

Court File No. CV-14-507120

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff/Moving Party

and

BRANDON MOYSE and WEST FACE CAPITAL INC.Defendants/  
Responding Party**NOTICE OF MOTION**

The Plaintiff ("Catalyst") will make a motion to a Judge on a date to be scheduled by the Civil Practice Court, or as soon after that time as the motion can be heard at the court house, 393 University Avenue, 10th Floor, Toronto, Ontario, M5G 1E6.

**PROPOSED METHOD OF HEARING:** The Motion is to be heard orally.**THE MOTION IS FOR**

- (a) If necessary, an Order abridging the time for delivery of this Notice of Motion;
- (b) An interim, interlocutory and/or permanent injunction restraining the defendant West Face Capital Inc. ("West Face"), its officers, directors, employees, agents or any persons acting under its direction or on its behalf, and any other persons affected by the Order granted from:

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- (i) Participating in the management and/or strategic direction of Wind Mobile Corp. and any affiliated or related corporations (collectively, "Wind"); and
  - (ii) Without limiting the generality of the foregoing, participating in the Spectrum Auction, as that term is defined below;
- (c) An Order authorizing an Independent Supervising Solicitor ("ISS") to attend West Face's premises to create forensic images of all electronic devices, including computers and mobile devices of West Face (the "Images") and to prepare a report which shall:
- (i) identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and, if possible, provide particulars or where on the Images the Confidential information is located or was located, when it was accessed and by whom, and when it was copied, transferred, shared or deleted and by and to whom; and
  - (ii) in the case of any identified or recovered emails sent or received containing or referring to Confidential Information, provide the following particulars:
    - (1) who authored the email;
    - (2) to whom the email was sent, copied and/or blind copied;
    - (3) the date and time when the email was sent;
    - (4) the subject line of the email;

- (5) whether the email contains any attachments, and if so, the names of the attachments and associated file information (i.e., size, date information);
  - (6) the contents of the email; and
  - (7) if the email was deleted, when the email was deleted.
- (d) The costs of this motion on a substantial indemnity basis, plus applicable taxes; and,
- (e) Such further and other relief as this Honourable Court may deem just.

#### **THE GROUNDS FOR THE MOTION ARE**

##### **The Parties to this Action**

- (a) Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is a world leader in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".
- (b) West Face is a Toronto-based private equity corporation with assets under management of approximately \$2.5 billion. In December 2013, West Face formed a credit fund for the purpose of competing directly with Catalyst in the special situations investments industry.
- (c) The defendant Brandon Moyses ("Moyse") was an investment analyst at Catalyst from November 2012 to June 22, 2014. Moyse was one of only two analysts and

had substantial autonomy and responsibility at Catalyst. He was primarily responsible for analysing new investment opportunities of distressed and/or under-valued situations where Catalyst could invest for control or influence.

- (d) On May 26, 2014, Moyse informed Catalyst of his intention to resign from Catalyst and to commence employment at West Face prior to the expiry of a non-competition clause in his employment agreement with Catalyst (the "Non-Competition Covenant").
- (e) On June 23, 2014, Moyse began working for West Face, in breach of the Non-Competition Covenant.

**Moyse and West Face Falsely Assure Catalyst there has been no Wrongdoing**

- (f) Between May 30 and June 19, 2014, counsel for the parties to this action exchanged correspondence and communicated by telephone. Catalyst's counsel tried, but failed, to get the defendants' counsel to agree to terms which would avoid the need for litigation.
- (g) In this exchange of correspondence, counsel for West Face and Moyse claimed that their clients were aware of and would respect Moyse's obligations to Catalyst regarding confidentiality. In particular, West Face's counsel wrote, "Your assertion that West Face induced Mr. Moyse to breach his contractual obligations to [Catalyst] is [...] baseless."
- (h) As discussed in detail below, this statement is wrong. In March 2014, Tom Dea, a Partner at West Face ("Dea"), expressly asked Moyse to send him samples of his

work at Catalyst, and Moyse sent Dea four Catalyst investment analysis memos stamped "Confidential" and "For Internal Discussion Purposes Only".

- (i) 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 restrictive covenants which prevented Moyse from working at West Face prior to December 22, 2014. On June 24, West Face rebuffed Catalyst's efforts to negotiate a resolution, following which Catalyst commenced this action and brought a motion for injunctive relief.
- (j) Notably, the defendants insisted on rushing to destroy the status quo even though West Face had no immediate need for Moyse's services: for the first two weeks of Moyse's employment at West Face, he was not assigned any tasks.

#### **The Interim Injunction**

- (k) 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:
  - (i) West Face agreed to preserve and maintain all records in its possession, power or control, whether electronic or otherwise, that relate to Catalyst, and/or relate to West Face's activities since March 27, 2014, and/or relate to or are relevant to any of the matters raised in Catalyst's action against West Face;

- (ii) Moyse agreed not to work at West Face pending the determination of Catalyst's motion for interlocutory relief;
  - (iii) 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
  - (iv) 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.
- (l) The affidavits of documents Moyse swore pursuant to the Interim Order revealed very damning facts which demonstrate that Moyse and West Face casually disregarded Catalyst's proprietary interest in its confidential information.

**Moyse Communicated Catalyst's Confidential Information to West Face**

- (m) As a result of the Defendants' refusal to respect the status quo in June 2014, Catalyst moved with urgency to seek interim relief and prepared its interim relief materials without the benefit of any evidence from the Defendants.
- (n) On July 7, 2014, Moyse and Dea swore responding affidavits which confirmed Catalyst's worst fear: Moyse had transferred Catalyst's confidential information to West Face, and West Face distributed that confidential information throughout the firm.
- (o) At a meeting with Moyse on March 26, Dea asked Moyse to send him research and writing samples so Dea could assess Moyse's writing and research ability.

- (p) In response to this request, Moyse sent Dea four memos, spanning over 130 pages, which related to actual or possible Catalyst investments (the "Investment Memos"). The Investment Memos contain Moyse's and other Catalyst employees' analyses of investment opportunities and were marked "Confidential" and "For Internal Discussion Purposes Only".
- (q) Moyse admitted he did not consider these markings to have any meaning, that he knew what he did was wrong, and that he deleted his email to Dea.
- (r) Dea also admitted that after he received the Investment Memos, he reviewed them and saw that they were marked confidential. Dea admitted that West Face considered the types of documents Moyse sent him to be confidential and that he would not want Moyse to treat West Face's confidential information in a similar fashion.
- (s) Dea admitted that after he reviewed the documents and saw that they were marked "Confidential", he circulated the Investment Memos to his partners and to a vice-president at West Face.
- (t) West Face never informed Catalyst that Moyse had given it copies of Catalyst's confidential information. Instead, West Face attached the Investment Memos to its responding motion record and filed them in open court. West Face did not seek Catalyst's permission to do so or otherwise give Catalyst an opportunity to seal the court file prior to the hearing of the motion for interim relief on July 16.

**Moyse Reviewed Confidential Information Unrelated to his Work before he Resigned**

- (u) In addition to the Confidential Memos that he sent to West Face, on March 28, 2014, two days after Moyse met Dea, Moyse accessed, over a ten-minute span, several of Catalyst's letters to its investors (the "Investor Letters"), from the time period when Catalyst was active in an investment in Stelco. Catalyst and West Face were in direct competition with respect to the Stelco situation. Ten minutes is an insufficient amount of time to read the Investor Letters, which had nothing to do with Moyse's duties or responsibilities to Catalyst.
- (v) On April 25, 2014, Moyse reviewed dozens of files related to Catalyst's investment in Stelco over a 75-minute period. Once again, there was no legitimate business reason why Moyse would review these documents, which he did in an insufficient amount of time to read the material he was accessing. Moyse admitted during cross-examination that he "routinely" reviewed transaction files from Catalyst's old transactions.
- (w) At all material times, Moyse had accounts with two Internet-based file-storage services. These services enable users to create a folder on their computer which is synchronized over the Internet so that files stored in the folder can be viewed from any computer with an Internet connection. The services are capable of moving large amounts of data in a relatively brief period of time without leaving a record of the activity on the computer from which it was copied.



- (x) In the opinion of Martin Musters, Catalyst's forensic IT expert ("Musters"), Moyse's conduct of reviewing several documents over a relatively brief period of time is consistent with transferring files to an Internet-based file storage account.

**Moyse Retained Hundreds of Catalyst Documents After He Left Catalyst**

- (y) In his first affidavit sworn in response to Catalyst's motion for injunctive relief, Moyse swore that Catalyst had not provided any "actual" evidence that Moyse had transferred information from Catalyst's servers to his personal devices.
- (z) However, pursuant to the Interim Order, Moyse provided Catalyst with two affidavits of documents which allegedly set out all of the documents in his power, possession or control that relate to his employment at Catalyst. Those affidavits disclosed over 830 Catalyst documents that remain in his possession. Just by reviewing the document titles alone, Catalyst identified 245 confidential documents that remained in Moyse's possession, power or control following his resignation from Catalyst and commencement of employment at West Face.
- (aa) Moyse also admitted that he frequently emailed Catalyst documents to his personal email accounts and that he retained those documents on his personal devices. Moyse could not say with absolute certainty that his most recent search has been exhaustive, and he admitted that he deleted documents between March and May 2014, that he did not inform Catalyst when he resigned that he had its confidential information and that he did not offer to return confidential information to Catalyst.

- (bb) Moyse's conduct fits the profile of an employee who took confidential information prior to his resignation from Catalyst.

#### **West Face's Porous Confidential Wall**

- (cc) Prior to his resignation from Catalyst, Moyse was part of a team working on a significant investment opportunity in the telecommunications industry -- the potential acquisition by Catalyst of Wind, one of Canada's few remaining independent mobile telecommunications companies.
- (dd) Moyse had access to confidential information pertaining to Catalyst's plans for Wind.
- (ee) At some point after it commenced its discussions with Moyse to come work at West Face, West Face also took an interest in Wind.
- (ff) In addition, both West Face and Catalyst owned secured debt of Mobilicity, another mobile telecommunications company. Catalyst is Mobilicity's largest secured creditor while West Face owns or owned a much smaller portion of Mobilicity's secured debt.
- (gg) In June 2014, after Catalyst's counsel expressed concern to West Face's counsel about the implications of West Face's efforts to hire Moyse on the rival investment firm's pursuit of the Wind opportunity, West Face claimed to have erected a "confidentiality wall" to separate Moyse from its own pursuit of Wind.
- (hh) The "wall" erected by West Face was incredibly weak:
- (i) it did not apply to all of West Face's employees;

- (ii) it applied to Wind, but not to Mobilicity;
- (iii) West Face took no steps to obtain acknowledgments from its investment team that a wall had been established;
- (iv) No prohibition was imposed to prevent West Face's employees from accessing Moyse's data; and
- (v) West Face has refused to state what consequences, if any, an employee would face if he or she did not comply with the confidentiality wall.

#### **West Face Purchased Wind Using Catalyst's Confidential Information**

- (ii) In August 2014, Catalyst had an exclusive negotiation period to negotiate the purchase of Wind from its then-owners.
- (jj) Those negotiations failed and the exclusivity period expired. The negotiations failed on issues relevant to the regulatory regime affecting Wind.
- (kk) Within days of negotiations failing with Catalyst, West Face, together with partners in a syndicated investment group, successfully negotiated the purchase of Wind. Notably, the West Face syndicate waived any regulatory concerns that Catalyst continued to have.
- (ll) West Face could not have negotiated the deal it did with Wind without access to Catalyst's confidential information, which was provided to it by Moyse.
- (mm) Catalyst has amended its claim against West Face to seek a declaration that West Face holds its interest in Wind in trust for Catalyst.

**The Interlocutory Injunction and the ISS**

- (nn) On November 10, 2014, the Court released its decision in Catalyst's motion for interlocutory relief to prevent Moyse from working at West Face prior to the expiry of the Non-Competition Covenant and to authorize an ISS to review the Images of Moyse's personal devices.
- (oo) The Court granted the relief sought by Catalyst: Moyse was enjoined from working at West Face prior to December 22, 2014 and an ISS was authorized to review the Images and prepare a report.
- (pp) The ISS is in the midst of preparing its report. The ISS process involves a review of the Images using search terms submitted by Catalyst to determine whether the Images contain or contained Catalyst's confidential information;
- (qq) The ISS's work is ongoing and its report is not yet final. However, the ISS has reported on an interim basis on the number of "hits" that the search terms requested by Catalyst have generated. Among other things, the following search terms generated an unexplainably large number of "hits" on Moyse's personal computer:
- (i) West Face: 5,360;
  - (ii) Callidus: 132;
  - (iii) Wind: 26,118;
  - (iv) Mobilicity: 768;

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- (v) Turbine (Catalyst's codename for the Wind opportunity): 756;
  - (vi) Boland (West Face's CEO): 554;
  - (vii) Dea: 4,013;
  - (viii) Auction: 6,489;
  - (ix) Spectrum: 3,852.
- (rr) There is no legitimate business reason why these search terms would yield such a large number of hits on Moyse's personal computer. The inference to be drawn from these hits is that Moyse copied Catalyst's confidential information to his personal computer and transferred it to his new employer's at West Face, either before or after he officially commenced employment there in June 2014.
- (ss) Hard drives, mobile devices and Internet accounts that could be inspected to determine whether West Face possesses or possessed Confidential Information are beyond the control or possession of Catalyst.

#### **The Callidus Report**

- (tt) Callidus Capital Corporation ("Callidus") is a publicly traded corporation that specializes in innovative and creative financing solutions for companies that are unable to obtain adequate financing from conventional lending sources. Catalyst owns a 60 per cent interest in Callidus.

- (uu) In November 2014, shortly after Catalyst successfully argued the interlocutory motion, the share price of Callidus began to drop precipitously without any apparent reason for the rapid decline.
- (vv) Catalyst was initially unable to discover the cause of the price drop. However, based on confidential sources, it learned that West Face was "talking down" the stock on the street and had prepared a research report that purported to reveal problems with Callidus's loan book.
- (ww) The identity of Callidus's borrowers is, in large part, not public information. If West Face had access to information about Callidus's borrowers, it obtained that information through improper means, likely from Moyse, who had no involvement with Callidus and yet who had 132 Callidus "hits" on his personal computer.
- (xx) Despite repeated requests to West Face, it has refused to disclose its research report on Callidus. West Face's conduct of talking down the stock was directed primarily at attempting to cause harm to Catalyst, a majority shareholder in Callidus.

#### **The Upcoming Spectrum Auction**

- (yy) In March 2015, Industry Canada is going to auction 30 MHz of AWS-3 spectrum to new entrants to the mobile telecommunications industry, including Wind and Mobilicity, to enable those new entrants to deliver services to more users at faster speeds (the "Spectrum Auction").

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- (zz) Bidders who intend to participate in the Spectrum Auction must submit a pre-auction financial deposit with their application to participate in the auction by no later than January 30, 2015.
- (aaa) Armed with Catalyst's Confidential Information, which it obtained from Moyse, West Face will be able to help Wind compete unfairly against Mobilicity in the Spectrum Auction or otherwise use this information to its advantage in relation to Mobilicity.

**Irreparable Harm**

- (bbb) The damage to Catalyst caused by West Face's conduct is not limited to monetary damages.
- (ccc) Absent injunctive relief, Catalyst will suffer irreparable harm.
- (ddd) Sections 101 and 104 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.
- (eee) Rules 1, 3, 37, 40 and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.  
and
- (fff) Such further and other grounds as the lawyers may advise.

**THE FOLLOWING DOCUMENTARY EVIDENCE** will be used at the hearing of the Motion:

- (a) The pleadings in this action;
- (b) The Reasons for Decision of Justice Lederer dated November 10, 2014;

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- (c) The affidavit of James A. Riley, to be sworn; and
- (d) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

January 13, 2015

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-and- BRANDON MOYSE and WEST FACE CAPITAL INC.  
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