowledge of Catalyst's negotiating positions.

C. THE CONSORTIUM SUBMITS A "SUPERIOR PROPOSAL"

251. On August 7, 2014, the Consortium sent VimpelCom a proposal that it labelled a "superior" proposal to purchase Wind (the "August Proposal"). The August Proposal entailed an offer to purchase VimpelCom's debt and equity interests in Wind, without conditions, for total consideration of $285 million. In so doing, the Consortium would effectively step into VimpelCom's shoes as the majority financial shareholder and minority voting shareholder, with no guarantee that it would receive regulatory approval to re-structure the voting interests in Wind at a late date.

252. Notably, all of the witnesses at the trial pointed to a non-witness (Lawrence Guffey) as the individual who allegedly came up with this proposed deal structure in August. Catalyst was therefore unable to cross-examine at trial and test the credibility of this alleged fact. There is no documentation that has been produced that supports the story that this deal structure was proposed or developed by Guffey.

253. In fact, among the three Consortium members who participated in the August Proposal, two of the principals of the Consortium members did not testify: Guffy and Boland. West Face also did not call Fraser to testify, even though he was deeply involved in the August Proposal as well. Catalyst submits that to the extent any evidence regarding these individuals' roles in this action is ambiguous, the Court can draw an adverse inference from West Face's failure to call Boland and Fraser to testify at trial and to subject themselves to cross-examination.

254. The evidence from representatives of the three Consortium members who did testify – Griffin, Hamish Burt on behalf of LG Capital, and Leitner – gave evidence that they did not view the waiving of regulatory approval to entail a significant risk.

255. This evidence does not accord with common sense, the obligations an investment fund owes to its investors or with the regulatory history leading up to August 2014. As the events of 2012-2014 demonstrated, regulatory approval of a change of control of spectrum licenses was not a rubber stamp and approval could not be presumed.

256. Notably, West Face engaged with Industry Canada once, in May 2014, before it was a member of the consortium. There is no documentary evidence in the record that sets out what steps, if any, LG Capital and Tennenbaum took to assure themselves that Industry Canada would approve the Consortium's application to re-structure Wind's voting control.

257. However, there is evidence that Tennenbaum viewed litigation as a mitigating strategy. Leitner's evidence at trial was that through ownership of shareholder loans, if the Consortium did not get shareholder approval, Wind would go into a CCAA proceeding, auction the business and the Consortium would receive its capital back.[180]

258. **This was the same litigation strategy that Catalyst had presented to Industry Canada in March and May 2014 in the PowerPoint presentations prepared by Moyse.**

259. Leitner's evidence demonstrates that while the Consortium members claimed not to have known about Catalyst's regulatory strategy, their approach to their deal matched exactly what

[180] Leitner Trial Cross, June 9, 2016, p. 904, ll. 1-23 **(CPM Tab 180)**.

Catalyst believed a third party – not Catalyst, which could not sue the government – could adopt to pressure the government to grant it regulatory approval.

D. THE CONSORTIUM FINALIZES TRANSACTION FOR WIND

260. Shortly after Catalyst's exclusivity with VimpelCom expired, VimpelCom entered into exclusivity with the now-expanded Consortium.

261. While it was in exclusivity with VimpelCom, West Face's attitude towards regulatory concessions changed, and merged with Catalysts.

262. On August 26, 2014, Boland wrote to Leitner, Guffy and Fraser to update them on a discussion he had with Lacavera. According to Boland, Lacavera was concerned about a regulatory approval ("Phase One") issue:

> 6. Phase one issue – this might be a problem:
>
> a. Given that we control the application he is concerned that we may over reach (**by asking for roaming, spectrum transfer to incumbent etc**) and could thwart the "sailing through" application.[181]

263. All of sudden, out of nowhere, the Consortium appears to have been discussing spectrum transfer to an incumbent.

264. Griffin was asked repeatedly during his cross-examination if spectrum transfer to an incumbent formed any part of West Face's investment thesis. He was adamant it did not:

> Was there ever any thinking at all about selling Wind to an incumbent as part of your investment thesis?

[181] WFC0042949 – Emails among the Consortium members, August 2014. The Boland email is on page 2-3 **(CPM Tab 181)**.

> A. If an incumbent includes Rogers, Bell or Telus, the three large firms as we traditionally thought about it, no, that was not viewed as a possibility.[182]

265. This evidence is incorrect. In fact, West Face's investor memo distributed in September 2015 to investors as part of the closing of the purchase of Wind expressly contemplated the sale of Wind to an incumbent as the first "mitigating strategy" if Wind did not succeed as an independent fourth wireless carrier.

266. Page 5 of the West Face September 2014 Investment Memo set out West Face's analysis of government policy and regulatory conditions.[183] On page 17-18 of the Investment Memo (Appendix B), West Face set out its collateral coverage and mitigating strategies that offer it "downside protection".

267. West Face envisioned four scenarios that could play out if Wind fails. The first scenario was "sale to an incumbent":

> 1. Scenario 1 - Sale to an Incumbent: In the event that Wind fails and there are no other buyer options, **the government cannot logically continue to block a sale to an incumbent**. In this scenario, valuation range is C$500 to C$800 million. [Emphasis added.]

268. Griffin's evidence on this point was non-sensical and did not accord with the plain and very clear wording in the memo:

> Q. And in paragraph 1 you say:
>
> "Scenario 1 -- sale to an incumbent: In the event that Wind fails and there are no other buyer options, the government cannot logically continue to block a sale to an incumbent. In this scenario, valuation range is $500 to $800 million."
>
> A. Uhm-hmm.

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[182] Griffin Trial Cross, June 10, 2016, p. 1115, ll.19- 25 **(CPM Tab 182)**.
[183] WFC0108033 – West Face September 2014 Investment Memo **(CPM Tab 183)**.

Q. So would you agree with me that you are describing to your LPs exactly the scenario you and I were just talking about that you said was never considered by you, i.e., a sale of spectrum to an incumbent?

A. No, I would make a distinction because what we are saying here is that in the event that the investment is an abject failure and the company ends up in a position of insolvency, if the only other alternative, rather than seeing the business disappear, is to break it up into its component parts, that would be a more palatable alternative than to just letting the assets be cast to the wind.

So I understand the question you are asking me, but I would say there is a fine distinction in there in terms of the scenario that we are talking about. The other scenario that is being contemplated is regardless of the financial condition of the company, if it was a success or a modest success, would we have an unfettered ability to monetize the assets to an incumbent in five years? I would say that is a lot more difficult a proposition.

Q. Right, but what I am suggesting to you, Mr. Griffin, is this was a scenario that you were analyzing as an exit strategy in the event that your operation of Wind going forward was a failure. This was the exit strategy or one of them was your view at the time that the sale of spectrum to an incumbent would not logically be blocked by the government in a CCAA scenario, right?

A. It is an assertion we are making, and again, this memo is tailored not to the equity investment. It is tailored to the credit investment.

Q. I get that.

A. I understand the question you are asking me.

Q. I get all of that --

A. I'm not denying it is a scenario that we are contemplating, but I am trying to make the distinction for you, it is not what we predicated the investment on insofar as creating an upside opportunity or return on capital.

Q. No, but this is exactly how you mitigate your risk.

A. It is one element of it.

Q. That is exactly what I am suggesting to you. You are mitigating your risk by contemplating a scenario where there would be a sale to

> an incumbent, and not only that, but your view that the government logically couldn't continue to block that sale, right?
>
> A. We had no information to -- it was a thesis, not -- it is a thesis and not one formed with the benefit of any insight as to the possibility of that happening.[184]

269. What is evident from Boland's August 26, 2014 email and West Face's memo to its credit fund investors is that at a crucial stage of its investment in Wind, West Face, without any internal analysis or evidence of research on this point, adopted **in its entirety** the theory Glassman so strongly believed in and shared with the Wind deal team, in particular in March and May 2014 following his meetings with Industry Canada: any purchaser of Wind would be able to force the government to grant the new owner regulatory concessions that would allow it to formulate an exit strategy if Wind failed as an independent wireless carrier.

270. This contemporaneous documentary evidence is not just a coincidence. West Face has produced no documentary evidence to show how this mitigation strategy became the centrepiece of its plans to exit the investment if Wind was an "abject failure". That is because it did not conduct any independent research – it learned of this strategy, and more, from Moyse.

MOYSE'S LUCKY GUESS

271. In September 2015, after the Consortium's purchase of Wind was announced, Moyse exchanged emails with a friend about the deal.[185] The friend asked Moyse if West Face would need more bodies because it was going to be operating Wind. Moyse's reply is very telling:

> [T]hink they're just backing them financially (my guess is they are lenders to the new company and maybe have some equity or warrants). Sounds like Lacavera will probably be the largest equity holder and majority owner.

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[184] Griffin Trial Cross, June 10, 2016, p. 1128, l. 7 – p. 1130, l. 25 **(CPM Tab 184)**.
[185] BM0004989 – Emails between Moyse and B. Matlin dated September 15 and 16, 2014 **(CPM Tab 185)**.

272. During his opening argument, West Face's counsel joked that what was interesting about this email is that Moyse gets everything wrong.

273. In fact, if one reflects back to West Face's original series of proposals to Wind, Moyse's "guess" is exactly what West Face was proposing. This is not just another coincidence.

18. MOYSE'S CREDIBILITY PROBLEMS

274. Since the commencement of this proceeding, Moyse has engaged in a long-standing course of conduct whereby his evidence changes to suit the situation. For example:

(a) Moyse admitted he "embellished" his c.v. by claiming to be an "associate" at Catalyst when the promotion had not yet been finalized;[186]

(b) Moyse admitted to misrepresenting his work on the "deal sheet" he sent to West Face in March 2014 by claiming group work as his own and claiming to have led a due diligence process that he merely participated in with more senior employees at Catalyst;[187]

(c) Moyse justified the "embellishments" on his deal sheet because he wanted a job, and because it was not a sworn document;[188]

(d) Moyse made untruthful statements regarding his involvement in a Catalyst situation in an email to a former colleague;[189]

(e) Moyse knowingly caused Catalyst to breach a non-disclosure agreement through the disclosure of one of the investment memos he sent West Face;[190]

(f) Moyse wiped his Catalyst-issued Blackberry before he returned it to Catalyst without attempting to preserve the evidence on the device, and then misrepresented the facts concerning his use of the Blackberry to communicate with West Face;[191]

(g) Contrary to his evidence in 2014 regarding his "limited" role on the Wind situation, Moyse received hundreds of emails in relation to the transaction, including emails containing due diligence agendas, reports of due diligence, and a draft of the share purchase agreement;[192] and

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[186] Moyse 2014 Cross, p. 15, qq. 57-62 **(CPM Tab 186)**.
[187] Moyse 2014 Cross, pp. 17-20, qq. 69-91 **(CPM Tab 187)**.
[188] Moyse 2014 Cross, p. 20, qq. 86-91 **(CPM Tab 188)**.
[189] Moyse 2014 Cross, pp. 85-86, qq. 394-396 **(CPM Tab 189)**.
[190] Moyse 2014 Cross, pp. 96-98, qq. 446-452 **(CPM Tab 190)**.
[191] Moyse 2014 Cross, p. 103-106, qq. 473-486 **(CPM Tab 191)**.
[192] Moyse 2014 Cross, pp. 174-74, qq. 803-809 **(CPM Tab 192)**.

(h) In his 2014 cross-examination, although asked in general terms what matters he worked on at West Face, Moyse omitted reference, even in general terms, to his work on the Arcan investment on his first and second days on the job.[193]

275. In addition, Moyse admits to having deleted his web browser history, the March 27, 2014 email he sent to Dea and his response to Dea's question about Callidus.

276. In light of these repeated misstatements and efforts to wipe his tracks, it is submitted that Moyse is not a credible witness in these proceedings and his evidence should not be adopted unless it is corroborated by contemporaneous documentary evidence.

PART III - ISSUES

277. There are five issues before this Court:

1. Did Moyse transmit Catalyst's confidential information to West Face?

2. Did West Face misuse that confidential information?

3. What is the remedy for West Face's misuse of confidential information?

4. Did Moyse commit the tort of spoliation?

5. What is the remedy for Moyse's spoliation?

[193] Moyse 2014 Cross, pp. 171-72, qq. 794-96 **(CPM Tab 193)**.

PART IV - LAW AND ARGUMENT

1. GOVERNING PRINCIPLES

E. TEST FOR BREACH OF CONFIDENCE

278. The elements of breach of confidence are:

> (1) that the information conveyed was confidential;
>
> (2) that it was communicated in confidence; and
>
> (3) that it was misused by the party to whom it was communicated.[194]

279. An action for breach of confidence may be brought against a third party. In *Cadbury Schweppes Inc v FBI Foods Ltd* Justice Binnie considered the misuse of confidential information in the hands of third parties:

> [19] Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. **Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of the fact even if innocent at the time of acquisition) and impose its remedies**. It is worth emphasizing that this is a case of third party liability. The appellants did not receive the confidence from the respondents, but from the now defunct Caesar Canning. **The receipt, however, was burdened with the knowledge that its use was to be confined to the purpose for which the information as provided**, namely the manufacture of Clamato under license.[195] [emphasis added]

280. *Cadbury*, and subsequent decisions,[196] make clear that when confidential information comes into the hands of third parties who are aware, or become aware, of the confidential nature of

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[194] *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2128 at para 68 [***Husky***] **(Book of Authorities ("BOA") Tab 1)**; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at para. 129 [***Lac Minerals***] **(BOA Tab 2)**; see also *Sabre Inc v International Air Transportation Inc*, 2011 ONSC 205, aff'd 2011 ONCA 474 [***Sabre***] **(BOA Tab 3)**.

[195] *Cadbury Schweppes Inc v FBI Foods Ltd*, [1999] 1 SCR 142 at para 19 [***Cadbury***] **(BOA Tab 4)**.

[196] see *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2128 at para 208 [***Husky***]**(BOA Tab 1)** and *Chamberlin Architect Services Ltd v Saplys*, 2015 ONSC 5145 at para 9 **(BOA Tab 5)**.

the information the third party is obligated to not use that information for a purpose other than that for which it was originally disclosed.

(i) The Information Conveyed Must Be Confidential

281. Canadian courts have rejected the view that confidential information is to be treated merely as property, and have "been at pains to emphasize that the action [for breach of confidence] is rooted in the relationship of confidence rather than the legal characteristics of the information confided."[197]

282. Justice Brown in *Boehmer Box LP v Ellis Packaging Ltd,* observed the parallels between fiduciary obligations owed by departing employees and the obligation for employees not to use confidential information obtained in the course of dealing with customers and potential customers. Justice Brown observed that "the case law recognizes that in some industries a company's trade attachment with its customers represents a substantial and vulnerable business asset since it constitutes the earning power of a company."

> In addition to the trade secrets of an employer, confidential information can include commercial information, such as special knowledge about the employer's customers, knowledge of the employer's policies and procedures that would make it possible to undercut the former employer with a view to inducing the customer to change from its current supplier to the former employee, as well as customer lists.[198]

283. Information retrieved from the public domain can become confidential if its collection or assembly was "brought into being by the application of the skill and ingenuity of the human

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[197] *Cadbury Schweppes Inc v FBI Foods Ltd,* [1999] 1 SCR 142 at para 41 [***Cadbury***] **(BOA Tab 4)**.
[198] *Boehmer Box LP v Ellis Packaging Ltd*, [2007] OJ No 1694 at para 63 **(BOA Tab 6)**.

brain", or if the recipient of confidential information was able to gain an advantage that he or she would not otherwise have had if he or she had to check only public sources.[199]

(ii) The Information Must be Conveyed in Confidence

284. To determine whether information was communicated in confidence, courts have applied a "reasonable person analysis." This analysis was employed by the Ontario Court of Appeal in *Sabre Inc v International Air Transport Assn*.[200] The Court in *Sabre* cited the well known passage from *Coco v AN Clark (Engineers) Ltd*:

> It seems to me that if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realized that upon reasonable grounds the information was being given to him in confidence, then this should suffice to impose upon him the equitable obligation of confidence.[201]

285. The Court in *Sabre* explained that "[l]ike other manifestations of the reasonable person analysis found in the common law, this inquiry is necessarily contextual and sensitive to the specific assembly of facts and circumstances presented by the evidence in an individual case."[202]

(iii) The Confidential Information Must be Used for an Unauthorized Purpose

286. If it is established that the recipient of confidential information made an unauthorized use of it to the detriment of the party communicating it, the cause of action for breach of confidence is complete.[203]

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[199] *Guzzo v Randazzo*, 2015 ONSC 6936 at para 191; Justice Sopinka, in *Lac Minerals*, rejected the argument that mixing of confidential information with publicly available records somehow lessened the severity of the breach, see paras 65 and 68.
[200][200] *Sabre Inc v International Air Transport Assn*., 2011 ONCA 747 at para 16 [***Sabre***] **(BOA Tab 3)**.
[201] *Sabre Inc v International Air Transport Assn*., 2011 ONCA 747 at para 16 [***Sabre***] **(BOA Tab 3)**.
[202] *Sabre Inc v International Air Transport Assn*., 2011 ONCA 747 at para 17 [***Sabre***] **(BOA Tab 3)**.
[203] *Cadbury Schweppes Inc v FBI Foods Ltd,* [1999] 1 SCR 142 at para 52 [***Cadbury***] **(BOA Tab 4)**.

287. The onus is on a recipient of confidential information to establish that there was no prohibited use of the information.[204]

288. The recipient of confidential information has the burden of showing that the confidential information was used for its intended and authorized purpose.[205]

289. In *Lac Minerals*, Justice La Forest clarified that the appropriate inquiry with respect to misuse of confidential information is not whether the information was put to a prohibited use, but rather whether the information was used for an authorized purpose.[206]

290. Courts have held that if confidential information gives the recipient a "head start" or is used as a "spring board", there will be a corresponding detriment to the disclosing party. [207]

291. The spring board principle was explained by Justice Roxburg in *Terrapin Ltd v Builders' Supply Co (Hayes) Ltd*, [1967] RPC 375 (Ch) at 391-392:

> As I understand it, the essence of this branch of law, whatever the origin of it may be, is that **a person who has obtained information in confidence is not allowed to use it as a spring-board for activities detrimental to the person who made the confidential communication** … It is, my view, inherent in the principle upon which the *Saltman* case rests that the **possessor of such information must be placed under a special disability in the field of competition to ensure that he does not get an unfair start** [emphasis added]. [208]

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[204] *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at para. 129 [***Lac Minerals***] at para 139 **(BOA Tab 2)**.
[205] *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at para. 129 [***Lac Minerals***] at para 139 **(BOA Tab 2)**;
[206] *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at para. 129 [***Lac Minerals***] at para 139 **(BOA Tab 2)**;
[207] *Husky Injection Molding Systems Ltd v Schad*, 2016 ONSC 2128 at para 68 [***Husky***] at paras 71,73, 249 and 255 **(BOA Tab 1)**; *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at para. 129 [***Lac Minerals***] at paras 59 and 61 **(BOA Tab 2)**;
[208] As cited in *Seaway Marine Services Ltd v Weiwaikum General Partner Ltd*, 2014 BCSC 2102 at para 87 **(BOA Tab 8)**.

292. A recipient of confidential information is therefore burdened. The weight of confidential information in the hands of a competitor was explained by Justice La Forest in *Lac Minerals*:

> [140] I am therefore of the view that **Lac breached a duty owed to Corona by approaching Mrs. Williams with a view to acquiring her property, and by acquiring that property**, whether or not Lac intended to invite Corona to participate in its subsequent exploration and development. **Such a holding may mean that Lac is uniquely disabled from pursuing property in the area for a period of time, but such a result is not unacceptable**. Lac had the option of either pursuing a relationship with Corona in which Corona would disclose confidential information to Lac so that Lac and Corona could negotiate a joint venture for the exploration and development of the area, or Lac could, on the basis of publicly available information, have pursued property in the area on its own behalf. Lac, however, is not entitled to the best of both worlds.[209]

(iv) Inferences may be Drawn from Circumstantial Evidence of Misuse

293. This Court is entitled to draw factual inferences. The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence.[210] The first step in the inference-drawing process is that the primary facts which provide the basis for the inference must be established by the evidence.[211] Inferences can be drawn on the basis of reasonable probability.[212]

294. In cases involving confidential information, misuse can rarely be proved by convincing direct evidence. In *Omega Digital Data Inc v Airos Technology Inc*, Justice Sharpe cited with approval the decision of Justice Guthrie:

> In cases involving confidential business information, misuse can rarely be proved by convincing direct evidence. In most cases employers must

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[209] *Lac Minerals Ltd v International Corona Resources Ltd*, [1989] 2 SCR 574 at para. 129 [***Lac Minerals***] at para 140 **(BOA Tab 2)**.
[210] *ICBC v* Atwal, 2012 BCCA 12 at para 40 **(BOA Tab 15)**, citing R *v Morrisay*, [1995] OJ No 639 at para 52 **(BOA Tab 7)**.
[211] *ICBC v* Atwal, 2012 BCCA 12 at para 41 **(BOA Tab 15)**.
[212] *ICBC v* Atwal, 2012 BCCA 12 at para 41 **(BOA Tab 15)**.

> construct a web of perhaps ambiguous circumstantial evidence from which the Court may draw inferences which convince it that it is more probable than not that what employers alleged happened, did in fact take place. Against this often delicate construct of circumstantial evidence there frequently must be balanced the testimony of employees and their witnesses who directly deny everything.[213]

295. Commentators have suggested that with respect to business information, an "inference of misuse may be drawn from an altered course of conduct on the part of the confidant which is explicable only by reference to the unauthorized use of confidential information."[214]

2. POSITION OF CATALYST

296. Catalyst submits that by virtue of his employment, Moyse received confidential information regarding Catalyst's bidding and regulatory strategy for Wind, and breached Catalyst's confidence by communicating that information to West Face. West Face knew the information was communicated in breach of confidence and misused the information in making the August proposal as part of the consortium.

3. MOYSE POSSESSED CONFIDENTIAL INFORMATION REGARDING CATALYST'S REGULATORY STRATEGY

A. MOYSE'S CONTRACTUAL CONFIDENTIALITY OBLIGATION TO CATALYST

297. There cannot be any doubt that Moyse had a relationship of confidence with Catalyst during the term of his employment, which ended on June 22, 2014. On October 1, 2012, Moyse entered into an employment agreement with Catalyst. Pursuant to the Employment Agreement,

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[213] *Omega Digital Data Inc v Airos Technology Inc*, [1996] OJ No 5382 at para 20 **(BOA Tab 16)**.
[214] See *Gurry on Breach of Confidence*, Second Edition at 15.02 **(BOA Tab 9)**.

Moyse owed Catalyst an obligation to maintain confidentiality over the information that he received in the course of his employment.[215]

298. During the course of his employment relationship with Catalyst, Moyse received information that was, by its very nature, confidential. The confidentiality covenant outlined in the employment agreement sets out the following information that would be confidential, including:

> (a) the identity of existing or prospective investors in the Fund and any such future partnership or fund;
> (b) the structure of same;
> (c) marketing strategies for securities or investments in the capital of or owned by the Fund or any such-partnership of or any such partnership or fund;
> (d) investment strategies;
> (e) value realization strategies;
> (f) negotiating positions;
> (g) the portfolio of investments;
> (h) prospective acquisitions to any such portfolio;
> (i) prospective dispositions from any such portfolio;
> (j) personal information about [Catalyst] and employees of [Catalyst] and the like.[216]

299. The confidentiality covenant prevented Moyse from transmitting any of Catalyst's confidential information to a third party. The confidentiality covenant barred Moyse from making known to any third party any "Confidential Information" which became known to Moyse during, or as a result of, his employment with Catalyst.[217]

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[215] CCG0018684 – the Employment Agreement, pp. 5-6 **(CPM Tab 14)**.
[216] CCG0018684 – the Employment Agreement, pp. 5-6 **(CPM Tab 14).**
[217] CCG0018684 – the Employment Agreement, pp. 5-6 **(CPM Tab 14)**.

B. MOYSE'S KNOWLEDGE OF CATALYST'S BIDDING AND REGULATORY STRATEGY IN THE WIND TRANSACTION

300. Moyse was the recipient of extensive information during his employment relationship with Catalyst that is confidential. The confidential information at issue in this proceeding relates specifically to Catalyst's work on the Wind transaction and its negotiations with the federal government concerning the regulatory environment.

301. Prior to his departure on May 24, 2014, the following confidential information was known to Moyse as a result of his employment at Catalyst and his involvement with Catalyst's telecommunications deal team and the Wind deal team:

(a) Catalyst was offering VimpelCom an enterprise value of $300 million for Wind[218];

(b) Catalyst's principals, Glassman and de Alba, both stated that any transaction with VimpelCom required a condition of governmental approval and Catalyst would never waive the regulatory condition[219];

(c) Catalyst was presenting three potential scenarios to the federal government in the March and May 2014 presentations;[220]

(d) Under option 1, the fourth carrier (consisting of a combined Wind and Mobilicity entity) would be focused on the retail market. In order to effect this scenario, Catalyst required the government to grant specific concessions, including an unrestricted ability to sell to an incumbent in five years (after trying to sell to a strategic buyer or exploring an initial public offering)[221];

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[218] De Alba Affidavit, Ex 23, CCG0009482 **(CMP Tab 117)**.
[219] De Alba Affidavit, Ex 23, CCG0009482 **(CMP Tab 117)**.
[220] Glassman Affidavit, Ex 1, CCG0011564 **(CMP Tab 55)**.
[221] Glassman Affidavit, Ex 1, CCG0011564 **(CMP Tab 55)**.

(e) Under option 2, the fourth carrier would be focused on the wholesale market and would rent its spectrum to incumbents. In order to effect this scenario, Catalyst required the government to grant fewer concessions than under option 1, but still required an unrestricted ability to sell to an incumbent in five years (after trying to sell to a strategic buyer or exploring an initial public offering)[222]

(f) Under option 3, the government would face litigation from the purchaser of Wind (or the state of Mobilicity) over the retroactive and unilateral conditions imposed on the 2008 Spectrum Licenses, which would: (i) likely be successful; (ii) likely embarrass the federal government; and (iii) if successful, allow the purchaser of Wind to sell the spectrum to the incumbents without restriction[223];

(g) Catalyst could not lead the litigation contemplated in option 3 because of its involvement in other regulated industries[224];

(h) By May 7, 2014, Glassman had declared that "option 1" was no longer a possibility because the federal government told Catalyst it would not allow the unrestricted ability to sell to an incumbent in five years[225];

(i) After the March 27 and May 12, 2014 meetings with IC and the federal government, Glassman believed that the federal government was softening regarding the requested concessions because of their concern about the option 3 litigation[226]; and

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[222] Glassman Affidavit, Ex 1, CCG0011564 **(CMP Tab 55)**.
[223] Glassman Affidavit at para 27 **(CMP Tab 194)**.
[224] Glassman Affidavit at para 27 **(CMP Tab 194)**.
[225] De Alba Affidavit, Ex 23, CCG0009482 **(CMP Tab 117)**.
[226] Glassman Affidavit at para 31, 39 **(CMP Tab 195)**.

(j) Catalyst submitted a bid to VimpelCom on May 23, 2014 based on an enterprise value of $300 million[227].

302. The information above is "confidential information" as defined in the employment agreement because the above information constitutes: investment strategies; value realization strategies; negotiating positions; and prospective acquisitions to any such portfolio. The value of Catalyst's offer to VimpelCom, the timing of its offer and the fact that it had to include a condition of regulatory approval were all confidential information.

303. There is no question that the information Moyse gleaned from the March 27 and May 12 PowerPoint presentations, including the concessions Catalyst was seeking and the likelihood of success of option 3 litigation, is highly strategic and confidential. Both Glassman and de Alba testified to this fact. Moyse himself now admits that the content in the March 27 and May 12 presentations is highly strategic and confidential.[228]

304. Finally, there is no question that Glassman's observations of IC and the federal government representatives during the meeting that suggested to him that they were softening on granting the concessions sought by Catalyst are confidential under the employment agreement.

C. MOYSE COMMUNICATED THE CONFIDENTIAL INFORMATION TO WEST FACE

(i) Direct Evidence of Transfer Is Not Required

305. Catalyst candidly acknowledges that it cannot point to any direct evidence to demonstrate that Moyse transferred Catalyst's confidential information concerning Wind to West Face; however, this is not a bar to a finding of breach of confidence. Rather, this Court must look to the

[227] De Alba Affidavit, Ex 49, CCG0011362 **(CMP Tab 196)**.
[228] Moyse Trial Cross at 1531:4-16 **(CMP Tab 197)**.

overall course of conduct of the alleged recipient to determine if it can infer that the transfer of confidential information occurred, and it must also consider whether that direct evidence was destroyed in the course of this proceeding.

(ii) Moyse's Conduct Indicates a Willingness and Opportunity to Transmit Catalyst's Confidential Information to West Face

306. Moyse's conduct is consistent with that of a person who is willing to share confidential information with a prospective employer, West Face, in order to curry favour and act on his animus towards his former employer, Catalyst.

(iii) Moyse Does Not Understand What Makes a Document Confidential

307. Moyse has demonstrated a tendency to not understand what makes a document confidential.

308. At the commencement of these proceedings, Moyse refused to accept that the investment memorandums that he sent to Dea on March 27 as his purported "writing samples" were confidential. Only at trial did Moyse finally accept that the Catalyst investment memos were both confidential and proprietary. Despite admitting that the memos were confidential, Moyse cannot help but deflect the blame for sending them – in direct examination he claimed that when he sent the memos he was tired, it was late at night, it had been a busy day and he should have taken more time to think about what he was doing.[229] Moyse still claims that at the time of sending them, he did not believe they would be harmful to Catalyst:

> I specifically chose these because, in my mind at the time, they were – they represented other analyses based on completely public information, or dead, stale, inactive, inactionable ideas. It doesn't

[229] Moyse Direct Examination at 1374:21-2 **(CMP Tab 198)**.

> change the fact they were confidential and I shouldn't have sent them.[230]

309. Moyse's testimony at trial that he believed the investment memos were confidential is an about face from Moyse's testimony on cross-examination in July 2014. During that cross-examination, Moyse professed to not understand what made a memo confidential:

> Q. So what makes a memo confidential?
>
> A. I'm not really sure.[231]

310. Moyse continued to profess his lack of understanding about confidential information:

> Q. Right. Right? It's the level of analysis, that's the work product that's being performed for your employer; you surely understand that.
>
> A. Yes.
>
> Q. And that's what makes it confidential.
>
> A. I don't know.
>
> Q. Do you disagree with that?
>
> A. I don't know what makes it confidential.[232]

311. Moyse refused to accept that the investment memos were confidential, despite being marked as "Privileged and Confidential" and "For Internal Discussion Only". He claimed that the memos were based on publicly available information:

> Q. Okay. And in terms of the actual confidential information, you say it didn't include any confidential information, you don't mean to suggest again that the analysis that you're performing is not confidential?
>
> A. I don't believe it is. It was based on publicly available information.

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[230] Moyse Direct Examination at 1375:5-11 **(CMP Tab 199)**.
[231] Moyse July 2014 Cross at q 429**(CMP Tab 200)**.
[232] Moyse July 2014 Cross at qq 435-437**(CMP Tab 201)**.

> Q. Right. But lots of things are based on publicly available information, but the fact that you're performing an analysis that may not be readily available to the public is what makes it confidential. That's your work product is analyzing.
>
> A. I agree it's a work product and proprietary.
>
> Q. And that's what makes it confidential. That's what you're being paid for, to perform this analysis that's not publicly available.
>
> A. I multiply publicly available numbers by publicly available numbers. Like-minded people would have done the same thing.[233]

312. The fact that Moyse does not appreciate what constitutes confidential information suggests that he would be willing to share it without realizing its confidential nature. Even during trial, Moyse was careful to qualify his answers about how he learned that Catalyst was interested in purchasing Wind in 2014. He claimed that he could not recall if he learned it from media reports or from the far more likely source, Catalyst itself.[234] This Court can conclude that while he was interviewing with and working for West Face, Moyse did not understand the character of confidential information, or was reckless/willfully blind in regard to his duty of confidentiality to Catalyst.

(iv) Moyse Demonstrates a Tendency to Share Confidential Information

313. Moyse had no difficulty sharing at least some of Catalyst's confidential information with West Face.[235] Moyse also had no issue publicly confirming Catalyst's involvement in Wind during interlocutory proceedings in 2014.[236]

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[233] Moyse July 2014 Cross at qq 431-433 **(CMP Tab 202)**.
[234] Moyse Trial Cross at 1519:3-25 **(CMP Tab 203)**.
[235] Dea Affidavit, Exhibit 3, WFC0075126 **(CMP Tab 95).**
[236] Moyse July 2014 Affidavit at paras 10-12 **(CMP Tab 204)**.

(v) Moyse Reviews Confidential Documents Immediately Preceding and After Interviews with West Face

314. Moyse accessed Catalyst records, including investor letters and Stelco files, neither of which he had any business reason to view. These files were accessed on March 27, after Moyse's interview with Dea and April 26, the day after Moyse scheduled his interview with Boland.

(vi) Moyse Demonstrates an Inexplicable Interest in Wind On Vacation

315. Moyse continued to show an interest in the Wind transaction while away on vacation and after having received an offer of employment with West Face. On May 21 and 23, Moyse asked his fellow analyst for updates on the Wind transaction, despite having absolutely no reason to do so. It is submitted that Moyse's inquiries were intended to elicit information that Moyse did not have access to because he was not in the Catalyst office. West Face's call logs indicate that Moyse had an 11:26 minute call with a West Face employee on May 22 and a 16:10 minute call with Tom Dea on May 23.

(vii) Moyse Minimized his Involvement in the Wind Deal Team

316. Moyse has continually minimized his role in the Wind transaction at Catalyst, including by denying that he knew that Catalyst was negotiating with VimpelCom before May 6, 2014.[237] His refusal to admit facts that are plainly supported by the contemporaneous documentary record is indicative of the fact that Moyse has something to hide about the extent of his knowledge of Wind.

(viii) Moyse Had Numerous Opportunities to Transfer Confidential Information

317. Moyse had a number of opportunities to transfer Catalyst's confidential information relating to Wind to West Face, including:

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[237] BM000624 – Affidavit of Brandon Moyse affirmed July 7, 2014 ("Moyse July 7 2014 Affidavit), at ¶11 **(CMP Tab 67)**; Moyse 2014 Cross, p. 155, qq. 736 – 737 **(CMP Tab 68)**; BM001935 – Affidavit of Brandon Moyse affirmed April 2, 2015 ("Moyse 2015 Affidavit"), at ¶14**(CMP Tab 69)**; Moyse 2015 Cross, p. 15, qq. 59-60 **(CMP Tab 18)**; Moyse June 2 2016 Affidavit at ¶64 **(CMP Tab 71)**.

(a) During his March 27 meeting with Dea;

(b) During his April 15 interviews with Griffin, Fraser, and Zhu;

(c) During his April 28 interview with Boland;

(d) In calls or text messages with representatives of West Face, either using his Catalyst Blackberry (which he wiped) or his personal cellphone;

(e) Via email from his Hotmail or Gmail email account;

(f) During meetings with any West Face employees while Moyse was on garden leave from Catalyst (between May 26 to June 22, 2014); and

(g) During face-to-face conversations with West Face representatives at West Face's offices between June 23 and July 14, 2014.

318. The confidential information that Catalyst alleges West Face received concerning Catalyst's strategy on Wind can be transmitted through a telephone discussion or in a meeting. The information is not something that necessarily requires transmission via documents. The lack of direct evidence or a document demonstrating transmission of the information from Moyse to West Face is equally consistent with it being transmitted in these other ways.

(ix) Moyse Deletes Evidence of Transfer of Confidential Information

319. It is indisputable that Moyse deleted at least some evidence of his communications with West Face.

320. Moyse wiped his Catalyst-issued Blackberry before returning it to Catalyst on May 24, 2014. Moyse claimed during cross-examination at trial that he did so because he wanted to delete

personal text messages and photos. However, he refused to admit that in doing so, he was also deleting relevant evidence:

> Q. Right. And so what you say in this affidavit, and I am looking specifically at paragraph 4 now, you say:
>
> "I 'wiped' the data from my BlackBerry prior to returning it to Catalyst, not to 'destroy evidence', but to remove any personal information from the device."
>
> And you go on to say some other things, but what I want to do is I want to go right to the last sentence:
>
> "In any event, I did not use my BlackBerry device or my Catalyst email account to communicate with West Face so this information was not deleted when I wiped the device prior to returning it to Catalyst."
>
> Now, let's just pause there for a second. That, sir, we know now is not true.
>
> A. Are you referring to the fact that I took a couple of phone calls on it?
>
> Q. Exactly right. You in fact did and had used your personal BlackBerry for the purpose of communicating with West Face?
>
> A. Yes, I had two phones. I didn't remember at the time which one I had used.
>
> Q. But, sir, if you don't remember things at the time, is it just simply your attitude that you should be fast and loose with what you are telling the Court in a sworn affidavit?
>
> A. No. I didn't think I had used it for that.
>
> Q. Sorry?
>
> A. I didn't think I had used it for that purpose.
>
> Q. But if you were not sure about it, I suggest to you you ought not to have made this statement in an affidavit sworn to the Court?
>
> A. It was wrong. It was a wrong statement, but I thought it was true.

Q. So we can all agree now that you did, in the process of wiping your BlackBerry, destroy evidence of your communications with West Face?

A. I don't agree. That evidence is call logs. That is not destroyed on the BlackBerry.

Q. What call logs, sir? The call logs are exactly what you destroyed?

A. But evidence of those calls had been produced.

Q. No, sir, listen, follow me. Your BlackBerry would have a history of calls that were made between you and West Face?

A. Sure, but Catalyst gets the bills. They could have gotten the list of calls I had made and received.

Q. Sir, do you know whether the bills that Catalyst would have received would have contained that level of detail?

A. I don't.

Q. So can you and I, just taking a step back, agree that evidence that existed on your BlackBerry in relation to the call log, at minimum, would have contained evidence of your communications with West Face in this critical period?

A. The information on the BlackBerry, yes, would have been deleted.

Q. And in addition to whatever call logs may have existed on the BlackBerry, your BlackBerry also would have contained a record of text messages as an example?

A. Correct.

Q. And any evidence of any text messages that you sent using your BlackBerry was also deleted?

A. I don't know.

Q. You don't know that?

A. Well, again, I don't know if the text messages can be recovered in some other way.

> Q. Sir, your evidence was, I can take you to it in paragraph 3 of this affidavit, that the reason you wiped your BlackBerry was precisely because you wanted to remove evidence of text messages?
>
> A. That was the best I could do, was delete it from the device. That doesn't mean I didn't think there was a possibility it could be recovered elsewhere.
>
> Q. Right, and how did you think that was all going to work? How did you think your text messages were going to magically be recovered?
>
> A. I'm not a technical expert. I don't know.[238]

321. Moyse also admits to deleting the email replying to Dea regarding his Callidus question, as well as the email sending Dea the confidential memos.[239]

(x) Moyse's Conduct is Calculated and Deliberate

322. Despite his submission otherwise, Moyse is not a rookie that made a few innocent mistakes. To the contrary, Moyse's actions before and during these proceedings have been calculated, thoughtful and deliberate. Moyse's intentional deletion of emails, including the emails to Dea on March 26 (discussing Callidus) and March 27 (attaching the confidential Catalyst memos) as well as the wiping of his Catalyst Blackberry, his admitted deletion of his internet browsing history, and "cleaning" his personal computer's registry, are consistent with an individual trying to hide his tracks.

323. Moyse's credentials suggest that he is very intelligent and experienced. Moyse scored a near perfect on his SATs. He attended an Ivy-League school and received an undergraduate degree

[238] Moyse Trial Cross at 1450:15 – 1454:9 **(CMP Tab 204)**.
[239] Dea Cross-Examination Brief, Tab 3, WFC00301090 **(CMP Tab 78)**.

in mathematics. Before arriving at Catalyst, Moyse spent two years working at Royal Bank of Canada in Toronto and Credit Suisse in New York.[240]

324. The references that Moyse offered to West Face described him as: "very hard working", "driven", as someone able to "get in the weeds" and "take a position/develop a view". Importantly, Moyse's references described him as someone who "had the capacity to develop into more than a processor".[241]

325. Moyse demonstrated a clear animus towards Catalyst and to its principals, including Glassman. Moyse admitted that he was unhappy and very frustrated at Catalyst. Despite denying that he had an animus towards Catalyst, he unequivocally admitted that he made derogatory jokes about Catalyst to his friends and that he joked about Catalyst partners with representatives of West Face.[242]

326. Moyse's did not make a rookie mistake. He acted deliberately to hide the fact that he transferred Catalyst's confidential information to West Face.

(xi) West Face is a Willing Recipient of Confidential Information

327. It is submitted that the Court can, on the record at trial, draw a reasonable and logical inference that West Face received Catalyst's confidential information concerning Wind from Moyse, knowing that it was confidential information.

328. West Face's conduct demonstrates that it had little difficulty accepting confidential information regardless of the source. In fact, Dea, one of West Face's partners, claimed on cross examination that there was a "spectrum of confidential information":

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[240] Moyse Trial Affidavit at para 10-11 **(CMP Tab 13)**.
[241] Dea Trial Affidavit at para 25 **(CMP Tab 206)**.
[242] Moyse Trial Cross Examination at 1566:5-1567:3 **(CMP Tab 207)**.

> Q. Well, benign, what does benign mean?
>
> A. Well, by benign, what I mean is there is a spectrum of confidential information. If someone were to pass on information a day ahead of a public takeover and it went up 50 percent the next day, that would be one end of the spectrum. At the other end you could have an internal memo that contains a summary of a company based on a few hours of work that summarizes information from their publicly disclosed financial documents. There is a spectrum to these things.[243]

329. West Face never objected to receiving confidential information from Moyse. Dea did not reveal any concern after receiving the investment memoranda from Moyse on March 27, despite it being obvious from the cover email that Moyse had not heeded his caution about confidential information.[244] Rather, he circulated the memoranda to his partners (and Zhu) on two separate occasions. Also, when Catalyst raised concerns about Moyse transferring confidential information to West Face in early June 2014, West Face did not disclose the fact that it possessed the confidential investment memos that Moyse sent to Dea.[245]

330. Second, the evidence demonstrates that in July and early August, West Face was willing to accept confidential information from various sources as part of its attempts to acquire Wind with the Consortium. In particular, West Face received information about Catalyst's exclusivity, and the economic terms of Catalyst's bid from Tennenbaum and UBS. West Face did not react by cautioning the rest of the Consortium about the misuse of confidential information.[246] Instead, West Face disseminated the information provided by Tennenbaum within its own organization.[247]

331. West Face's behavior betrays a willingness to trade on confidential information regardless of the source.

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[243] Dea Trial Cross at 1248:3-14 **(CMP Tab 93)**.
[244] Dea Affidavit, Exhibit 3, WFC0075126 **(CMP Tab 95)**.
[245] Riley June 26, 2014 Affidavit, Exhibit K, CCG0018694 **(CMP Tab 147)**,
[246] WFC0047832 at 2 **(CMP Tab 179)**.
[247] WFC0070195 **(CMP Tab 178)**.

332. Third, shortly after Moyse's hiring on May 26, 2014, Griffin not only knew that Catalyst was in the bidding for VimpelCom, but he was able to comment on the quality of the Catalyst proposal ("Catalyst seems to be a lot of air").[248]

333. It is submitted that Griffin must have known Catalyst's regulatory strategy and the concessions it was trying to obtain from IC and the federal government to make this statement about Catalyst's proposal. Griffin's statement is consistent with his trial evidence about his view of Catalyst's regulatory strategy. Griffin said of Catalyst's regulatory strategy:

> With no disrespect intended to Mr. Glassman, had Mr. Moyse informed me of Mr. Glassman's opinions, I would not have put any stock in them given that they were directly contradictory to our own views, and the views of Simon Lockie, WIND'S Chief Legal Officer.
>
> In short, even if I had considered Mr. Glassman's "analysis and approach", I would not have considered it as meaningfully mitigating the financial risk in bidding for WIND, let alone "eliminating" it.[249]

334. It is submitted that the reason Griffin described Catalyst as being "full of air" is because he was aware of Catalyst's negotiation strategy. Griffin believed that the federal government would never grant the concessions sought by Catalyst, thereby making Catalyst's bid weak.

335. Griffin's explanation for his statement about Catalyst's bid is entirely incredible. Griffin testified:

> Q. What did you mean by that, "Catalyst seems to be a lot of air"?
>
> A. Well, I guess to put it in layman's terms, for all the smoke and discussion about their potential involvement, we had nothing to

[248] Griffin Trial Affidavit, Exhibit 30, WFC0068142 **(CMP Tab 143)**.
[249] Griffin Trial Affidavit at para 110 **(CMP Tab 208)**.

> substantiate that they were there, that they were serious or credible. I didn't know.[250]

336. This explanation simply does not make sense in a competitive bidding process where the bidding parties were bound by non-disclosure agreements with VimpelCom. It is unclear how Griffin could ever "substantiate" Catalyst's involvement or its seriousness without obtaining confidential information about Catalyst's bid. The more credible explanation for Griffin's comment on the quality of Catalyst's bid is that Moyse had provided West Face with Catalyst's confidential information regarding Wind by that point in time.

337. Fourth, none of Griffin, Leitner or Burt would concede that by July 23, the Consortium *knew* that Catalyst was the party in exclusivity with VimpelCom. Even in the face of an extensive number of contemporaneous emails that use phrases like "Catalyst is in exclusivity" or the "Catalyst SPA is going to the Board this weekend", Griffin, Leitner and Burt refused to agree they knew Catalyst was in exclusivity. Instead, all three claimed, incredibly, that they were using Catalyst as a "placeholder" in emails, or that they were simply assuming that Catalyst was a bidder.

338. The reason that this denial is so significant in this case is because actual knowledge of the identity of the competing bidder could have a very significant role in explaining the actions taken by the Consortium after the members of the Consortium became aware of the fact that the Catalyst SPA was being taken to the VimpelCom board for approval.

339. Prior to having this knowledge, the Consortium could not be confident of what negotiating positions were likely being taken by interested parties. While they were in the dark on this, the Consortium continued down the path of making a bid resembling previous overtures and which

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[250] Griffin Trial Cross at 752:2-8 **(CMP Tab 145)**.

contemplated a potential combination of Wind and Mobilicity (and which would require regulatory concessions/approvals).

340. However, once the Consortium knew that Catalyst's bid was the one being taken to VimpelCom's board, it was then in a position to use the confidential information in the possession of West Face with respect to its negotiating position and its regulatory approach in order to confidently make a "superior" proposal.

341. On August 6, 2014, the Consortium submitted a proposal to VimpelCom entitled "Superior Proposal". The Proposal outlined several key terms, including an enterprise value of $300 million. Importantly, it said the following regarding a regulatory condition:

> Our proposal will be superior to any other offer as our proposal will not require regulatory approval and our Investor Group will be able to close and fund the transaction within 24-48 hours after signing. Our transaction will not be a change of control of the Company, and as a result requires no engagement with the regulatory authorities.[251]

342. The practical effect of the Consortium's proposal to VimpelCom was that within 24-48 hours, the Consortium would step into the shoes of VimpelCom with a majority of the equity in Wind but no voting control of the entity. The Consortium would have to hope that IC would approve a reorganization of the equity structure as a second step, and permit the Consortium to take control of Wind. This was a risky proposition. Two of the members of the Consortium, Tennenbaum and LG, were foreign backers. IC had previously been wary of giving any foreign backer control of a Canadian telecommunications company.

[251] Leitner Affidavit, Exhibit 4, WFC0075054 **(CMP Tab 209)**.

343. Additionally, the Consortium had received information that Catalyst had entered the exclusivity period at VimpelCom's reserve price, $150 million.[252] However, in making its Superior Proposal, the Consortium offered VimpelCom the equivalent of $150 million and did not raise its consideration even a dollar above the reserve price.

344. It is evident that the Consortium executed these tactics because it knew Catalyst was in exclusivity and was emboldened with the knowledge from Moyse that Catalyst could and would not waive a regulatory condition. The simplest way for the Consortium to block Catalyst was to offer VimpelCom the deal that Catalyst could not do itself.

345. Importantly, it is submitted that the only logical reason the Consortium was willing to execute this strategy and take the risk of stepping into VimpelCom's shoes is because West Face had received from Moyse information regarding Catalyst's option 3 and Glassman's impressions of how IC and the federal government reacted to his explanation of potential litigation. The Consortium knew that it could use this potential litigation as leverage to pressure the federal government to offer the concessions that Catalyst wanted, and that the government would ultimately have no choice but to allow a sale to incumbents. The Consortium therefore knew that it had a viable mitigating strategy – one that had been formulated by Catalyst and that Moyse was well aware of.

346. Griffin gave testimony on several occasions that West Face "had no need for a guarantee from the Government that West Face would be able to sell Wind and/or its spectrum to an incumbent in five years".[253] He testified that West Face would never have based its strategy on the "litigation" that Glassman believed could be pursued against the federal government concerning

[252] WFC0048724 **(CMP Tab 177)**.
[253] Griffin Trial Affidavit at para 101 **(CMP Tab 210)**.

the regulatory restrictions on the transferability of the 2008 spectrum licenses.[254] Griffin went so far as to state the following:

> As such, I categorically disagree with Mr. Glassman's statement in paragraph 34 of his Affidavit that "knowledge of this analysis and approach would prove **invaluable** to any other potential bidder since it in essence would **massively mitigate,** if not entirely **eliminate,** their financial risk in bidding". In fact, we fundamentally disagreed with Mr. Glassman's analysis. Based on our own discussions with Industry Canada, including during the May 21 meeting with Industry Canada, described above, West Face believed that the Government was going to continue to promote a fourth wireless carrier by maintaining the existing restrictions on transfers of spectrum to incumbents. We never understood the Government's policy stance to be a "bluff". [255]

347. Griffin held fast to this position during cross-examination:

> Q. I just asked you the simple question, did you ever at any point consider the prospect of selling spectrum to an incumbent?
>
> A. Would it enter our thinking? Sure. Did we rely upon it? No.
>
> Q. So it did enter your thinking at minimum? Yes?
>
> A. It is a possibility, like lightning striking.[256]

348. He indicated that selling Wind to an incumbent was not part of West Face's investment thesis:

> Q. Was there ever any thinking at all about selling Wind to an incumbent as part of your investment thesis?
>
> A. If an incumbent includes Rogers, Bell or Telus, the three large firms as we traditionally thought about it, no, that was not viewed as a possibility.[257]

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[254] Griffin Trial Affidavit at para 106 **(CMP Tab 211)**.
[255] Griffin Trial Affidavit at para 107 **(CMP Tab 212)**.
[256] Griffin Trial Cross at 1113:17-25 **(CMP Tab 213)**.
[257] Griffin Trial Cross at 1115:19-25 **(CMP Tab 182)**.

349. However, contemporaneous documents directly contradict Griffin's testimony on this critical point. The fact was, West Face *did* consider the sale of Wind (or its spectrum) to an incumbent and it *was* part of West Face's investment thesis. This was not mere coincidence.

350. On August 26, 2014, Boland wrote to the Consortium summarizing a meeting with Lacavera. In his message to the Consortium, Boland explained the following:

> Phase one issue – this might be a problem.
>
> Given that we control the application he is concerned that we may over reach (by asking for roaming, spectrum transfer to incumbent etc) and could thwart "sailing through" application.[258]

351. It is notable that Boland did not give evidence in this proceeding. However, it is plain from this email that the Consortium did, in fact, intend to push the federal government for concessions concerning roaming and spectrum transfer to incumbents despite agreeing to step into the shoes of VimpelCom in phase one of the transaction.

352. Griffin's trial testimony is also directly contradicted by West Face's own investor memo, dated September 10, 2014. According to Griffin, this is the memo that would have been distributed to West Face's LPs to raise capital for the purchase of Wind.[259]

353. The memo refers to the fact that West Face's investment would be supported by "significant asset value" in a liquidation scenario.

354. Despite claiming that selling to an incumbent did not enter into West Face's investment thesis, this memo outlines mitigating "Scenario 1" as follows:

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[258] WFC0042949 (Cross Exam of Griffin, Tab 57) **(CMP Tab 181)**.
[259] Griffin Cross at 1124:5-16 **(CMP Tab 214)**.

> 1. *Scenario 1 – Sale to an Incumbent:* In the event that Wind fails and there are no other buyer options, the government cannot logically continue to block a sale to an incumbent. In this scenario, valuation range in C$500 to C$800 million.[260]

355. Griffin's evidence was that West Face believed that the government would maintain its position on promoting competition and its position on refusing to allow transfers of spectrum to incumbents was not a bluff.[261] That is contradicted by the clear language of the memo. There is no document produced by West Face that demonstrates that there was any considered analysis performed by West Face or its advisors on this critical risk mitigation strategy.

356. The only logical inference to draw from the glaring inconsistency between Griffin's testimony and the lack of contemporaneous supporting documents is that West Face did have access to Catalyst's analysis regarding option 3 and possible litigation against the federal government, and based its investment thesis on this information.

4. WEST FACE MISUSES THE CONFIDENTIAL INFORMATION TO WIN WIND FROM VIMPELCOM

A. WEST FACE AND THE CONSORTIUM RELIED ON THE CONFIDENTIAL INFORMATION TO SECURE WIND FROM VIMPELCOM

357. The Consortium's offer on August 6 was based on Catalyst's confidential information – the Consortium planned its structure around the one condition that Catalyst could not waive. The Consortium only pursued their structure with confidence because it had Catalyst's analysis concerning the logical outcome of potential litigation with the federal government over the spectrum licenses.

358. The Consortium used Catalyst's confidential information as a spring board to launch itself ahead of Catalyst in the bidding with VimpelCom. As a result of the Consortium's

[260] WFC0108033 at p 18 (Cross Exam of Griffin, Tab 58) **(CMP Tab 183)**.
[261] Griffin Trial Affidavit at para 107 **(CMP Tab 212)**.

spring-boarding, Catalyst could not complete an agreement with VimpelCom during the exclusivity period. Additionally, it is submitted that VimpelCom demanded a break fee and a shorter time period for regulatory approvals because it had the Consortium's offer in hand as well. This was exactly what the Consortium had intended.

5. WEST FACE MUST ACCOUNT FOR ITS PROFITS ARISING FROM THE WIND TRANSACTION

A. REMEDIES FOR BREACH OF CONFIDENCE

359. Remedies available for breach of confidence are unique. As explained by Justice Sopinka in *Lac Minerals*, "the foundation of action for breach of confidence does not rest solely on one of the traditional jurisdictional bases for action of contract, equity or property. The action is *sui generis* relying on all three to enforce the policy of the law that confidences be respected."[262] Justice Sopinka observed that "[t]his multi-faceted jurisdictional basis for the action provides the Court with considerable flexibility to fashion a remedy."[263]

360. Acknowledging the fact dependent and flexible remedies available, Justice La Forest for the Court held:

> **182** The appropriate remedy in this case cannot be divorced from the findings of fact made by the courts below. As I indicated earlier, there is no doubt in my mind that but for the actions of Lac in misusing confidential information and thereby acquiring the Williams property, that property would have been acquired by Corona. That finding is fundamental to the determination of the appropriate remedy. Both courts below awarded the Williams property to Corona on payment to Lac of the value to Corona of the improvements Lac had made to the property. The trial judge dealt only with the remedy available for a breach of a fiduciary duty, but the Court of Appeal would have awarded the same remedy on the claim for breach of confidence, even though it was of the view that it was artificial and difficult

[262] *Lac Minerals* at para 73 **(BOA Tab 2)** .
[263] *Lac Minerals* at para 74 (**BOA Tab 2**).

> to consider the relief available for that claim on the hypothesis that there was no fiduciary obligation.

361. Justice Binnie in *Cadbury* reinforced the contextual, and fact dependant, nature of remedies available for breach of confidence:

> **24** The result of Lac Minerals is to confirm jurisdiction in the courts in a breach of confidence action to grant a remedy dictated by the facts of the case rather than the strict jurisdictional or doctrinal considerations. See J.D. Davies, "Duties of Confidence and Loyalty", [1990] Lloyd's Mar. & Com. L.Q. 4, at p. 5:
>
> > There is much to be said for the majority view in [Lac Minerals] that, if a ground for liability is established, then the remedy that follows should be one that is most appropriate on the facts of the case rather than one derived from history or over-categorized.[264]

362. The Supreme Court in *Cadbury*[265] and the Ontario Court of Appeal in *Rodaro v Royal Bank of* Canada have recognized loss of potential economic opportunity as a sound method to determine damages.[266] In all cases, a detriment to the confider must be shown.[267]

363. In Cadbury, Justice Binnie considered the assessment of damages in light of a competitive marketplace and the accompanying loss of speculative economic opportunity:

> [71] That having been said, the respondents were in the business of exploiting commercial opportunities, and their ability to make a profit from Clamato was limited by the acknowledged entitlement of the appellants to market a similar product without clam juice. **The assessment of compensation has therefore to address the value of the lost market opportunity and, in particular, the lost advantage of being able to market Clamato free of the appellants' competition for 12 months, and not be diverted to a valuation of the confidential information itself**. […]

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[264] *Cadbury* at para 24 **(BOA Tab 4)**; see also *Husky Injection Molding Systems Ltd v* Schad, 2016 ONSC 2297 at para 75 **(BOA Tab1)**.
[265] *Cadbury* at para 64 **(BOA Tab 4)**.
[266] *Rodaro v Royal Bank*, 2002, OJ No 1365 (ONCA) at para 57 **(BOA Tab 10)** (the court recognized loss of opportunity as a sound method of determining damages, however did not apply it in that case).
[267] *Rodaro v Royal Bank*, 2002, OJ No 1365 (ONCA) **(BOA Tab 10)** at para 48.

> [73] The respondents complain that the trial judge's analysis was hypothetical, because the appellants have never in fact reproduced Clamato using non-confidential technology. **However, the Court is free to draw inferences from the evidence as to what would likely have happened "but for" the breach**: Lac Minerals, per Sopinka J., at pp. 619-20, and per La Forest J., at pp. 668-69; Rainbow Industrial Caterers Ltd. v. Canadian National Railway Co., [1991] 3 S.C.R. 3, at p. 15; Pharand Ski Corp. v. In Alberta, supra, per Mason J., at p. 263, para. 202; and Chaleur Silica Inc. v. Lockhart (1990), 108 N.B.R. (2d) 366 (Q.B.), per Russell J., at p. 405, para. 76. In the case of Coco v. A. N. Clark (Engineers) Ltd., supra, on which they rely so strongly, Megarry J., at p. 49, pointed to the artificiality of actually requiring the confidant to discover "independently" the information of which he or she is already aware.

364. Your Honour has recently surveyed the available remedies for breach of confidence in *Husky*:

> [367] The principles on which damages may be claimed in this case are set out in the submissions of Husky, which I accept. They are based on Cadbury Schweppes Inc. v. FBI Foods Ltd., [1999] 1 S.C.R. 142; Canson Enterprises v. Broughton, [1991] 3 S.C.R. 534; and Dimock, Ronald E. ed., Intellectual Property Disputes: Resolutions and Remedies (Toronto: Carswell, 2015). Husky's submissions are the following:
>
> > 208. Damages can be awarded for breach of confidence and for breach of fiduciary duty pursuant to the court's general equitable jurisdiction. **The objective of damages for breach of confidence is "to put the confider in as good a position as it would have been in but for the breach."** For equitable compensation, the plaintiff's actual loss as a consequence of the breach is to be assessed with the full benefit of hindsight." Foreseeability is not a concern in assessing compensation, but it is essential that the losses made good are only those which on a common sense view of causation, were caused by the breach." The plaintiff is not required to mitigate, but losses resulting from clearly unreasonable behaviour on the plaintiff's part will be adjudged to flow from that behaviour and not from the breach.
> >
> > 209. **The appropriate measure of damages for breach of confidence may include** any one or a combination of the following considerations: (1) **loss of profit**; (2) the value of a consultant's fee; (3) **the development costs incurred in acquiring the information;** (4) capitalization of an appropriate royalty; (5) the

> market value on information as between a willing buyer and a willing seller; and/or (6) **lost opportunity.**
>
> 210. The following factors have been identified as helpful in establishing loss of profit: (1) **identifying specific customers that were diverted to the defendant**; (2) showing proof of a general decline in sales; (3) **disruption of business growth following the commencement of use by the defendant**; and (4) evidence that sales made by the defendant would instead have been made by the plaintiff, in which case the plaintiff may establish its lost profits by applying its own profit margin to the defendant's sales.
>
> 211. A compensable period must be determined. In Cadbury Schweppes, that period was fixed at 12 months...

B. WEST FACE MUST ACCOUNT FOR ITS PROFITS

365. In order to place Catalyst in the position that it would have been in "but for" the breach, this Court must order that West Face account for its profits earned on the Wind transaction. The detriment Catalyst suffered as a result of the Consortium's misuse of Catalyst's confidential information was the loss of the Wind transaction. This Court can and should infer that Catalyst's offer for Wind would have been successful but for the defendants' breach of confidence and misuse of confidential information.

6. MOYSE COMMITTED THE TORT OF SPOLIATION

A. GENERAL PRINCIPLES OF SPOLIATION

366. Spoliation is the intentional destruction of evidence relevant to ongoing or contemplated litigation, where a reasonable inference can be drawn that the evidence was destroyed to affect the litigation.[268]

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[268] *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 at para 18 **(BOA Tab 11)**.

367. Spoliation gives rise to a rebuttable presumption that the evidence would be unfavourable to the party who destroyed the evidence. The presumption can be rebutted by proving that there was no intention to destroy evidence relevant to existing or contemplated litigation.[269]

368. Spoliation will be made out when the following four elements are established on a balance of probabilities:

a. the missing evidence is relevant;

b. the missing evidence must have been destroyed intentionally;

c. at the time of the destruction, litigation must have been ongoing or contemplated; and

d. it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.[270]

369. In addition to being an evidentiary doctrine, Canadian courts have begun to gradually accept spoliation as a basis for an independent tort with its own remedies.

(xii) The Tort of Spoliation

370. Spoliation can and should be recognized as an independent tort within the framework of this case. This is particularly so where the destruction of evidence took place within the context of a preservation order and an eventual court-ordered ISS process.

371. Canadian courts have been slow to expand spoliation into a free-standing tort; however, there are increasing indications that the time has now come for a recognized tort of spoliation. In Ontario, the Court of Appeal in *Spasic Estate v Imperial Tobacco Ltd*. refused to dismiss a claim for the tort of spoliation on an appeal of a motion to strike the claim, and refused to foreclose the

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[269] *McDougall v Black & Decker Canada Inc*, 2008 ABCA 353 at paras 16-18 **(BOA Tab 11)**..
[270] *Nova Growth Corp v Kepinski*, 2014 ONSC 2763 at para 296 **(BOA Tab 13)**.

possibility that one of the possible remedies for the intentional destruction of evidence might be the imposition of an obligation in tort. Borins JA, writing for a unanimous Court, held:

> [22] Therefore, I would apply the reasoning of Wilson J. in Hunt and permit the plaintiff's claim based on the tort of spoliation to proceed to trial. As in Hunt, there is no need to embark on a detailed consideration of the strengths and weaknesses of the law, including the Canadian law, on the tort of spoliation. **If it is established that the conduct of the respondents resulted in harm to the plaintiff by making it impossible for her to prove her claim, then it will be for the trial judge, in the context of a complete record, to determine whether the plaintiff should have a remedy**. This is how the progress of the common law is marked in cases of first impression, where the court has created a new cause of action where none had been recognized before. I need refer only to Donoghue v. Stevenson [1932] A.C. 562, 101 L.J.P.C. 119 (H.L.) as but one example. Expanding on what Wilson J. stated, when it is clear that a person's interests are entitled to legal protection against the conduct of another, the fact that the claim is novel will not in itself operate as a bar to a remedy. As well, I do not see why the existence of procedural sanctions or the "spoliation inference", which may, or may not, ameliorate the effects of spoliation, should in themselves preclude the recognition of an independent tort. As the appellant relies on the spoliation inference, the trial judge will hear and consider evidence of spoliation in any event. **I can see no reason why the trial judge should be precluded from considering all possible remedies, including a separate tort**, on the basis of the record that will be developed. [emphasis added].[271]

372. More recently, the Alberta Court of Appeal, in *McDougall v Black & Decker Inc*, provided a comprehensive overview of the development of the independent tort and tracked the willingness of courts throughout Canada to grant remedies for the intentional destruction of evidence beyond the application of a rebuttable presumption.[272] The Court in *McDougall* concluded that:

> [22] **These cases suggest there is some judicial recognition that the remedy described in *St. Louis* may not be enough to deal with the prejudice caused by the intentional destruction of evidence**, although I note that there is nothing in *St. Louis* [i.e. "rebuttable presumption of fact arises that the evidence would tell against the spoliator"] to suggest that

[271] *Spasic Estate v Imperial Tobacco Ltd*, [2000] OJ No 2690 at para. 22 **(BOA Tab 19)**.
[272] *McDougall v Black & Decker Inc*, 2008 ABCA 353 at para 19 **(BOA Tab 11)**.

> remedies beyond the evidentiary presumption flow from the intentional destruction of evidence. **That is not to say, however, that there is no ability to provide other remedies such as costs and pre-trial remedies where evidence is destroyed.** Indeed the ability to provide remedies for destroyed evidence, even where that evidence is not intentionally destroyed, but destroyed through negligence, may arise from the procedural rules of court, a trial judge's discretion on matters of costs and his or her duty to control abuse of process.

373. The Court in *McDougall* observed that, while "some Canadian courts have left open the possibility of extending the law relating to spoliation", there is "one aspect of the law that Canadian courts appear to agree upon. Because spoliation is primarily an issue of fact, and the remedies based on prejudice (also a matter of fact), these are matters usually best left to a trial judge."[273]

B. REMEDY FOR SPOLIATION

(i) Remedy if Moyse Liable for Tort of Spoliation

374. The remedies available for the tort of spoliation, have been left open by courts in Canada. Courts have suggested that, because of the nature of the tort, remedies would be specific to each case. For that reason, any remedy should be left to the trial judge in the context of a complete record. [274]

375. The very nature of spoliation makes it difficult to calculate damages with precision. While no court in Canada has yet awarded a remedy for the tort of spoliation, courts in the United States have done so, and this provides some guidance for the approach to be adopted. US courts have held that in assessing damages for the tort of spoliation, the critical question is to what degree the spoliated evidence would have contributed to the plaintiff's success on the merits of the underlying

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[273] *McDougall v Black & Decker Inc*, 2008 ABCA 353 at para 27 **(BOA Tab 11)**.
[274] *Spasic Estate v Imperial Tobacco Ltd*, [2000] OJ No 2690 at para 22 **(BOA Tab 19)**.

action.[275] Once the court has determined the quantum of damages the plaintiff would be entitled to receive on the underlying claim, it must determine the percentage likelihood of success if the plaintiff had access to the spoliated evidence (and accounting for litigation risk), and multiply the overall damages by this factor. For example, if the expected recovery is $500 million and there was an estimated 60% possibility the plaintiff would have recovered that amount had it not been impaired by spoliation, the plaintiff would be entitled to damages of $300 million.[276]

(ii) Remedy for Moyse's Violation of the evidentiary doctrine of Spoliation

376. If this Court refuses to recognize the tort of spoliation, but finds nonetheless that Moyse has engaged in spoliation, the correct remedy is to infer that the destroyed evidence would have been damaging to the defence of Moyse, and by extention West Face.[277]

The Saskatchewan Court of Appeal in *Doust v Schatz* has also suggested that, at trial, a judge may go beyond the presumption in giving a remedy for intentional destruction of documents.[278] The Court held that it is "open to a trial judge to impose sanctions or draw an adverse inference from such conduct. In this case, it was clearly open to the trial judge to take this conduct into account when considering matters of **reliability, credibility and costs**" [emphasis added].[279]

(iii) Moyse Ran a Software Scrubbing Program to Delete Relevant Evidence

377. Catalyst repeats and relies on the facts set out in Section 15 of this argument (paragraphs 215 to 235) in support of its argument that Moyse deliberately ran the Scrubber software on July 20, 2014 to delete relevant files and/or folders containing evidence that would assist Catalyst's

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[275] *Holmes v Amerex Rent-A-Car* (1998), 710 A.2d 846 (DC CA) **(BOA Tab 17)**.
[276] *Oliver v Stimson Lumber Co* (1999), 297 Mont.336 at paras 51-53 **(BOA Tab 18)**; *Holmes v Amerex Rent-A-Car* (1998), 710 A.2d 846 (DC CA) **(BOA Tab 17)**.
[277] *Black & Decker Canada Inc*, 2008 ABCA 252 **(BOA Tab 11)**; *Spasic Estate v Imperial Tobacco Ltd*, 2000 OAC at para 10 **(BOA Tab 19)**.
[278] *Doust v Schatz*, 2002 SKCA 129 **(BOA Tab 20)**.
[279] *Doust v Schatz*, 2002 SKCA 129 at para. 29 **(BOA Tab 20)**.

case, namely, files in relation to Catalyst's strategy for the Wind transaction and/or evidence of Moyse's communications with West Face.

(iv) Moyse Deleted His Internet Browsing History

378. It is beyond controversy that by deleting his web browsing history, Moyse deleted evidence relating to his activities since March 27, 2014, because the web browsing history would have included evidence of his efforts to access the web-based storage services at issue in this action.

(v) Moyse Wiped His Catalyst BlackBerry

379. The evidence is undisputed that Moyse used his Blackberry to communicate with West Face during the relevant time period, contrary to his sworn evidence given in July 2014. By wiping his Blackberry on the eve of litigation, Moyse intentionally destroyed records of those communications and any other potential evidence, such as text messages.

(vi) Litigation was Contemplated When Moyse Deleted Relevant Information

380. Moyse was served with a Statement of Claim together with injunction motion material on June 25, 2014. Not only had litigation been commenced when Moyse deleted information relevant to these proceedings—the Interim Order specifically requiring him to not delete relevant information was in place since July 16, 2014.[280]

(vii) The Evidence Would Have Affected the Litigation

381. Given that Moyse ran a Scrubber the night before his computer was scheduled to be imaged, the Court should presume that he did so to destroy relevant evidence that would have

[280] Order of Justice Firestone dated July 16, 2014; Motion Record ("MR"), Tab 3-G, pp.130-34 **(CMP Tab 155)**.

affected the outcome of this litigation, as there is no other reasonable explanation for installing and launching a Scrubber in these circumstances.

C. WEST FACE IS VICARIOUSLY LIABLE

382. Moyse was an employee of West Face when he downloaded and ran the Scrubber. He did so for the benefit of West Face in order to destroy evidence that would have implicated West Face in the wrongful conduct claimed by Catalyst.

383. At the time, West Face was indemnifying Moyse's legal costs. In these circumstances, West Face is liable for its employee's tortious conduct.

PART V - CONCLUSION

384. For the reasons set out above, Catalyst respectfully requests judgment be issued in accordance with prayer for relief sought in its claim.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June, 2016.

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

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