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Court File No. CV-14-507120

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

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--- This is Day 3/Volume 3 of the ROUGH DRAFT transcript of proceedings in the above matter held at the Superior Court of Ontario, Courtroom 8-1, 330 University Avenue, Toronto, Ontario, on the 8th day of June, 2016, commencing at 9:00 a.m.

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B E F O R E: The Honourable Justice F. Newbould

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REPORTED BY: Kimberley A. Neeson  
RPR, CRR, CSR, CCP, CBC  
Realtime Systems Administrator

A P P E A R A N C E S :

Rocco DiPucchio, Esq.,  
& Andrew Winton, Esq., for the Plaintiff.  
& Brad Vermeersch, Esq.

Robert A. Centa, Esq., for the Defendant,  
& Kris Borg-Olivier, Esq., Brandon Moyse.  
& Denise Cooney, Esq.

Kent Thomson, Esq.,  
& Matthew Milne-Smith, Esq.,  
& Andrew Carlson, Esq., for the Defendant,  
West Face Capital Inc.

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1 -- Upon commencing at 9:10 a.m.

2 THE REGISTRAR: Good morning,  
3 Mr. Glassman. Just to remind you, you are still  
4 under oath.

5 NEWTON GLASSMAN: PREVIOUSLY AFFIRMED

6 THE COURT: Mr. Centa?

7 MR. CENTA: Good morning, Justice  
8 Newbould. You will find the documents that I  
9 intend to refer to this morning in the folder,  
10 evidence at trial, and then Mr. Glassman's folder.

11 THE COURT: I have it.

12 MR. CENTA: You've got it? Terrific.

13 THE COURT: I notice you've got an iPad  
14 as opposed to Mr. Thomson had a great big thick  
15 binder of paper.

16 MR. THOMSON: We call that old school.

17 THE COURT: Me too.

18 CROSS-EXAMINATION BY MR. CENTA:

19 Q. Good morning, Mr. Glassman, my  
20 name is Rob Centa, I am counsel for Brandon Moyse  
21 in this proceeding.

22 Mr. Glassman, you've worked with Mr. de  
23 Alba for approximately 14 years?

24 A. Approximately.

25 Q. And you know him very well?

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1 A. I think so.

2 Q. And as you said yesterday about  
3 him, he knows exactly who you are?

4 A. I hope so.

5 Q. Mr. de Alba has extensive and  
6 impressive experience in the telecommunications  
7 industry?

8 A. Yes.

9 Q. And as you explained yesterday,  
10 that includes leading the restructuring of AT&T  
11 Latin America which was eventually sold for \$14  
12 billion?

13 A. Something like that.

14 Q. And that predates his arrival at  
15 Catalyst?

16 A. It does.

17 Q. And since Mr. de Alba arrived at  
18 Catalyst, he has continued to develop extensive  
19 telecommunications and wireless telecommunications  
20 experience through his work at Catalyst?

21 A. The whole firm has.

22 Q. Including Mr. de Alba?

23 A. Yeah.

24 Q. And as of March 2014, Mr. de Alba  
25 had accumulated more experience in the

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1 telecommunication sector and the wireless  
2 telecommunication sector than had Mr. Moyse?

3 A. For sure.

4 Q. Mr. de Alba was the principal  
5 person negotiating with VimpelCom and other parties  
6 on the Wind transaction?

7 A. The business issues, yes.

8 Q. The business issues.

9 A. Yes.

10 Q. And in terms of the negotiations  
11 with VimpelCom on the Wind transaction, what other  
12 issues were being negotiated other than -- other  
13 than the business issues you just described?

14 A. Well, there were other parties so  
15 there was regulatory issues, there was timing  
16 issues, there was -- within Mobilicity there were  
17 creditor right issues, there was a whole bunch of  
18 other things going on at the same time.

19 Q. And among those other issues, you  
20 would have been the principal person responsible  
21 for some of them, like the regulatory issues  
22 dealing with the government?

23 A. Yes. Some.

24 Q. Some. Not all, some. Would  
25 Mr. Riley have been the principal person

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1 responsible for some other issues related to the  
2 constellation of concerns you just described?

3 A. Some.

4 Q. And as of March through May, would  
5 you agree with me that Mr. de Alba had more  
6 knowledge on the Wind file than did Mr. Moyses?

7 A. Yeah.

8 Q. You described yourself yesterday,  
9 I believe, as the chief architect of Catalyst's  
10 regulatory strategy?

11 A. Amongst other things, yeah.

12 Q. Sorry, not to suggest that's your  
13 only role, but that was one of your roles?

14 A. Yes.

15 Q. And you had more knowledge about  
16 that component of Catalyst's regulatory strategy  
17 than did Mr. Moyses?

18 A. That's why we made sure the rest  
19 of the team was informed, yes.

20 Q. Absolutely. And you were doing  
21 the informing because that was one of your areas of  
22 principal responsibility?

23 A. I was doing part of the informing.

24 Q. Correct. But take it one step at  
25 a time. You were the chief architect of the

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1 regulatory strategy?

2 A. Yes.

3 Q. And you took the lead in the  
4 formal negotiations with the government and the  
5 government's officials?

6 A. Sure.

7 Q. And you often took the lead in the  
8 informal negotiations with the government  
9 officials?

10 A. Sure.

11 Q. And in that role you were  
12 augmented by Mr. Drysdale in some of the informal  
13 discussions with government?

14 A. Sure. I was augmented by the  
15 whole team, including Mr. Moyse. We got feedback  
16 from everybody on the team.

17 Q. In terms of negotiations or  
18 discussions with government, you don't suggest that  
19 Mr. Moyse was having even informal discussions?

20 A. No, no, of course not.

21 Q. You were having those discussions,  
22 correct?

23 A. I was one of the parties having  
24 the discussions.

25 Q. And Mr. Drysdale was one of the



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1 parties having those discussions?

2 A. The informal part of the  
3 discussions.

4 Q. And Mr. Riley was having some of  
5 those discussions?

6 A. Some of the indirect  
7 conversations, so he would have been involved in  
8 the process.

9 Q. Okay. And then you and  
10 Mr. Drysdale and Mr. Riley, to the extent he was  
11 having indirect conversations, would then be  
12 responsible for conveying that information back to  
13 the other members of the deal team who were not  
14 having those conversations?

15 A. Correct.

16 Q. And one of the things that Mr. de  
17 Alba would know about you is, as you said  
18 yesterday, you would never relieve the tension on  
19 any deal member on any deal at any point in time?

20 A. Not unless there was a strategic  
21 or tactical reason to do so.

22 Q. And Mr. de Alba would know that  
23 about you?

24 A. He would.

25 Q. And as you said, you would never

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1 let up the pressure on a deal team member?

2 A. Not unless there was a tactical or  
3 strategic reason to do so.

4 Q. You described yourself yesterday  
5 as an instigator of pressure?

6 A. At times.

7 Q. And that's because putting  
8 pressure on your advisors and your deal team  
9 members, putting pressure on the other side,  
10 putting pressure on the other stakeholders is one  
11 of the things, not the only thing, but one of the  
12 things that has made Catalyst exceptionally  
13 successful over its life?

14 A. I think so, given what we do for a  
15 living.

16 Q. Given what you do for a living --

17 A. Yeah.

18 Q. -- placing that pressure is an  
19 important element in your success?

20 A. I think it's been helpful to our  
21 success.

22 Q. And as you said, absent a  
23 strategic or tactical reason to do otherwise,  
24 Mr. de Alba would know that?

25 A. Sure.

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1 Q. And as you said yesterday, we  
2 could ask him that?

3 A. Sure.

4 Q. And you would never not ask a  
5 question of an analyst, an important question you  
6 wanted answered, just to avoid putting pressure on  
7 an analyst?

8 A. No, that I would do. It might  
9 have a tactical reason.

10 Q. To not ask a question of an  
11 analyst?

12 A. That's not how I heard your  
13 question. I'm sorry, can you repeat it?

14 Q. If you wanted an important  
15 question answered by an analyst, if you had an  
16 important question for an analyst, you would ask  
17 it?

18 A. Well, I may not ask it but it  
19 would be asked. It would be done in a manner that  
20 we thought got the best result. So if my asking it  
21 would potentially obscure or frustrate the outcome,  
22 then we would have somebody else ask the question.  
23 But it would be discussed.

24 Q. And the question would be asked  
25 and answered?

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1 A. We hoped it would be answered.

2 Q. Mr. Riley is the chief operating  
3 officer at Catalyst?

4 A. He is.

5 Q. He is also a partner?

6 A. He is.

7 Q. He accompanied you to meetings in  
8 Ottawa on March 26th and May 12th?

9 A. Yes, he did.

10 Q. And through attendance at those  
11 meetings and his other involvement at Catalyst he  
12 had extensive knowledge of the Wind file?

13 A. He did.

14 Q. This was not the first time that  
15 Mr. Riley had a role in government relations on a  
16 file in Catalyst?

17 A. I don't know if it was the first  
18 but it's not the only.

19 Q. It's not the only. He had  
20 attended meetings with government officials on  
21 behalf of Catalyst on other occasions?

22 A. That I don't know.

23 Q. You told us yesterday that  
24 Industry Canada had no problem with Catalyst  
25 keeping a copy of the final PowerPoint presentation

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1           that you delivered to them on March 26th?

2                   A.   That was my understanding.

3                   Q.   That was what they told you?

4                   A.   Yes, that doesn't mean that they  
5           didn't internally have a problem with it.  The  
6           question was, they had no problem with it.  I don't  
7           know.  They articulated that to us.  I don't know  
8           what they were thinking.

9                   Q.   Right.  But Industry Canada told  
10          you --

11                   A.   Yeah.

12                   Q.   -- that you could keep a copy of  
13          the final PowerPoint presentation, correct?

14                   A.   Yes.

15                   Q.   But they requested that you  
16          destroy the draft presentations?

17                   A.   All the drafts leading up to it.

18                   Q.   You testified that you kept a  
19          master file with the final presentation in it?

20                   A.   I didn't say I kept it.  I said  
21          the firm kept it.

22                   Q.   The firm kept --

23                   A.   Yes.

24                   Q.   -- a master file with the final  
25          presentation in it?

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1 A. That was their instructions.

2 Q. And the team members were asked to  
3 destroy their draft presentations?

4 A. Correct.

5 Q. And Catalyst does not have a  
6 general practice of destroying copies of  
7 presentations made to government?

8 A. I don't know if we've ever made  
9 another presentation to government.

10 Q. Catalyst does not have a general  
11 practice, though, there's no policy, no practice,  
12 of destroying presentations to government?

13 A. I think this was the first  
14 presentation we've ever actually made formally to  
15 any government official. So I don't know what that  
16 means to say we had a practice or not have a  
17 practice. We were asked to do something, we did as  
18 we were asked. If in the future they asked us to  
19 do something that was improper, we would have a  
20 discussion about it.

21 Q. So having -- if it's true that you  
22 had never made a presentation to government before,  
23 then you wouldn't have had a practice of destroying  
24 those presentations because you hadn't made  
25 presentations before that, correct?

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1           A. I can only give you the testimony  
2 that we would do as we were asked so long as it was  
3 legal and we considered it appropriate.

4           Q. Can you turn up tab 13, please, in  
5 the cross-examination binder. This is the  
6 examination for discovery of Mr. de Alba, and these  
7 are questions regarding the destruction of the --

8           THE COURT: Not in my copy. Tab 13 is  
9 not that.

10          MR. CENTA: This is my  
11 cross-examination binder, the Paliare Roland.

12          THE COURT: Yes, I have your  
13 cross-examination. Tab 13 is an email.

14          MR. CENTA: Perhaps, Justice Newbould,  
15 if I could direct you -- we'll try and sort that  
16 out for you. If you could look at the big screen,  
17 I can call up the very short question I'm going to  
18 refer to and we will provide you with whatever  
19 cross-references we need to. So I am referring  
20 to --

21          THE COURT: Hang on, hang on.

22          MR. CENTA: Mr. Thomson advises me you  
23 might find this at tab 41 of his cross-examination  
24 folder, if that would be easier.

25          THE COURT: Anyway, you go ahead, I'll

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1 just do it here.

2 MR. CENTA: Thank you.

3 BY MR. CENTA:

4 Q. So I'm referring to document  
5 WFC011936, it's page 39 of the transcript, page 40  
6 of the document, and these are questions being  
7 asked by Mr. Milne-Smith of Mr. de Alba in regard  
8 to the March 26th PowerPoint presentation.

9 And Mr. Milne-Smith asks of Mr. de  
10 Alba:

11 "Question: Is it Catalyst's  
12 general practice to destroy copies  
13 of presentations made to  
14 government?"

15 Mr. de Alba's answer:

16 "Answer: It is. It is also  
17 industry practice to keep  
18 information that is critical  
19 confidential."

20 That was question 143. And,  
21 Mr. Glassman, I take it you're not aware of any  
22 general practice at Catalyst to destroy copies of  
23 presentations made to government?

24 A. You can't have a general practice  
25 if it was the first time that we made a



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1 presentation.

2 MR. CENTA: Thank you. Those are my  
3 questions.

4 MR. DIPUCCHIO: No re-examination, Your  
5 Honour.

6 THE COURT: I've got a couple of  
7 questions for you, Mr. Glassman. You said  
8 yesterday that Catalyst, perhaps not de jure but  
9 de facto controlled Mobilicity, and I think you  
10 were talking about around the time it went into  
11 CCAA.

12 I just want to understand when you say  
13 de facto you controlled Mobilicity, why did you say  
14 that was the situation?

15 THE WITNESS: We owned just under a  
16 negative control blocking position. We owned 32.6  
17 percent or 32.4 percent, I forget the exact number.  
18 We had verbal support from a couple of the minority  
19 bondholders who had this very strange lockup that  
20 had been manufactured to support us.

21 So at our own 32 and change percent it  
22 would be mathematically difficult but not  
23 impossible to overrule us in a plan, but with the  
24 support of even a small piece, we had effectively  
25 negative control. We eventually did get negative

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1 control. One of the holders did sell the block to  
2 us eventually and we had over 34 percent.

3 The other reason -- that's number one.

4 THE COURT: What you call negative  
5 control, you mean a blocking position?

6 THE WITNESS: A blocking position.  
7 That was the first reason.

8 The second reason was because there  
9 was, and you presided over the case so you and I  
10 may have different views of certain issues, but  
11 there was this attempt through the holding company  
12 to control how the actual collateral was being  
13 treated because the holding company was out of the  
14 money.

15 Our position in the holding company had  
16 structural and legal seniority. That also provided  
17 us with a certain amount of de facto control over  
18 what would happen. So I meant both issues.

19 THE COURT: Again, the holding company  
20 was in a blocking position?

21 THE WITNESS: No, our blocking position  
22 was at OpCo, so we were structurally senior and  
23 legally senior. It would be very difficult to get  
24 a plan through, but aside even from the mathematics  
25 of the negative control, there was this issue, if

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1           one spent enough time thinking about it, there was  
2           this issue of trying to do what would otherwise  
3           look like a substantive consolidation in order to  
4           move money and value up to the HoldCo. That would  
5           never happen because we would have kept contesting  
6           it and I believe we eventually would have won it  
7           because I think you know what was going on.

8                         THE COURT: The other question has to  
9           do with a statement you made yesterday, I think in  
10          your affidavit as well, that you were shocked when  
11          you finally saw what the West Face, or the  
12          consortium deal was, that I think you said you  
13          didn't think any fiduciary could just ignore or  
14          waive the problem of the government regulation.

15                        Was that a view held generally in the  
16          industry?

17                        THE WITNESS: Yes.

18                        THE COURT: That the government  
19          regulations would have to change for something to  
20          work?

21                        THE WITNESS: Yes.

22                        THE COURT: And would you assume or not  
23          that any other player bidding for Wind would have  
24          the same concern? I take it from being shocked,  
25          you would have?

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1 THE WITNESS: Two things. I can't  
2 remember if I used the phrase shocked or  
3 gob-smacked, but shocked.

4 THE COURT: I wrote down the word  
5 "shocked" so I assume you used it.

6 THE WITNESS: It would be in my style  
7 to say gob-smacked too, so I just wanted to be  
8 clear but I do mean shocked if I said gob-smacked.

9 In the context of at that time of what  
10 was going on, you had a situation where the  
11 government had unilaterally changed rules, likely  
12 illegally, related to a contract, to contracts as  
13 to spectrum. You had everybody losing money. You  
14 had the government pushing for something that  
15 nobody could make sense of either in the industry  
16 or, frankly, in the press.

17 So for somebody to take the risk  
18 related to regulatory approval had to have meant  
19 that they were either disregarding or denigrating  
20 their duty over other people's money or they had a  
21 piece of information that allowed them to view it  
22 in a way that they didn't think it was a risk.

23 THE COURT: But you assume that another  
24 bidder -- would you assume that another bidder  
25 would think you were trying to do something so you

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1 wouldn't have to face that risk?

2 THE WITNESS: So VimpelCom itself was  
3 terrified of the regulatory risk and they said that  
4 because -- and we've seen the testimony where they  
5 said that because of their own experience with the  
6 government, the government had turned down other  
7 deals, the environment had gotten worse, so for  
8 example, the original founder of Orascom, and  
9 Orascom was sold to VimpelCom, was turned down on  
10 his attempt to purchase ManitobaTel, so here is  
11 somebody who in the past who was acceptable, now  
12 wasn't acceptable.

13 The business was losing a lot of money.  
14 I suspect people that we had talked to, plus common  
15 sense, would tell one that it would be expected,  
16 notwithstanding the posturing and the positioning  
17 by the seller, who didn't want to accept the risk,  
18 that no one would take that risk, which is one of  
19 the reasons why we were talking about the lawsuit  
20 with the government, because the government had a  
21 problem.

22 THE COURT: All right. So --

23 THE WITNESS: And that was the way out.

24 THE COURT: Would it be fair to assume  
25 that another bidder such as West Face or the

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1 consortium, would it be fair to assume that they  
2 would think that you were putting some condition to  
3 the government or putting some position to the  
4 government that they had to waive your position?

5 THE WITNESS: It's my view that they  
6 were told.

7 THE COURT: That's what you had --

8 THE WITNESS: It's my personal view.

9 THE COURT: I understand that. But  
10 apart from your personal view, would it be fair to  
11 assume that in view of what the industry knew, they  
12 would think you were doing something like that with  
13 the government?

14 THE WITNESS: Well, as you can see from  
15 the testimony about Quebecor, they also had  
16 conditions. So I think anybody in the business  
17 would have thought about what conditions they want.  
18 They may not all be the same, but there would have  
19 been some regulatory conditions around what they  
20 were doing unless somebody understood the legal  
21 ramifications of the lawsuit.

22 THE COURT: What I was asking you was,  
23 would it be fair to assume that they would think  
24 that you, Catalyst --

25 THE WITNESS: I think so.

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1 THE COURT: -- was making that kind of  
2 presentation to the government?

3 THE WITNESS: Yeah, they either would  
4 assume or know.

5 THE COURT: Thanks.

6 THE WITNESS: Sorry, I didn't  
7 understand the question.

8 THE COURT: That's okay. Are there any  
9 questions arising from my questions?

10 MR. THOMSON: I have none.

11 MR. DIPUCCHIO: No.

12 THE COURT: Thank you very much.

13 -- WITNESS EXCUSED --

14 THE COURT: Yes?

15 MR. WINTON: Good morning, Your Honour.  
16 Our next witness is Mr. Riley.

17 JAMES RILEY: SWORN.

18 MR. WINTON: Your Honour, Mr. Thomson  
19 has just informed me that there is something he  
20 wishes to say to the court before Mr. Riley begins  
21 his testimony.

22 MR. THOMSON: Your Honour, you may  
23 recall from my opening that I raised an objection  
24 concerning the contents of Mr. Riley's affidavits.  
25 I am assuming we can proceed on the same basis as

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1 we did in the Athena trial, which is my objection  
2 stands, you'll deal with the evidence as you see  
3 fit and you'll sort out the admissible evidence  
4 from the inadmissible evidence?

5 THE COURT: That's fine. Mr. Winton?

6 EXAMINATION IN-CHIEF BY MR. WINTON:

7 Q. Good morning, Mr. Riley.

8 A. Good morning.

9 Q. Do you recall in this proceeding  
10 you have sworn five affidavits?

11 A. I do.

12 Q. And specifically those were dated  
13 June 26, 2014?

14 A. Yes.

15 Q. And July 14th, 2014?

16 A. Yes.

17 Q. July 28th, 2014?

18 A. Yes.

19 Q. February 15th, 2015?

20 A. Yes.

21 Q. And May 1st, 2015?

22 A. Yes.

23 Q. And you understand that those  
24 affidavits constitute your evidence in-chief in  
25 this trial?



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1 A. They do.

2 Q. And you adopt the contents of  
3 those affidavits as your evidence in-chief?

4 A. I do.

5 Q. You were cross-examined on two  
6 occasions prior to today, correct?

7 A. Yes.

8 Q. You reviewed the transcripts of  
9 those cross-examinations prior to today?

10 A. Yes, I have.

11 Q. Do you adopt the evidence that you  
12 gave in those cross-examinations as part of your  
13 evidence as well?

14 A. I do.

15 Q. So we're just going to go through  
16 some highlights of your evidence today, but before  
17 I do that, just perhaps to get your background into  
18 the record, what is your position at Catalyst?

19 A. I am a managing director and chief  
20 operating officer. I am also a partner.

21 Q. When did you join Catalyst?

22 A. 2011.

23 Q. What are your primary  
24 responsibilities as the chief operating officer and  
25 managing director?

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1           A. I manage day-to-day operations  
2           which includes management of the office, I  
3           interface with the finance group, I manage our  
4           borrowings with the banks, I am also involved in  
5           fundraising including participating in meetings. I  
6           also manage day to day certain litigation files  
7           like this, and when things -- when things are not  
8           otherwise in a specific task, I will take over  
9           those tasks.

10           Q. So just to put your affidavits  
11           into some context, the first affidavit sworn on  
12           June 26th, 2014, which is one day after this action  
13           was commenced, if we can just have available. Now,  
14           in this affidavit -- Your Honour, you have a  
15           folder. Do you have that open for Mr. Riley?

16           THE COURT: I do. I have the  
17           affidavit.

18           MR. WINTON: Thank you.

19           BY MR. WINTON:

20           Q. Now, in this affidavit you had  
21           referred to the forensic review of Mr. Moyse's work  
22           computer that was performed at Catalyst which was  
23           conducted June 2014. What led Catalyst to engage a  
24           forensic investigator to review Mr. Moyse's  
25           computer?

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1                   A. Mr. Moyses indicated that he was  
2 going to a competitor, West Face, and he was not  
3 going to honour his non-compete.

4                   Q. When did you retain the expert?

5                   A. It would have been in around that  
6 time. I think he imaged the computer on that  
7 weekend, I think June 26/27, approximately.

8                   Q. Okay.

9                   A. Actually, prior to that, sorry.

10                  Q. Okay. Let's turn up -- if you  
11 scroll down in the affidavit, please, a few pages  
12 down.

13                  THE COURT: Which paragraph do you  
14 want?

15                  MR. WINTON: Sorry, I'm trying to find  
16 it, Your Honour. Stop there. Okay.

17                  BY MR. WINTON:

18                  Q. So now looking at paragraph 45,  
19 you see there is an excerpt of the email from  
20 Mr. DiPucchio to counsel for -- previous counsel  
21 for Mr. Moyses and West Face dated June 19th, 2014.  
22 Do you see that, Mr. Riley, paragraph 45?

23                  A. Yes, I do.

24                  Q. Does that refresh your memory as  
25 to approximately the date when you engaged

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1 Mr. Musters?

2 A. That is correct. That was  
3 primarily because the defendant was not prepared to  
4 maintain the status quo.

5 Q. Now, paragraph 55 of this  
6 affidavit on page 15, there is reference to  
7 investment letters that you describe. What kind of  
8 information is contained in the investment letters?

9 A. This would be confidential  
10 information reported to investors in the funds, our  
11 limited partners, to give them a status on a  
12 quarterly basis -- typically on a quarterly basis  
13 as to what the status of the investments made by  
14 that particular fund, in this case fund 2.

15 Q. In 2014 was fund 2 still an open  
16 fund?

17 A. No, it was not.

18 Q. So what is the significance to the  
19 fact that a fund is no longer an open fund?

20 A. It means it is in the course of  
21 realization and will be making no further  
22 investments.

23 Q. Would an analyst at Catalyst have  
24 a legitimate business reason to review the  
25 investment letters relating to fund 2?

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1 A. No.

2 Q. Are analysts allowed to view old  
3 investment letters without authorization from the  
4 partners?

5 A. No.

6 Q. What would be the consequences for  
7 them if they did so?

8 A. Depending on the circumstances, it  
9 could be grounds for termination.

10 Q. Okay. If we can go to the next  
11 affidavit, the one sworn July 14, 2014. Sorry,  
12 just to go back to one question about what you said  
13 about -- you don't need to go to the affidavit.  
14 Were the analysts aware of this policy concerning  
15 the confidentiality of the investment letters?

16 A. I believe they're aware of our  
17 general confidentiality restrictions, so it would  
18 be included in this.

19 Q. So in the July 14th affidavit, and  
20 just if you go to the first page of that, to put  
21 this into context, paragraph 2 indicates you swore  
22 this in response to the affidavits filed by  
23 Mr. Moyse and West Face?

24 A. I believe it was particularly in  
25 response to an affidavit filed by Mr. Dea in which

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1 he enclosed four of our confidential deal memos  
2 which had been provided to him by Mr. Moyse.

3 Q. Okay. So if we turn to paragraph  
4 12 beginning at the bottom of page 3 and then it's  
5 going to go to the top of page 4, you refer to the  
6 evidence that West Face filed in its record. What  
7 was -- you were referring to those four  
8 confidential memos. Prior to seeing them in the  
9 affidavit, were you aware that West Face had  
10 possession of those memos?

11 A. I was not aware of that.

12 Q. So when was the first time you  
13 became aware that they possessed those memos?

14 A. As I think I said previously,  
15 Mr. Dea's affidavit.

16 Q. The next affidavit is sworn two  
17 weeks later, July 28th, 2014, if you'd turn that  
18 up. What were the circumstances that led to you  
19 swearing this third affidavit?

20 A. It was as a result of disclosure  
21 by Mr. Moyse that he had more than 800 -- more than  
22 800 files representing confidential information,  
23 and we had reviewed those, Zach Michaud and I had  
24 reviewed them and identified at least 200.

25 Q. Sorry, I just want to make sure

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1 we're clear for the record. How many of the 800  
2 documents did you review and consider to be  
3 confidential?

4 A. We reviewed the whole of the list  
5 and believed at least 200 of them were  
6 confidential. We did not review the actual files  
7 themselves.

8 Q. Your next affidavit was sworn  
9 February 18th, 2015, so several months later. And  
10 do you recall what were the intervening events that  
11 led to you swearing this fourth affidavit?

12 A. There was a West Face transaction  
13 involving Wind. The ISS review of Moyse's devices  
14 had revealed that he had installed a scrubber and  
15 there was some evidence relating to West Face in  
16 connection with its short attack against Callidus.

17 Q. And those are the events?

18 A. Yes, those are the events.

19 Q. Your fifth affidavit was sworn May  
20 1st, 2015. As you see -- just at paragraph 3, to  
21 help orient you, this was the responding affidavit  
22 that you swore --

23 A. Yes.

24 Q. -- at this time period?

25 A. Yes.

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1           Q.    I won't deal with I guess the  
2           evidence concerning Callidus, but if we turn to  
3           page 10 at paragraph 35, do you recall why at this  
4           stage in the proceeding you're giving evidence  
5           concerning Mr. Moyse's role on the Wind file?

6           A.    Yes.  This was in response to his  
7           position that he had a minimal involvement in the  
8           Wind file and, in particular, we wanted to bring  
9           forward the fact that he had -- he was involved in  
10          the March 26th PowerPoint presentation, preparation  
11          of that presentation.

12          Q.    Around the time that you swore  
13          this or when you swore this affidavit, did you or  
14          were you able to review a copy of that PowerPoint  
15          presentation?

16          A.    No.  I wish I had, but I believed  
17          all copies of it had been destroyed or deleted.

18          Q.    And what formed or what was the  
19          basis for that belief?

20          A.    I had asked that all of the people  
21          that had copies of it to destroy theirs and delete  
22          them.

23          Q.    Why did you make that request?

24          A.    I believed that given the  
25          sensitivity of the information enclosed, it was



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1 best to not have maintained copies.

2 MR. WINTON: Those are my questions,  
3 Your Honour.

4 THE COURT: Yes, Mr. Thomson?

5 MR. THOMSON: Do you have my  
6 cross-examination electronic binder, Your Honour?

7 THE COURT: Yes.

8 MR. THOMSON: Thank you.

9 CROSS-EXAMINATION BY MR. THOMSON:

10 Q. Good morning, Mr. Riley.

11 A. Good morning.

12 Q. You were not involved directly in  
13 the discussions and negotiations between Catalyst  
14 and VimpelCom, as I understand it?

15 A. That is correct.

16 Q. You attended no meetings with  
17 VimpelCom?

18 A. No.

19 Q. Instead, as I understand the  
20 evidence, Catalyst's lead negotiator was Mr. de  
21 Alba?

22 A. Yes.

23 Q. Mr. de Alba had directed Catalyst  
24 deal team and its advisors?

25 A. Yes.

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1 Q. Mr. Glassman was primarily  
2 responsible for Catalyst's discussions and  
3 negotiations with the Government of Canada  
4 concerning regulatory issues?

5 A. Yes.

6 Q. Now, let me deal with Mr. Moyse's  
7 resignation. Can you pull up tab 9, please. And,  
8 sir, you'll see here Mr. Moyse's email to Mr. de  
9 Alba of May 24th of 2014 telling Mr. de Alba that  
10 he was resigning from Catalyst?

11 A. Yes.

12 Q. I take it that Mr. Moyse's  
13 resignation was brought to your attention shortly  
14 after it was given?

15 A. Yes.

16 Q. And am I correct that you met with  
17 Mr. Moyse two days later on Monday, May 26th, 2014?

18 A. I did.

19 Q. During that meeting, Mr. Moyse  
20 told you that he intended to join West Face?

21 A. Yes.

22 Q. And am I correct that as a result  
23 you sent Mr. Moyse home?

24 A. Yes.

25 Q. You did so at least in part in

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1 order to ensure that Mr. Moyse played no role in  
2 and was kept isolated from any future discussions  
3 regarding upcoming investment opportunities at  
4 Catalyst?

5 A. Correct.

6 Q. And am I right that Mr. Moyse did  
7 in fact stay home for the remainder of the 30-day  
8 notice period? He did not rejoin Catalyst?

9 A. He did not come back to the  
10 office.

11 Q. He no longer attended Catalyst  
12 Monday meetings either in person or by phone?

13 A. No.

14 Q. He no longer performed work for or  
15 on behalf of Catalyst?

16 A. I don't know for sure because  
17 there were some continuing matters that he might  
18 have to give help -- help in the transition.

19 Q. You're not aware of any  
20 significant matters?

21 A. No.

22 Q. Am I right that on May 26th of  
23 2014 Catalyst also contacted its IT provider and  
24 asked that Mr. Moyse -- Moyse's permission to  
25 access the Catalyst servers be revoked?

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1 A. Yes.

2 Q. In the period after Monday, May  
3 26th of 2014, you shared no information whatsoever  
4 with Mr. Moyse concerning Catalyst's discussions  
5 and negotiations with VimpelCom?

6 A. Are you asking me personally?

7 Q. Yes.

8 A. No.

9 Q. Nor to your knowledge did  
10 Mr. Glassman or Mr. de Alba?

11 A. To my knowledge, no.

12 Q. In the period after Monday, May  
13 26th, 2014 you shared no information whatsoever  
14 with Mr. Moyse concerning Catalyst's discussions  
15 and negotiations with the Government of Canada,  
16 correct?

17 A. No.

18 Q. Nor to your knowledge did  
19 Mr. Glassman or Mr. de Alba?

20 A. To my knowledge, no.

21 Q. Now, am I right that you have been  
22 the person at Catalyst primarily responsible for  
23 managing what I'll call the Moyse litigation in the  
24 period since it was commenced in June of 2014?

25 A. That is correct.

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1           Q. We've already established that in  
2           the course of the litigation, you have prepared and  
3           sworn five affidavits?

4           A. Yes.

5           Q. And you spent a considerable  
6           amount of time reviewing Mr. Moyse's documents as  
7           well as productions of Catalyst and West Face?

8           A. Yes.

9           Q. And am I right in saying this, Mr.  
10          Riley, you've certainly reviewed all of the  
11          particularly relevant or important documents that  
12          have been brought to your attention from time to  
13          time by Catalyst counsel?

14          A. Yes.

15          Q. Now, can we agree that you were  
16          not present during any meetings or discussions  
17          Mr. Moyse may have had with representatives of West  
18          Face?

19          A. No.

20          Q. And that is so either before he  
21          joined West Face on June 23, 2014 or after,  
22          correct?

23          A. That is correct.

24          Q. And therefore you can't testify  
25          under oath as to what happened during any of those

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1 meetings or discussions, correct? You weren't  
2 there?

3 A. No, I wasn't there. Sorry, I'm  
4 just trying to think of what I learned through  
5 affidavits.

6 Q. Now, am I correct as well, having  
7 read in some detail all of your five affidavits,  
8 that you have not attached to any of your five  
9 affidavits even one document in which Mr. Moyse  
10 conveys to West Face confidential information of  
11 Catalyst concerning either Wind or VimpelCom?

12 A. No.

13 THE COURT: I think the answer is yes.  
14 These questions that Mr. Thomson asks, "now am I  
15 correct that," that's his modus operandi. So I  
16 think he meant the answer to be yes.

17 THE WITNESS: The answer is yes. Thank  
18 you for that.

19 MR. THOMSON: Thank you.

20 THE WITNESS: So don't be so tricky.

21 THE COURT: He will be if he can get  
22 away with it.

23 MR. THOMSON: Yeah, yeah. I wish I was  
24 that smart.

25 BY MR. THOMSON:

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1 Q. Let me turn to the issue of the  
2 writing samples.

3 A. Yes.

4 Q. By writing samples, I mean the  
5 samples that Mr. Moyse sent to Mr. Dea of West Face  
6 on March 27. You are aware of those?

7 A. I am.

8 Q. And if we pull up, please, tab 8  
9 of the cross-examination binder. Just so we have  
10 it for the record, Your Honour, this is WFC0075126,  
11 which is the email at the bottom, half-way down the  
12 page, an email from Mr. Moyse to Mr. Dea of March  
13 27 of 2014 at 1:47 a.m. attaching his CV, his deal  
14 sheet and what he calls a few investment write-ups  
15 that he had done at Catalyst.

16 I take it you've reviewed the email and  
17 its attachments before testifying today?

18 A. I have.

19 Q. And the writing samples pertained  
20 to, as I understand it, four companies, so Homburg,  
21 NSI, Rona and Arcan Resources?

22 A. Yes.

23 Q. And you would concede, in  
24 fairness, I'm sure, Mr. Riley, that none of those  
25 samples concern Wind Mobile?

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1 A. I agree.

2 Q. To your knowledge Catalyst never  
3 made an investment in Arcan?

4 A. No, it did not.

5 Q. To your knowledge Catalyst never  
6 made an investment in NSI?

7 A. We did not.

8 Q. To your knowledge Catalyst never  
9 made an investment in Rona?

10 A. We did not.

11 Q. And to your knowledge West Face  
12 made no investment in Homburg?

13 A. Oh, yes, we did.

14 Q. No, West Face?

15 A. Oh, sorry, I apologize. To my  
16 knowledge, no.

17 Q. To your knowledge West Face made  
18 no investment in NSI?

19 A. Not to my knowledge.

20 Q. And to your knowledge West Face  
21 made no investment in Rona?

22 A. To my knowledge, no.

23 Q. And if we -- with respect to  
24 Arcan, if we can pull up, please, tab 21. So tab  
25 21, Your Honour, is WFC0080746, which is an



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1 affidavit of Mr. Griffin sworn on March 7 of 2015.

2 Mr. Riley, am I right that you have  
3 reviewed Mr. Griffin's affidavit before testifying  
4 today?

5 A. Yes, I have.

6 Q. And can we please turn in the  
7 affidavit to paragraph 52. Stop there. So at 52  
8 of his affidavit, Mr. Griffin says:

9 "Of the four writing samples,  
10 only one - concerning Arcan  
11 Resources - addressed a company that  
12 was being followed by West Face and  
13 ultimately became the subject of a  
14 transaction by West Face."

15 He says the transaction was directed by  
16 him and was independent of Moyse's analysis for  
17 Catalyst.

18 It refers to following Arcan for  
19 several years. It says at his direction West Face  
20 had taken a position in two different series of  
21 Arcan's unsecured debentures between September 2012  
22 and July of 2013.

23 And then go to paragraph 53. You'll  
24 see he says that on June 23 of 2014 at 4:22 p.m.:

25 "Arcan announced a strategic

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1 transaction with Aspenleaf Energy  
2 Limited pursuant to which Aspenleaf  
3 and Arcan would complete a Plan of  
4 Arrangement. I concluded that the  
5 debenture holders should be able to  
6 negotiate a better deal for  
7 themselves than had been proposed  
8 under the Plan of Arrangement, and  
9 that if they could do so, the  
10 debentures would rise in value."

11 He then goes on, as you'll recall, to  
12 explain in the affidavit that they then made the  
13 investment in those debentures and that they  
14 actually lost money as a result of having done so.

15 So here's my question for you. Am I  
16 right that Catalyst made no investment in relation  
17 to that Plan of Arrangement proceeding?

18 A. To my knowledge, no.

19 Q. Of course Mr. Moyse's writing  
20 sample concerning Arcan, which I'm happy to take  
21 you to, was dated January 2014?

22 A. I don't know the date of that.

23 Q. Can you pull up, please, tab 8,  
24 and turn to page 123 of tab 8. So you'll see this  
25 is - just pause there - this is the writing sample?

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1                   A. I see the date at the top is Jan  
2                   2014.

3                   Q. Right. That's my point. So the  
4                   writing sample was prepared and dated well before  
5                   the Plan of Arrangement that led to the West Face  
6                   investment was announced on June 23 of 2014; fair  
7                   enough?

8                   A. Yes.

9                   Q. Now, let me turn to an issue that  
10                  was raised with you during the course of your  
11                  examination in-chief. Am I right that on July 16  
12                  of 2014 Catalyst obtained a consent order from  
13                  Justice Firestone?

14                  A. Yes.

15                  Q. Pull up, please, tab 10 of the  
16                  cross-examination binder. Here is the order of  
17                  Justice Firestone of July 16 of 2014, and if you  
18                  turn, please, to paragraph 10 of the order, you'll  
19                  see that the court on consent made an order sealing  
20                  the court file?

21                  A. Yes.

22                  Q. And one of the reasons that the  
23                  sealing order was sought was because the writing  
24                  samples we just looked at a moment ago were in the  
25                  court file and had been attached to a responding

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1 affidavit of West Face?

2 A. Yes.

3 Q. Now, am I right that on January  
4 13th of 2015 Catalyst commenced a motion against  
5 West Face in relation to its acquisition of Wind  
6 Mobile?

7 A. Without being able to confirm, is  
8 that the date? I can't remember the date.

9 Q. Okay. That's fine. Pull up tab  
10 13, please. So, Your Honour, this is CAT000917.  
11 And you'll find a Notice of Motion of Catalyst, and  
12 if we flip to page 16 of the document, you'll find  
13 the date of January 13, 2015?

14 A. I see that date and adopt that  
15 date.

16 Q. So that's the date on which  
17 Catalyst commenced this motion against West Face,  
18 correct?

19 A. Correct.

20 Q. If we go back to the first page of  
21 the Notice of Motion and look at the relief sought,  
22 briefly scroll down, please, look at paragraph B,  
23 so Catalyst sought injunctive relief restraining  
24 West Face, its officers, directors, employees,  
25 agents and so on from, and then skip to the next

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1 page, please, from participating in the management  
2 and/or strategic direction of Wind Mobile and any  
3 affiliated or related corporations and  
4 participating in the upcoming spectrum auction.  
5 Fair enough?

6 A. Yes.

7 Q. And then also sought in paragraph  
8 C, an order authorizing an independent supervising  
9 solicitor to attend at West Face's premises to  
10 create forensic images of all electronic devices,  
11 including computers and mobile devices of West Face  
12 and so on. So that was the nature of the relief  
13 sought by Catalyst against West Face as of January  
14 2015?

15 A. Yes.

16 Q. Now, am I right that two days  
17 after that motion was brought, Catalyst took the  
18 necessary steps to unseal the court file?

19 MR. DIPUCCHIO: Your Honour, that's  
20 actually not correct. I have to rise. We didn't  
21 take any steps to unseal the court file. The court  
22 file was only sealed pending the outcome of the  
23 interlocutory injunction. That's what the order  
24 says.

25 BY MR. THOMSON:

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1 Q. All right. Let's then deal with  
2 it one step at a time. Pull up tab -- pull up tab  
3 19, please. Mr. Riley, here you'll see a  
4 transcript of your cross-examination conducted on  
5 May 13th of 2015?

6 A. Yes.

7 Q. And will you please turn to page  
8 62 of the transcript or page 63 of the document.  
9 And you'll see at question 259, Mr. Riley, the  
10 question that was put was:

11 "Catalyst alleges that  
12 Mr. Moyse disclosed the confidential  
13 information to West Face in the  
14 March 27, 2014 email which attached  
15 the writing samples?

16 Answer: Yes.

17 Question: And Catalyst has, in  
18 fact, consented to unsealing the  
19 court record that contained those  
20 documents, correct?

21 Answer: Yes."

22 And then 261:

23 "Question: So it no longer  
24 treats that information as  
25 confidential?

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1                                   Answer: Yes."

2                                   I take it you were asked those  
3 questions and gave those answers?

4                                   A. I did, but if I review 260 again,  
5 I adopt my counsel's interpretation that the  
6 sealing order was functus once the hearing was  
7 over.

8                                   Q. Pull up tab 14, please, of the  
9 cross-examination binder.

10                                  THE COURT: Just before you do that,  
11 Mr. Riley, so the answer to question 261, do you  
12 have that in front of you?

13                                  THE WITNESS: Yes, I do.

14                                  THE COURT: The question:

15   "Question: So it no longer  
16 treats that information as  
17 confidential?

18   Answer. Yes."

19                                  THE WITNESS: We had no choice.

20                                  THE COURT: You're saying that Catalyst  
21 no longer treated the information as confidential?

22                                  THE WITNESS: Correct. Sorry, is there  
23 another document you want to look at?

24                                  BY MR. THOMSON:

25   Q. Yes. Right here, it should be on

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1 the screen. So Your Honour, this is WFC0081342.

2 A. Yes.

3 Q. Part of the court record  
4 concerning this matter. And you'll see a series of  
5 different dates. So per order of Firestone, J.  
6 dated July 16, 2014, file sealed pending the  
7 outcome of interlocutory relief motion. The second  
8 reference says the same thing. Below that, sealed  
9 material sent to Divisional Court per requisition  
10 dated December 22, 2014. Below that, partial file  
11 sealed by order of Firestone, J. on October 21,  
12 2014. Below that, January 15, obviously of 2015,  
13 file unsealed?

14 A. Yes.

15 Q. Re counsel Andrew Winton, lawyer,  
16 and so on.

17 So my question for you is this.

18 What steps, if any, did Catalyst take  
19 in January 2015, and you'll note January 15 is two  
20 days after the motion we just looked at a moment  
21 ago was brought --

22 A. Yes.

23 Q. What steps, if any, did Catalyst  
24 take to make sure the court file was in fact  
25 unsealed in January of 2015?



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1                   MR. DIPUCCHIO: I have to rise again,  
2                   Your Honour, because this is really a question  
3                   directed to us, I assume. There were no steps  
4                   taken to unseal the court file. The court file was  
5                   unsealed as a result of Justice Firestone's order.

6                   THE COURT: I saw the order before,  
7                   Mr. DiPucchio. I would have thought counsel would  
8                   agree on this. When I saw the order at tab 10 I  
9                   did see that it was pending or until the motion for  
10                  interlocutory relief was heard.

11                  MR. DIPUCCHIO: Yes.

12                  THE COURT: When was that motion heard?

13                  MR. DIPUCCHIO: That was heard in  
14                  October of 2014.

15                  THE COURT: Right.

16                  MR. DIPUCCHIO: And then there was a  
17                  decision rendered in November, and our  
18                  understanding was the file was unsealed thereafter  
19                  because the order no longer applied. That was our  
20                  understanding. We didn't take any steps to unseal  
21                  the court file.

22                  THE COURT: So --

23                  MR. DIPUCCHIO: I'm not sure what turns  
24                  on it, Your Honour.

25                  THE COURT: I'm not sure what turns on

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1           it.  If that's correct, then Mr. Riley's first  
2           answer was incorrect on the cross because he  
3           conceded he thought that there was a consent to the  
4           unsealing, and you're saying, what's the --

5                       MR. DIPUCCHIO:  That's all I'm saying,  
6           Your Honour.  I understand what my friend is trying  
7           to do, which is to suggest we unsealed the court  
8           file, but that's categorically not true.  We didn't  
9           do anything to unseal the court file.

10                      THE COURT:  Does it matter,  
11           Mr. Thomson?  Mr. Riley has said they no longer  
12           treated the documents as confidential.

13                      MR. THOMSON:  That's the point.

14                      THE COURT:  Well, he's already said  
15           that.

16                      MR. DIPUCCHIO:  And just, Your Honour,  
17           to close the loop on this, just to assure my  
18           friends, the reference to Mr. Winton, as Mr. Winton  
19           just advises me, is the court called him to confirm  
20           that the file was no longer sealed.  So that's the  
21           reference to Mr. Winton.

22                      THE COURT:  Was this a Commercial List  
23           matter at that time?

24                      MR. DIPUCCHIO:  No, it was not, Your  
25           Honour.

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1 THE COURT: I guess it wasn't because  
2 Justice Firestone was on it.

3 MR. DIPUCCHIO: Right.

4 BY MR. THOMSON:

5 Q. Am I right in assuming this, Mr.  
6 Riley, that although you were not responsible for  
7 the negotiation of the Wind transaction, you were  
8 certainly kept in the loop on a regular basis  
9 concerning developments as they occurred?

10 A. It would depend on the importance  
11 of the issue. So I would say not as -- I wouldn't  
12 know on a day-to-day basis what was going on.

13 Q. You were certainly advised of  
14 important developments?

15 A. Certain important developments,  
16 not all.

17 Q. And I take it that Mr. Glassman  
18 and Mr. de Alba would have conferred with you when  
19 the Catalyst transaction ran into difficulties in  
20 mid-August of 2014?

21 A. Those dialogues would have been  
22 more between Newton and Gabriel.

23 Q. You heard Mr. Glassman say -- you  
24 were here for his evidence, weren't you, yesterday?

25 A. Yes, I was.

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1           Q.    You heard Mr. Glassman testify  
2           yesterday morning, or yesterday afternoon perhaps  
3           it was, that you would certainly have been kept  
4           apprised of Mr. VimpelCom's request for a break  
5           fee?

6           A.    I actually don't think I knew  
7           that.  So my memory may be different than his.

8           Q.    Now, let's just show His Honour  
9           how that issue developed in the period leading up  
10          to the trial.  Am I correct that you were, in fact,  
11          cross-examined in May of 2015 in the motion we just  
12          looked at a moment ago concerning the issue of a  
13          break fee?

14          A.    Yes.

15          Q.    And am I also right that  
16          Mr. Milne-Smith cross-examined you concerning that  
17          issue before Catalyst produced its documents in  
18          this case concerning its negotiations with  
19          VimpelCom?

20          A.    I believe that's correct.

21          Q.    And if we pull up, please, tab 19,  
22          which is the transcript of your cross-examination  
23          on May 13th of 2015, and scroll to page 127.  I'm  
24          interested, Mr. Riley, in what happened around  
25          question 554.  So question 554, the question was:

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1 "Did VimpelCom ever ask for a  
2 break fee?"

3 You said:

4 "I don't know."

5 And then at question 556

6 Mr. Milne-Smith asked you to make inquiries and to  
7 advise.

8 A. Yes.

9 Q. And then question 557, the next  
10 question was:

11 "I would also like to know if  
12 VimpelCom did ask for a break fee, I  
13 would like to know obviously its  
14 precise terms and whether Catalyst  
15 agreed to it."

16 Mr. Winton then took that question  
17 under advisement.

18 A. Yes.

19 Q. You recall that exchange during  
20 the examination?

21 A. I do.

22 Q. And if we then turn to tab 20 --

23 A. Is there a way to turn that?

24 Q. She will do that in a second.

25 Your Honour, this is UTS000020, which are the

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1           answers to undertakings and advisements and so on  
2           from your examination of May 13, 2015. And can I  
3           ask you to scroll to answers 15 and 16.

4                         So the undertakings are recorded in the  
5           fourth column from the left and the answers that  
6           were given are on the column on the right. So  
7           again, the first question was to advise whether  
8           VimpelCom ever asked for a break fee. The answer  
9           was:

10                        "The parties never negotiated a  
11                        break fee."

12                        The next question was if VimpelCom did  
13           ask for a break fee, to provide its precise terms  
14           and whether Catalyst agreed to it. And the answer  
15           was, not applicable, presumably because of the  
16           answer just before that.

17                        So those were the answers to  
18           undertakings given arising out of your examination  
19           in May of 2015?

20                        A. Correct.

21                        Q. And you'll note of course that the  
22           answer given didn't answer the question that was  
23           asked?

24                        A. I now understand that because of  
25           subsequent information that was -- we corrected

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1           this undertaking.

2                       Q.   I'm going to come to that  
3           momentarily.

4                       THE COURT:   Is there a date when this  
5           was delivered?

6                       MR. MILNE-SMITH:   It was  
7           contemporaneous with the motion before Justice  
8           Glustein so we can check, but it would have been  
9           around May of 2015.

10                      THE COURT:   So shortly after the cross?

11                      MR. MILNE-SMITH:   Yes, we're referring  
12           to Justice Glustein in June or July, so it had to  
13           be before that.

14                      BY MR. THOMSON:

15                      Q.   This was the state of the  
16           record -- do we have it, Mr. Riley, this was the  
17           state of the record as of the date that that motion  
18           against West Face for the relief we just looked at  
19           was argued?

20                      A.   Yes.

21                      Q.   And we now know, and you were here  
22           for Mr. Glassman's examination yesterday, we now  
23           know that VimpelCom did in fact ask for a break fee  
24           in mid-August?

25                      A.   Yes.

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1 Q. And it was the request for the  
2 break fee, as Mr. Glassman says in his affidavit,  
3 that ultimately caused the transaction to fail?

4 A. Yes.

5 Q. Now, if we elaborate on this just  
6 a little bit, the answer to undertaking 15, again  
7 the question was to advise whether VimpelCom ever  
8 asked for a break fee, and the answer was the  
9 parties never negotiated a break fee, one of the  
10 reasons the parties never negotiated a break fee is  
11 because Catalyst simply refused to accede to the  
12 request of VimpelCom?

13 A. Yes.

14 Q. And then if we look at how this  
15 issue then developed in the period after the  
16 Glustein motion was argued and turn all the way  
17 forward to Mr. de Alba's discovery about three  
18 weeks ago, on May 11 of this year, pull up tab 33,  
19 please.

20 THE COURT: Just a second. Just remind  
21 me, Justice Glustein was asked -- what was he asked  
22 to do?

23 MR. THOMSON: He was asked to issue  
24 injunctive relief against West Face to prohibit it  
25 from having any involvement with Wind Mobile,



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1 prohibiting the spectrum auction, so it is the  
2 Notice of Motion --

3 THE COURT: Is that the Notice of  
4 Motion of Justice Glustein?

5 MR. THOMSON: Yes.

6 THE COURT: I thought it was -- I  
7 thought he had something to do with whether or not  
8 further documents should be produced.

9 MR. MILNE-SMITH: That too.

10 THE COURT: Okay.

11 MR. THOMSON: So it was --

12 MR. MILNE-SMITH: And contempt against  
13 Mr. Moyse.

14 THE COURT: Pardon?

15 MR. MILNE-SMITH: And contempt against  
16 Mr. Moyse.

17 MR. THOMSON: Just pull up tab 13,  
18 please.

19 THE COURT: I remember that. I  
20 understand. I just wasn't sure, I had not realized  
21 that Justice Glustein was asked to do that, that's  
22 all.

23 MR. THOMSON: Yes. So it was both  
24 aspects of this, Your Honour.

25 BY MR. THOMSON:

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1 Q. Now, can you pull up, please, tab  
2 33. Sorry, one more reference. Hang on. Sorry,  
3 tab 23. And, Mr. Riley, here you'll find the  
4 discovery transcript of Mr. de Alba conducted about  
5 three weeks ago on Wednesday, May 11 of 2016?

6 A. Yes.

7 Q. And if we turn to page 201,  
8 please. Scroll down a bit, please. So at question  
9 748, Mr. Milne-Smith is now discovering Mr. de Alba  
10 and says:

11 "And so I take it from this  
12 that VimpelCom had asked you for a  
13 break fee?"  
14 They get into a discussion about that.  
15 Scroll down a bit, please.

16 A. Sorry, could I just read the  
17 response?

18 Q. Sure. It raised the topic and  
19 that debate --

20 A. It looks like something is broken  
21 here. I take from this two things, the comment of  
22 the break fee. Is there information missing? See  
23 the answer?

24 Q. I see the answer. That is the  
25 answer. Scroll down to question 752 is what I'm

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1 really interested in.

2 "Okay. So if we go back, I  
3 don't know if you have any of the  
4 earlier materials in this case,  
5 Mr. Winton, but if you'll recall  
6 during the cross-examination of Mr.  
7 Riley, I put a question to him?"

8 Mr. Winton says:

9 "Which date."

10 Mr. Milne-Smith says:

11 "The one that I did."

12 Mr. Winton:

13 "That can be only be one date."

14 Mr. Milne-Smith says:

15 "I'm actually looking at the  
16 answers to undertaking number 15..."

17 THE COURT: Do we have to read through  
18 all this? What's the point here?

19 MR. THOMSON: Just to give the witness  
20 the context, Your Honour.

21 THE COURT: Why don't you just let him  
22 read it to himself.

23 BY MR. THOMSON:

24 Q. Okay. Scroll down, please.

25 A. (Witness reads document).

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1 Q. Stop there. Question 754, this is  
2 after Mr. Milne-Smith has now put the answer to  
3 undertaking that we just reviewed and the question  
4 was, this is to de Alba:

5 "Were you consulted in  
6 providing -- answering this  
7 undertaking that was given on the  
8 cross-examination of Mr. Riley?  
9 Were you consulted?

10 Answer: No."

11 So I take it from that that when you  
12 gave the answer to undertaking arising out of your  
13 cross-examination in May of 2015 as to whether  
14 VimpelCom requested a break fee, you did not  
15 consult with Mr. de Alba in answering the question?

16 A. That is correct.

17 Q. Even though he was the lead  
18 negotiator on behalf of Catalyst?

19 A. Yes.

20 Q. And even though, I take it, he  
21 works right down the hall from you in relatively  
22 small offices?

23 A. Yes, except the closer person was  
24 Zach Michaud and I don't believe Gabriel was in the  
25 office at the time I was responding to this

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1           undertaking.

2                       Q.   Now, let me pull up then tab 27,  
3           so we have a complete record of this.  So you'll  
4           see a letter here, which is WFC0112220, which is a  
5           letter from Mr. DiPucchio of June 3 of 2016, so  
6           sent last Friday just before the trial started  
7           following up on several discovery issues.

8                       If you scroll to the next page, you'll  
9           see he says just before the end of the letter:

10                      "Additionally, below are  
11                      corrections to the undertaking  
12                      responses that have previously been  
13                      given."

14                      And it's undertaking number 47 that I'm  
15           interested in, so this is what we were told last  
16           Friday:

17                      "Mr. Riley recalls that, in  
18                      addition to his own recollection on  
19                      the issue of a break fee, he spoke  
20                      with Zach Michaud.  However Mr.  
21                      Riley recalls that he asked  
22                      Mr. Michaud whether there was a  
23                      break fee in the transaction (not  
24                      whether VimpelCom asked for a break  
25                      fee) and Mr. Michaud advised that

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1                   there was not."

2                   I take it that is an accurate  
3                   description of what happened when you were  
4                   compiling the answers to the undertakings in May of  
5                   2015?

6                   A.    Yes, it is.

7                   Q.    So you would concede, in fairness,  
8                   that you asked Mr. Michaud the wrong question?

9                   A.    Either I asked him the wrong  
10                  question or he gave me the wrong answer, and then  
11                  when I transmitted it to my counsel, it was further  
12                  degraded.  But I stand by that correction.

13                  Q.    Now, let me turn to a different  
14                  subject which is the call with Industry Canada  
15                  that was discussed with Mr. Glassman yesterday.  
16                  This is the call of August 11 of 2014.

17                  A.    Yes.

18                  Q.    You were present again in court  
19                  yesterday when Mr. Glassman was cross-examined on  
20                  this issue?

21                  A.    I was.

22                  Q.    And he referred to a call that  
23                  took place with Industry Canada on the evening of  
24                  August 11 of 2014?

25                  A.    Yes.

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1 Q. Just so you have it, to make this  
2 easy for you, pull up tab 26, please. Your Honour,  
3 tab 26 is CCG0028711. This is the affidavit of Mr.  
4 Glassman sworn May 27, 2016. And if you turn,  
5 please, to paragraph 45 of the affidavit, and you  
6 may recall, Mr. Riley, I put this paragraph to Mr.  
7 Glassman yesterday, where he says:

8 "Despite VimpelCom's sudden  
9 concerns about regulatory risk,  
10 during the late evening of August  
11 11, 2014, I understand from de Alba  
12 that Catalyst and VimpelCom had a  
13 call with Industry Canada during  
14 which the parties told Industry  
15 Canada that the 'deal was done'."

16 A. Yes.

17 Q. Can you please pull up tab 11-A of  
18 the cross-examination binder. And, Your Honour,  
19 this is CCG0024726, a series of emails of August 11  
20 and 12 of 2014. And scroll to the bottom of the  
21 page, please. Bennett Jones --

22 A. Sorry, can I just ask you, is this  
23 the whole of the email chain? Is this the bottom  
24 of the chain?

25 Q. I think that's right. Just so His

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1 Honour has it, Bennett Jones acted for VimpelCom in  
2 the case? Bennett Jones acted for VimpelCom in the  
3 case?

4 A. Yes, yes, they did.

5 Q. And this is an email from Adam  
6 Kalbfleisch of Bennett Jones. You'll see the date  
7 of it is Monday, August 11?

8 A. Yes.

9 Q. At 11:23 p.m., so the very evening  
10 this call with Industry Canada took place?

11 A. I would take that from that email.

12 Q. And he says to Paul Halucha of  
13 Industry Canada -- is he one of the people you met  
14 with?

15 A. I don't recall his name.

16 Q. He says:

17 "Paul, I understand that  
18 VimpelCom and Catalyst spoke with  
19 Jim Nicholson earlier this evening  
20 to update him on the progress being  
21 made on the transaction."

22 Mr. Nicholson was one of the people you  
23 met with at Industry Canada?

24 A. Yes.

25 Q. He says:



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1 "I would be available to  
2 schedule a call with you tomorrow to  
3 provide an update."

4 And so on. Scroll up, please, in the  
5 email chain.

6 A. Sorry, can I read all of that  
7 email, please?

8 Q. The one at the bottom?

9 A. Yes.

10 Q. Sure.

11 A. (Witness reads document). Thank  
12 you.

13 Q. Scroll up. It's the email above  
14 that I'm interested in. This is an email from  
15 Stephen Acker at Faskens. I take it you worked  
16 with Mr. Acker on the transaction?

17 A. I didn't personally.

18 Q. Certainly Catalyst did?

19 A. He was our counsel so he might be  
20 one of the team.

21 Q. He writes to de Alba, copied to  
22 Jon Levin and several others and he says:

23 "Gabriel: See below. This  
24 follows another email from Adam just  
25 before 11 p.m. telling Yale, Anthony

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1                   and me that the clients and Bruce  
2                   Drysdale spoke today with Jim  
3                   Nicholson re being close to signing  
4                   and that he had asked him to  
5                   co-ordinate with Industry Canada.  
6                   He has in mind a joint call with us  
7                   essentially to repeat the same  
8                   message to Halucha in the Ministry's  
9                   office at Industry Canada."

10                  And so on. And so the phrase he uses  
11                  in the email, this is the very evening of this  
12                  call, is that the clients and Bruce Drysdale spoke  
13                  today with Jim Nicholson re being close to signing?

14                  A. I see those words.

15                  Q. As opposed to the deal being done.  
16                  And I take it, because you were one of the two  
17                  people at Catalyst most responsible for dealings  
18                  with the Government of Canada, you had been on the  
19                  call?

20                  A. No, I was not on that call.

21                  Q. You were not on the call?

22                  A. No.

23                  Q. So who was on the call?

24                  A. I don't know.

25                  Q. Now, can you and I agree that in

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1 the business world people do, in fact, reach  
2 different conclusions on the prospects of companies  
3 and investments all the time?

4 A. I'm not sure I understand the  
5 question.

6 Q. Let me try to put it to you one  
7 more time. Can you and I agree that in the  
8 business world people do in fact reach different  
9 conclusions on the prospects of companies and  
10 investments all the time?

11 A. Not when there's this stage of a  
12 deal.

13 Q. All right. Pull up tab 19. Go  
14 back to the front cover, please. This is the  
15 transcript of your cross-examination on May 13th of  
16 2015?

17 A. Yes, I see that.

18 Q. Will you please turn to question  
19 219. Question 219, this is a question put to you  
20 by Mr. Milne-Smith on May 13. The question:

21 "But the fact of the matter is  
22 that people do, in fact, reach  
23 different conclusions on the  
24 prospects of a company or an  
25 investment all the time?"

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1 Answer: Yes."

2 A. That is correct.

3 Q. I take it you were asked that  
4 question and you gave that answer?

5 A. I gave that answer but that is a  
6 different question than the question you just asked  
7 me.

8 THE COURT: Mr. Riley --

9 THE WITNESS: I apologize, Your Honour.

10 BY MR. THOMSON:

11 Q. And I'm going to suggest to you,  
12 Mr. Riley, in fairness, that it is hardly  
13 surprising that companies and organizations as  
14 sophisticated as West Face, Tennenbaum, people like  
15 Guffey, Lacavera, Government of Canada, might well  
16 have had different views and perspectives than you  
17 or Mr. Glassman did in 2014 concerning the  
18 prospects of Wind Mobile? That wouldn't surprise  
19 you, would it?

20 A. We could have different --  
21 different views.

22 Q. Now, in your affidavits you made  
23 just two statements concerning the nature of the  
24 arrangements between Catalyst and VimpelCom and I  
25 just wanted to speak with you about it briefly.

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1                   They are contained in your affidavits  
2                   at February 18th of 2015 and May 1 of 2015 as well.  
3                   So let me start by pulling up, please, your  
4                   affidavit of February 18th which is tab 4 of the  
5                   cross-examination binder. This is, Your Honour,  
6                   CAT000066, Mr. Riley's affidavit of February 18 of  
7                   2015.

8                   And I ask you to turn, please, to  
9                   paragraph 45 of the affidavit. So at paragraph 45  
10                  of your affidavit you say this:

11                                 "During the exclusivity  
12                                 period..."

13                   And that would be the period of  
14                   exclusivity that Catalyst had with VimpelCom? Fair  
15                   enough?

16                   A. Yes.

17                   Q. So:

18                                 "During the exclusivity period,  
19                                 Catalyst and VimpelCom were able to  
20                                 negotiate almost all of the terms of  
21                                 the potential sale of Wind Mobile to  
22                                 Catalyst. The only point over which  
23                                 the parties could not agree was  
24                                 regulatory approval risk - Catalyst  
25                                 wanted to ensure that its purchase

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1                   was conditional on receiving certain  
2                   regulatory concessions from Industry  
3                   Canada, but VimpelCom would not  
4                   agree to the conditions Catalyst  
5                   sought."

6                   And if we then go to the May 1, 2015  
7                   affidavit --

8                   A.    Before you do, let me just read  
9                   this again, please.

10                  Q.    Sure.

11                  A.    (Witness reads document). Thank  
12                  you.

13                  Q.    Go to the May 1 affidavit at tab  
14                  5. Your Honour, this is CAT000382, which is the  
15                  supplementary affidavit of Mr. Riley sworn May 1,  
16                  2015. And I want to take you to paragraph 42 where  
17                  you deal with the same issue.

18                  So paragraph 42, Mr. Riley, you say --  
19                  to make sense of the first three words, you have to  
20                  scroll up to 41, so go back a little bit. So the  
21                  timeframe you're dealing with here is early August  
22                  of 2014?

23                  A.    Yes.

24                  Q.    So if you then, with that  
25                  timeframe in mind, then look at paragraph 42 where

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1           you say:

2                                 "At the time," that's early  
3                                 August 2014, "the anticipated deal  
4                                 with VimpelCom was conditional," you  
5                                 say "was conditional on Industry  
6                                 Canada approval and the granting of  
7                                 certain regulatory concessions to a  
8                                 Catalyst-owned Wind that in  
9                                 Catalyst's mind would make it easier  
10                                for a fourth national carrier to  
11                                succeed. These concessions were  
12                                essentially the same regulatory  
13                                concessions summarized in the  
14                                PowerPoint presentation Moyse helped  
15                                create in early 2014.

16                                THE COURT: If you would scroll down  
17                                the page, so I can see both together?

18                                MR. THOMSON: Yes. Will you do that?

19                                THE COURT: Thank you.

20                                BY MR. THOMSON:

21                                Q. Mr. Riley, again in fairness to  
22                                you, you were here for the cross-examination of  
23                                Mr. de Alba?

24                                A. I was.

25                                Q. I am happy to do this the easy way

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1 or the hard way. Can we agree that at no time was  
2 the Catalyst transaction of VimpelCom conditional  
3 on Catalyst obtaining the regulatory concessions  
4 that had been sought from the government during the  
5 meetings in March and May of 2014?

6 A. I would have to look at the  
7 wording in the SPA to answer that question  
8 directly.

9 Q. That's been gone through with  
10 Mr. de Alba, but let me try to do this the easy  
11 way. Pull up tab 24, please. This is CCG0028722,  
12 which are the answers to undertakings and so on  
13 given from the discovery of Mr. de Alba of May 11,  
14 2016, several weeks ago. If we look at number 14,  
15 please, number 14 was to advise if any drafts of  
16 the share purchase agreement being negotiated  
17 between Catalyst and VimpelCom contained a  
18 condition that the deal could not close unless  
19 Catalyst obtained certain regulatory concessions  
20 from the government, and the answer that was given  
21 was:

22 "The drafts of the share  
23 purchase agreement exchanged by  
24 Catalyst and VimpelCom contained  
25 certain regulatory conditions. None



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1                   were expressly predicated on  
2                   Catalyst obtaining any regulatory  
3                   concessions."

4                   I take it you adopt that answer?

5                   A.    I adopt that answer.

6                   Q.    And then one last statement you  
7                   made in your affidavit of February 18 of 2015 I'd  
8                   like to take you to, if I may.  Please pull up tab  
9                   4.  Go to the front of it, please.

10                   So, Mr. Riley, we've looked at this  
11                   before, this is CAT000066, this is your affidavit  
12                   sworn February 18?

13                   A.    I see that date.  Can you give me  
14                   the context of that affidavit because we've gone  
15                   back and forth through so many affidavits so I just  
16                   want to make sure I understand which one this is.

17                   Q.    This is your fourth affidavit,  
18                   this was filed in relation to the Glustein motion.

19                   A.    Okay, thank you.

20                   Q.    And if we can look, please, at  
21                   paragraph 46 of the affidavit.  46, pause there.  
22                   And you say in paragraph 46:

23                                 "The exclusivity period expired  
24                                 in mid-August 2014.  Very shortly  
25                                 thereafter, Catalyst learned that a

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1 syndicate of investors led by West  
2 Face was negotiating with VimpelCom  
3 to purchase Wind."

4 And you say:

5 "Ultimately, the consortium  
6 purchased Wind from VimpelCom on  
7 what I believe were essentially the  
8 same terms as Catalyst had proposed,  
9 with the one exception that the  
10 consortium waived the regulatory  
11 conditions Catalyst had been  
12 seeking."

13 A. Yes.

14 Q. That was a statement made in the  
15 affidavit as of February of 2015?

16 A. Yes.

17 Q. I take it that by now, regardless  
18 of what you thought or what you believed at the  
19 time, by now you've had a chance to review the  
20 share purchase agreement -- rather, the purchase  
21 agreement entered into by the West Face consortium  
22 with VimpelCom on September 16th of 2014?

23 A. I do not believe I have reviewed  
24 that copy.

25 Q. You've never reviewed it?

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1 A. To my knowledge, no.

2 MR. THOMSON: Thank you very much, Mr.  
3 Riley. Those are my questions.

4 THE COURT: You say, Mr. Riley, that  
5 you never reviewed the deal between the consortium  
6 and VimpelCom?

7 THE WITNESS: To the best of my  
8 knowledge.

9 THE COURT: To the best of your  
10 recollection?

11 THE WITNESS: Yes, to the best of my  
12 recollection. Sorry. Thank you.

13 MR. BORG-OLIVIER: Your Honour, I have  
14 probably half an hour to 45 minutes of questions  
15 for Mr. Riley. Would now be a good time to take  
16 the morning break?

17 THE COURT: No, we'll start.

18 MR. BORG-OLIVIER: Justice Newbould,  
19 you'll see in Mr. Riley's folder there is a  
20 cross-examination folder for Moyse defendants,  
21 cross-examination by Paliare Roland.

22 THE COURT: I've got the folder.

23 MR. BORG-OLIVIER: Okay. I think  
24 unless something goes wrong, every document that  
25 I'll be referring to should be there. Something

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1           might go wrong.

2                           CROSS-EXAMINATION BY MR. BORG-OLIVIER:

3                           Q.    Good morning, Mr. Riley.

4                           A.    Good morning.

5                           Q.    I'd like to take you to your  
6           affidavit and in particular this is the affidavit  
7           at tab 6 which is the first affidavit that you  
8           swore in this proceeding?

9                           A.    Yes.

10                          Q.    That's the one at tab 6.  If we  
11           could pull that up.  And my focus is going to be in  
12           particular on the section of your affidavit  
13           starting at page 14, paragraph 48.  This is a  
14           section called "Catalyst learns Moyse removed its  
15           confidential information."  Do you see that?

16                          A.    Yes.

17                          Q.    Now, in the opening line of that  
18           paragraph 48, skipping down to the third line of  
19           the paragraph, you say:

20                                    "Prior to his resignation,  
21           Moyse accessed and was capable of  
22           transferring Catalyst's confidential  
23           information to his personal  
24           possession."

25                          And, as you say in the next line, this

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1 was based on the information that you got from  
2 Mr. Musters, correct?

3 A. Correct. Can I just do one thing?  
4 There is a defined term in there, "Catalyst  
5 confidential information." In case it becomes  
6 relevant, can we assume that all information that  
7 was transferred was confidential? Is that what  
8 that definition means?

9 Q. I think that's right. I think we  
10 can assume that for these purposes.

11 A. Okay, thank you.

12 Q. Just to make sure that we  
13 understand each other here, the issue was that he  
14 accessed and was capable of transferring the  
15 information, correct?

16 A. Yes.

17 Q. It's not actually, notwithstanding  
18 what the heading says, there was no evidence of  
19 removal of the confidential information certainly  
20 at that point?

21 A. I think Mr. Musters' review  
22 determined that he had transferred confidential  
23 information.

24 Q. Well, let's pull up Mr. Musters'  
25 affidavit, which is at tab 1 of this folder.

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1 A. Thank you.

2 Q. And we'll go to paragraph 17 and

3 18. So what Mr. Musters says there is:

4 "In my experience, Moyse's  
5 conduct of accessing several files  
6 from the same directory over a brief  
7 period of time, as described above,  
8 is consistent with transferring  
9 files to a cloud service. It is my  
10 opinion that based on the pattern of  
11 conduct described above, Moyse was  
12 very likely transferring the  
13 documents he reviewed on May 28,  
14 April 25 and May 13 from Catalyst's  
15 computers to his DropBox or Box  
16 accounts, although I cannot say so  
17 definitively at this time. I cannot  
18 conclusively determine whether  
19 Catalyst's files were transferred by  
20 Moyse to the cloud services and then  
21 from the cloud services on to any  
22 other computer or electronic device  
23 such as an iPad without accessing  
24 those computers and/or devices that  
25 potentially had the files

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1 transferred from."

2 So I say to you again, Mr. Riley, the  
3 issue was that Mr. Moyses, based on this evidence  
4 from Mr. Musters, accessed and was capable of  
5 transferring the evidence but there was in fact no  
6 direct evidence of --

7 A. At this time?

8 Q. Yes.

9 A. That is correct. At the time of  
10 this affidavit.

11 Q. Right. Let's go back to tab 6 and  
12 to paragraph 50. You say in your affidavit here:

13 "I understand from Musters'  
14 report that Moyses's conduct between  
15 March 27 and May 26, 2014 is  
16 consistent with uploading  
17 confidential Catalyst documents from  
18 Catalyst's server, which Catalyst  
19 controls and can access --"

20 THE COURT: You're going awfully  
21 quickly.

22 BY MR. BORG-OLIVIER:

23 Q. Absolutely.

24 "...to Moyses's personal  
25 accounts with two internet based

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1 file storage services, DropBox and  
2 Box, which Catalyst does not control  
3 and cannot access."

4 Now, I take it any evidence as to  
5 Catalyst's control or access of the DropBox and Box  
6 file would have been provided to Mr. Musters by you  
7 or your counsel?

8 A. I'm sorry, could you repeat the  
9 question, please?

10 Q. Sure. Mr. Musters in there said  
11 that Catalyst doesn't control and cannot access the  
12 DropBox or Box folders. I take it he would have  
13 had to get that information from Catalyst or from  
14 its counsel?

15 A. I think you're getting me into an  
16 area that I'm not as proficient with. I believe  
17 that in subsequent evidence the DropBox was used  
18 for certain shared information between Catalyst and  
19 Natural Markets. The Box was Moyse's personal box.

20 Q. Let me help you with that because  
21 you've got that backwards.

22 A. Do I have it backwards? There is  
23 one that is shared and one that is not shared.

24 Q. Perfect. Let's just, to get some  
25 clarity on that, let's pull up Mr. Moyse's



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1 affidavit.

2 A. That shows you how untechnical I  
3 am.

4 Q. You're close. So Mr. Moyse's  
5 affidavit is at tab 2 of the folder.

6 A. If we're going back and forth this  
7 much, I'm going to ask you to go a little more  
8 slowly, if you could, please.

9 Q. Absolutely. And I'd like to go to  
10 paragraph 38, please. This is Mr. Moyse's  
11 affidavit of July 4, 2014, BM001957. So we're at  
12 paragraph 38 together, Mr. Riley?

13 A. Yes. Could I just read this?

14 Q. Yes.

15 A. (Witness reads document). Yes.

16 Q. So here, Mr. Moyse, at the end of  
17 paragraph 38, says that his Box account was  
18 established under his Catalyst email address with  
19 Catalyst's knowledge to host or have access to  
20 information hosted by Catalyst portfolio companies  
21 or advisors. You see that?

22 A. Yes.

23 Q. That's what you're referring to, I  
24 take it?

25 A. Yes, correct.

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1           Q.    So let's go back, if we can, to  
2           your affidavit.  And at paragraph 51 of your  
3           affidavit, which, to put this in time, predates the  
4           affidavit that we just saw from Mr. Moyses.  Yours  
5           was the first affidavit in this proceeding.

6           A.    Thank you, yes.

7           Q.    At paragraph 51 you made a  
8           statement that you spoke to Jonathan Moore who was  
9           the team lead at Catalyst external IT services  
10          supplier, and you learned from him that Moyses had  
11          no reason to use DropBox or Box for work purposes.

12          And I take it based on the information  
13          that we've just seen and in fact you volunteered,  
14          that statement, at least as it pertains to Box, was  
15          incorrect?

16          A.    That is correct.

17          Q.    And to the extent that there are  
18          statements with regard to Mr. Moyses's Box account  
19          being personal, in subsequent affidavits of yours,  
20          or in fact you adopting that evidence today, I take  
21          it you disavow those statements?

22          A.    Sorry, which statements am I  
23          disavowing, please?

24          Q.    Well, this morning Mr. Winton  
25          asked you if you adopt the evidence in your

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1 affidavits sitting here today as your evidence at  
2 the trial?

3 A. Yes.

4 Q. And what I'm suggesting is that  
5 that evidence at paragraph 51 is not correct and is  
6 not part of what you adopt as truth here today?

7 A. I'm not trying to quibble but  
8 there is a whole series of affidavits and in the --  
9 if I go on for a moment. As we learned more  
10 information, our affidavits got more refined. So  
11 at this stage, this is the first affidavit,  
12 correct, that I swore?

13 Q. Right.

14 A. We were dealing with what seemed  
15 to be general information and we didn't have  
16 further information as was provided in subsequent  
17 affidavits.

18 So when I adopt these, at that time  
19 those were true in my -- when I swore the  
20 affidavit.

21 Q. So let's go to paragraph 51 of  
22 your affidavit, if we could. And what you say here  
23 is:

24 "As detailed below, the breadth  
25 and depth of Moyse's conduct is

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1                   alarming."

2                   And the conduct that you're talking  
3                   about here is the access of Catalyst information,  
4                   correct?

5                   A.    Yes.

6                   Q.    And we'll go through these one by  
7                   one, but just to set the scene a bit, what's  
8                   detailed below, starting at paragraph 5, is access  
9                   to the investment letters that Mr. Winton asked you  
10                  about this morning?

11                  A.    Yes.

12                  THE COURT:   Paragraph what?

13                  MR. BORG-OLIVIER:   Sorry, Your Honour?

14                  THE COURT:   Paragraph what?

15                  MR. BORG-OLIVIER:   55.

16                  THE COURT:   55.   I thought you said 5.

17                  BY MR. BORG-OLIVIER:

18                  Q.    So those are the investment  
19                  letters and we'll talk a little bit about those.

20                  At paragraph 58, access to certain  
21                  files pertaining to Stelco?

22                  A.    Yes.

23                  Q.    At paragraph 60, access to certain  
24                  files pertaining to Masonite?

25                  A.    Yes.

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1 Q. At paragraph 61, access to certain  
2 telecom files which I think we now know refer to  
3 Wind files, correct?

4 A. I think those were Wind and  
5 Mobilicity but they were telecommunications files.

6 Q. Okay. And at paragraph 64, access  
7 to the Monday meeting notes which we've heard a bit  
8 about?

9 A. Yes.

10 Q. So when you referred at paragraph  
11 51 to the breadth and depth of Mr. Moyses's conduct,  
12 it was with respect to his access to those files  
13 that you were referring to?

14 A. I think I said including. Could  
15 we go back up to the top, please, just so I have  
16 the right context? I think you have to go down a  
17 little bit, please.

18 Q. Scroll down. I take it, Mr.  
19 Riley, there were no files of concern other than  
20 the ones that you referred to here?

21 A. If you go down, scroll down,  
22 please.

23 Q. What would you like to look at?

24 A. These are examples only.

25 Q. Okay. Some examples. And these

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1           were the examples that you took because you viewed  
2           them as the ones that were potentially sensitive,  
3           correct?

4                     A.   Based on -- we were acting very  
5           quickly, so we tried to highlight it but we did not  
6           do an in-depth review of all of the files.

7                     Q.   You selected these because you  
8           viewed these as the sensitive files?

9                     A.   Yes.  Well, excuse me, sensitive  
10          or indicative of conduct that did not seem to be  
11          consistent with the duties that he had at that  
12          time.

13                    Q.   Let's start with the investment  
14          letters, if we could.  So let's go to paragraph 55  
15          of your affidavit.  So these are the investment  
16          letters that Mr. Winton asked you some questions  
17          about this morning?

18                    A.   Yes.

19                    Q.   Okay.  At paragraph 57 you note  
20          that Mr. Moyse accessed these files between 6:28  
21          p.m. and 6:39 p.m., outside of regular office hours  
22          at Catalyst.

23                    A.   Yes.

24                    Q.   And, Mr. Riley, there's nothing  
25          unusual about professional staff at Catalyst being

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1 in the office at around 6:30 p.m.?

2 A. Correct.

3 Q. And in fact, with the possible  
4 exception of Mr. Glassman and Mr. de Alba, it would  
5 have common for everyone, including you, to be  
6 around the office at about 6:30?

7 A. I think all three of us could be  
8 around at 6:30.

9 Q. So there's nothing in particular  
10 that should be drawn from the fact that this is  
11 outside of regular office hours; is that fair?

12 A. There would be fewer people around  
13 is the only thing I would draw from that and it was  
14 past the 5:30 regular office hour.

15 Q. But quite typical for plenty of  
16 the professional staff to be around?

17 A. Yes.

18 Q. Now, the investment letters that  
19 were accessed that are at Exhibit R, I don't think  
20 we need to pull it up unless you would like to have  
21 a look at the file listing --

22 A. I think for now I'll say no.

23 Q. Sure. I think we can agree that  
24 the letters that were accessed were from the period  
25 of 2006 to 2011; is that right?

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1 A. Yes.

2 Q. And am I right, Mr. Riley, that  
3 investment letters rarely, if ever, included  
4 information about prospective investments?

5 A. They do on occasion, yes. They do  
6 on prospective investments.

7 Q. But rarely?

8 A. Well, again, I'm not going to  
9 quibble. I'd rather say that they do include that  
10 from time to time.

11 Q. Okay. Can we go to tab 11,  
12 please. Mr. Riley, this is a transcript of your  
13 cross-examination of July 29, 2014 in which you  
14 were cross-examined on this and two of your  
15 subsequent affidavits.

16 Now, we weren't there, as it turns out,  
17 that day, and Mr. Moyse was represented by  
18 different counsel at that time, but you recall  
19 being cross-examined on that date?

20 A. I do.

21 Q. Can we go to question 297, please.  
22 So you were asked the following question and gave  
23 the following answer, Mr. Riley?

24 A. Yes, I did.

25 Q. Okay.



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1           A.    And these letters would give  
2           investors updates on potential new  
3           investments, updates on current  
4           investments, that type of thing?

5           Answer:  Yes.  Not so much  
6           prospective developments.  We might  
7           say that we're looking at something  
8           related to the area, but not very  
9           often would the direction be the  
10          investments.

11          Question:  But they could?

12          Answer:  Could."

13          And then if we skip ahead to question  
14          302, you were asked:

15                 "But would the investment  
16                 letters not talk about potential  
17                 acquisitions in a more general form?

18                 Answer:  No.

19                 Question:  Not at all?

20                 Answer:  No.  Well, I'd have to  
21                 go back and look at each one again.

22                 Question:  I find that hard to  
23                 believe.

24                 Answer:  Generally speaking  
25                 that's very sensitive information,

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1                   so we would not want to signal it  
2                   because of a need to ensure that we  
3                   didn't have information out there  
4                   that can be used against us."

5                   Do you recall being asked those  
6                   questions and giving those answers?

7                   A.    I do.

8                   Q.    And the evidence you gave --

9                   THE COURT:  Is there any difference  
10                  between what he said on his cross and what he said  
11                  today?

12                  MR. BORG-OLIVIER:  I think there is,  
13                  Your Honour, to be fair.

14                  BY MR. BORG-OLIVIER:

15                  Q.    So the concern was that the  
16                  investor letters should not include sensitive  
17                  information because you didn't want information out  
18                  there that could be used against Catalyst, correct?

19                  A.    Yes, that is correct.

20                  Q.    And we heard this morning for the  
21                  first time, Mr. Riley, that analysts are not  
22                  allowed to view old investment letters without  
23                  authorization from partners.  You'll agree that  
24                  information is nowhere in your affidavit?

25                  A.    It is not.

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1           Q.   And when Mr. Winton asked you  
2           about policies pertaining to it, if I got this down  
3           correctly, I think you made reference to general  
4           confidentiality restrictions. Did I have that  
5           right?

6           A.   That is correct.

7           Q.   And I take it then that the answer  
8           is there is no formal policy that states as such?

9           A.   We are in the course of preparing  
10          one.

11          Q.   Okay. So the answer is there is  
12          no formal policy?

13          A.   That is correct.

14          Q.   And certainly there wasn't one  
15          when Mr. Moyse was there?

16          A.   There was not.

17          Q.   And there is no firewall on the  
18          system, I take it, that limits access to partners  
19          alone?

20          A.   There are some firewalls but not  
21          around this information.

22          Q.   Let's move back to your affidavit,  
23          if we could, and to paragraph 58, which is the  
24          Stelco files.

25          A.   Um-hmm.

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1 Q. Why don't you read those two  
2 paragraphs to yourself, Mr. Riley, to orient  
3 yourself.

4 A. (Witness reads document). Yes.

5 Q. And again I won't take you to  
6 Exhibit S unless we have to, but I take it you  
7 would agree with me that the information in those  
8 Stelco documents dated back to approximately 2005  
9 to 2007?

10 A. Correct. I'll take it as given.  
11 But I may have to refer to it.

12 Q. Sure. And as of 2014 certainly  
13 Catalyst's Stelco investment was no longer active?

14 A. That is correct, but steel was  
15 back on the table. In other words, there was the  
16 start of the Dofasco and Essar, as it's now known,  
17 and Stelco or US steel as it is now known.

18 THE COURT: You've got that wrong.  
19 Essar is not Stelco. It's Algoma.

20 THE WITNESS: Sorry, I apologize.

21 MR. BORG-OLIVIER: I could give all  
22 sorts of evidence on that, if it's useful.

23 THE COURT: E-S-S-E-R.

24 BY MR. BORG-OLIVIER:

25 Q. So the answer, Mr. Riley, is no,

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1 Catalyst's Stelco investment was no longer active?

2 A. Yes.

3 Q. And what you did in preparing your  
4 affidavit is you looked at the list of files that  
5 Mr. Musters pulled but you didn't actually pull  
6 from the system any of the documents that were  
7 accessed; do I have that right?

8 A. To the best of my recollection, I  
9 did not look at them.

10 Q. And so your concern was really  
11 based on nothing more than the file names?

12 A. Yes.

13 Q. And you didn't append any of the  
14 documents to your affidavit?

15 A. No.

16 Q. And nor did you produce any of  
17 those documents in this litigation?

18 A. No.

19 Q. Let's just scroll down that page  
20 to the Masonite files. Am I right, Mr. Riley, that  
21 Catalyst never made an investment in Masonite?

22 A. That is correct.

23 Q. And Catalyst had analyzed Masonite  
24 in approximately 2008, approximately six years  
25 earlier?

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1                   A.    It was before my time but I think  
2                   that's right.

3                   Q.    And nothing had occurred to bring  
4                   Masonite back to the forefront?

5                   A.    Not to my knowledge.

6                   Q.    So to the extent that you say at  
7                   paragraph 60 and the fourth line that these files  
8                   are related to an opportunity Catalyst has been  
9                   studying, you'd agree with me that "has been  
10                  studying" is an inaccurate statement there?

11                  A.    I think it was correct what I knew  
12                  at the time, because, as I've said elsewhere, we  
13                  review investments over a long period of time, so  
14                  Masonite I think would still have been active  
15                  because of the time period, it could still be  
16                  relevant.

17                  Q.    But it was last analyzed by  
18                  Catalyst in 2008?

19                  A.    That is correct.

20                  Q.    So an opportunity that Catalyst  
21                  had looked at six years earlier would have been a  
22                  more accurate statement?

23                  A.    Yes.

24                  Q.    Now, I take it that after  
25                  delivering this affidavit and receiving the

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1           responding affidavit from Mr. Moyse, you would have  
2           reviewed Mr. Moyse's affidavit?

3                     A.    Yes.

4                     Q.    Okay.  Can we pull up tab 2,  
5           please, again, which is Mr. Moyse's affidavit of  
6           July 4, 2014.  And at paragraph 51 and 52, so  
7           Mr. Moyse in his responding affidavit says the  
8           following with respect to Masonite:

9                             "As part of my job search, I  
10                            interviewed with a number of  
11                            companies including MacKenzie  
12                            Investments.  The reason that I had  
13                            documents in my DropBox related to  
14                            Masonite is because, as part of the  
15                            interview process, I was asked to  
16                            use the company as a case study and  
17                            to draft a 2-4 page model of the  
18                            company.

19                            Attached at Exhibit I is an email  
20                            (with attachments) from Sharon Beers  
21                            at MacKenzie Investments assigning  
22                            me the project.

23                            I will note that Exhibits T and E  
24                            of Mr. Riley's and Mr. Musters'  
25                            affidavits show that the documents I

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1           accessed were located in my personal  
2           DropBox (which was linked to my  
3           Catalyst computer) and have not  
4           provided any evidence that I  
5           accessed any Masonite documents on  
6           Catalyst's system. This is because  
7           no such evidence exists. The  
8           documents I used for the case study  
9           were public documents, published by  
10          Masonite and provided to me by  
11          MacKenzie Investments or obtained  
12          from Masonite's website."

13                 So you would have read that explanation  
14          from Mr. Moyse at or around the time you received  
15          his affidavit?

16                 A. Yes.

17                 Q. And I take it you would have  
18          looked into Mr. Moyse's explanation to determine  
19          whether there was any merit to it?

20                 A. I don't recall.

21                 Q. You don't recall whether you did  
22          it or not?

23                 A. Correct.

24                 Q. Sitting here today, do you have  
25          any reason to dispute the evidence of Mr. Moyse as



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1 to how he accessed or how he got his hands on these  
2 Masonite documents.

3 A. If I could go back to 51?

4 Q. Yes.

5 A. What I could never reconcile when  
6 I was looking at this affidavit is why he would  
7 access the Masonite documents when they were  
8 public. In other words, I think he was looking at  
9 our files on that matter as opposed to the public  
10 documents. You would have to go back to the  
11 document list to see what he accessed.

12 Q. Okay. And I take it you made no  
13 attempt to cross-reference the Masonite documents  
14 on the Catalyst system with the documents that  
15 Mr. Moyse appended to the affidavit?

16 A. No, we did not.

17 Q. And you'll agree with me that that  
18 would have been a way to confirm or deny whether  
19 Mr. Moyse in fact had accessed Catalyst documents?

20 A. I don't know for sure. In other  
21 words, I don't know what would be revealed and what  
22 it would show. I don't know.

23 Q. You just made no effort whatsoever  
24 to confirm the truth or falsity of Mr. Moyse's  
25 statement in this regard?

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1 A. That is correct.

2 Q. Can we go back to tab 6, please.

3 And now let's go to paragraph 64. And this is in  
4 reference to the Monday meeting notes. I'll take  
5 you first, Mr. Riley, to paragraph 64. So you say:

6 "Two days after Moyses gave  
7 notice, Moyses apparently created a  
8 file containing his notes from our  
9 Monday morning meeting held on May  
10 26, 2014. According to the record  
11 from Moyses's hard drive, an excerpt  
12 of which is attached as Exhibit V,  
13 Moyses accessed these notes at 12:30  
14 p.m., which appears to be after the  
15 meeting ended."

16 I think you said you were here when Mr.  
17 Glassman testified?

18 A. I was.

19 Q. Okay. And I take it you would  
20 have heard Mr. Glassman say that the Monday  
21 meetings, despite I think sometimes being referred  
22 to as Monday morning meetings, occurred almost  
23 invariably over lunch?

24 A. Yes.

25 Q. And you agree with Mr. Glassman?

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1           A. Yes, I do. But when we say that,  
2 it's kind of colloquial.

3           Q. It's colloquially, exactly. I  
4 take it there is no evidence that the May 26th  
5 meeting was any different from normal practice?

6           A. Not to my memory.

7           Q. So, in fact, I take it there is no  
8 reason to believe that 12:30 would have been after  
9 the meeting ended?

10          A. I'm sorry, say that again, please?

11          Q. Sure. At the back of paragraph 64  
12 you say:

13                        "Moyses accessed these notes at  
14 12:30 p.m. which appears to be after  
15 the meeting ended."

16          I take it you have no basis to actually  
17 say that 12:30 p.m. would be after the meeting  
18 ended?

19          A. I would not recall.

20          Q. Most likely on a typical Monday at  
21 12:30 p.m. the meeting would either just be  
22 beginning or still going on?

23          A. Yes.

24          Q. And I take it, if we read  
25 paragraph 65, the last line of paragraph 65 you

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1 say:

2 "I am unaware of any legitimate  
3 reason why Mr. Moyse would be making  
4 notes of a meeting he attended after  
5 he had resigned."

6 I take it this appropriately captures  
7 your concern around the Monday morning meeting  
8 files in Mr. Moyse's computer?

9 A. Yes.

10 Q. You thought that it was improper  
11 that he be attending a meeting on May 26th and  
12 taking notes?

13 A. Yes. I would have to remember at  
14 what point I had the discussion with him as to why  
15 he should go home because it was in the context of  
16 his non-compete and what his stance was, but it  
17 would be in the context of that morning.

18 Q. Okay. So that's precisely the  
19 question that I have for you. So you confirmed  
20 this morning that you were the one who in fact sent  
21 Mr. Moyse home?

22 A. I did.

23 Q. And if Mr. Moyse testifies that  
24 that occurred before the Monday morning meeting  
25 ever occurred, you would have no basis to dispute

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1           that, I take it?

2                   A.    No.

3                   Q.    And it's quite simple, I take it,  
4           to confirm attendance at Monday morning meetings  
5           since attendance is mandatory, as we heard, and  
6           absence is very rare?

7                   A.    Yes.

8                   Q.    I take it, though, you didn't  
9           confirm with any of your colleagues as to whether  
10          in fact Mr. Moyse had attended on May 26 before  
11          swearing this affidavit?

12                   A.    I did not.

13                   Q.    And the notes that you make  
14          reference to here, you'll have seen Mr. Moyse's  
15          evidence in that regard, and let's go back, if we  
16          could, to tab 2, which again is Mr. Moyse's  
17          affidavit, and if we can go to paragraphs 59 and  
18          60, so Mr. Moyse says this:

19                            "In any event, I did not attend  
20                            the meeting on May 26, 2014.

21                            Earlier that morning, I verbally  
22                            confirmed my previous written notice  
23                            of resignation and, as a result, was  
24                            not invited to the meeting.

25                            Following my resignation, I did not

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1 attend any further Monday meetings  
2 as I was asked to remain at home.

3 The Monday meeting notes were not  
4 my notes from the meeting (which  
5 would be impossible because I didn't  
6 attend it), but were my notes for  
7 the meeting consisting of world news  
8 and economic events which might be  
9 discussed at the meeting. This was  
10 my usual practice prior to most  
11 Monday meetings. I do not believe  
12 the notes were Catalyst's property  
13 and in any event they did not  
14 contain any confidential  
15 information.

16 Nevertheless, I did not transfer  
17 the notes to my Box, DropBox or any  
18 other personal account, nor have I  
19 provided any of the information to  
20 West Face."

21 I take it, Mr. Riley, you would have  
22 read Mr. Moyse's affidavit and explanation as to  
23 those notes?

24 A. Yes.

25 Q. And did you take any steps to

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1 access the notes themselves, which, as you know,  
2 were resident on the Catalyst computer, to  
3 determine whether they were more consistent with  
4 Mr. Moyse's description or with in fact being notes  
5 of what was said at that meeting?

6 A. I don't remember doing so.

7 Q. Okay. And I take it that's  
8 because you didn't do so?

9 A. Correct.

10 THE COURT: Why don't we take the  
11 morning break, Mr. Borg-Olivier. Should we take  
12 the morning break now?

13 MR. BORG-OLIVIER: We could, Your  
14 Honour, although I think I'll be less than five  
15 minutes and I'll be done.

16 THE COURT: All right.

17 BY MR. BORG-OLIVIER:

18 Q. So if we could pull tab 6 up  
19 again, please. And let's go to paragraph 61. And  
20 at paragraphs 61 through 63 you make reference to a  
21 very sensitive and confidential opportunity in the  
22 telecommunications industry and, as I put it to you  
23 earlier, this refers at least in part to Wind?

24 A. Yes.

25 Q. And the reason you didn't name it

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1 at the time of course is because it was still a  
2 live opportunity?

3 A. That is true.

4 Q. And what you say in paragraph 62  
5 is that -- I'm sorry, where are you? Yes, on  
6 paragraph 62 you say:

7 "On the evening of May 13,  
8 2014, shortly after he reviewed or  
9 transferred the Masonite  
10 international files referred to  
11 above, Moyse accessed several files  
12 related to this situation."

13 Now, you'll agree with me, Mr. Riley,  
14 that of course on May 13, 2014 Mr. Moyse was part  
15 of the telecom team?

16 A. Yes.

17 Q. Part of the Wind deal team?

18 A. Yes.

19 Q. You knew that at the time he was  
20 doing due diligence and working on the investment  
21 memo?

22 A. Yes.

23 Q. And you knew that at the time that  
24 you swore this affidavit?

25 A. Yes.



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1           Q.   And you knew that in that context  
2           it was entirely reasonable for Mr. Moyse to be  
3           accessing documents related to Wind? In fact,  
4           essential to him performing the tasks he needed to  
5           perform at the time?

6           A.   Yes.

7           Q.   And as I read it, nowhere in here,  
8           Mr. Riley, do you mention to the court that  
9           Mr. Moyse was part of the Wind team at the time?

10          A.   No, I did not.

11          Q.   And I put it to you, Mr. Riley,  
12          that the reason you didn't do so is because you  
13          knew that if you disclosed that Mr. Moyse was  
14          working on the file, that would take all the sting  
15          out of the picture you were trying to paint that  
16          Mr. Moyse is somehow acting inappropriately?

17          A.   That was not my reason.

18          Q.   Are you prepared now to concede  
19          that nothing in paragraph 61 to 63 is in any way  
20          evidence of inappropriate actions on behalf of  
21          Mr. Moyse?

22          A.   It would depend on the use he made  
23          of the information.

24          Q.   Certainly none of the evidence  
25          that you have presented here suggests any

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1 inappropriate actions?

2 A. That is correct. That is correct.

3 MR. BORG-OLIVIER: That's all I have,  
4 Your Honour.

5 THE COURT: Thank you. Any  
6 re-examination?

7 MR. DIPUCCHIO: No.

8 THE COURT: Thanks, Mr. Riley.

9 -- WITNESS EXCUSED --

10 THE COURT: We will take the morning  
11 break and then I guess you'll have your expert.

12 MR. DIPUCCHIO: We are lining him up as  
13 we speak. We are a bit ahead of schedule,  
14 actually, Your Honour, happily, so we'll line him  
15 up and get him in here as soon as we can.

16 -- RECESS AT 11:08 --

17 -- UPON RESUMING AT 11:35 --

18 THE COURT: Yes, Mr. Winton?

19 MR. WINTON: Thank you, Your Honour.

20 Our next witness is Mr. Musters, our expert.

21 Yesterday afternoon, at the close of the day, you  
22 were handed an expert brief. If you have that with  
23 you.

24 THE COURT: I do have it.

25 MR. WINTON: Wonderful. I just wanted

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1 to make sure you did before we got started.

2 Also, Your Honour, just a housekeeping  
3 matter to bring to your attention. We have a small  
4 volume of read-ins that for technical reasons we  
5 were not able to prepare electronically for this  
6 morning. We are preparing briefs and having them  
7 brought up to court.

8 THE COURT: You're not going to take  
9 the time and actually start reading them in, are  
10 you? They are just being taken as being read?

11 MR. WINTON: Absolutely, Your Honour.  
12 My question, Your Honour, is if my friends don't  
13 disagree, we could just arrange to have them loaded  
14 onto the iPad at the next opportunity.

15 THE COURT: That's fine.

16 MR. WINTON: Thank you.

17 THE COURT: That's fine.

18 MR. WINTON: Thank you. Our next  
19 witness is Martin Musters.

20 MARTIN MUSTERS: SWORN.

21 MR. WINTON: Your Honour, there was an  
22 agreement of counsel that both the experts who were  
23 going to be called to testify before you, counsel  
24 were not going to challenge the experts'  
25 qualifications. I know my friend does want to make

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1           some initial submissions before Mr. Musters gives  
2           his evidence regarding some concerns about the  
3           qualifications and for what expertise the witnesses  
4           are qualified, and we are also in your hands as to  
5           whether or not we need to qualify the witness by  
6           asking questions.

7                         THE COURT: Let me understand. You're  
8           saying -- so you're saying that there is a concern  
9           about qualifications?

10                        MR. WINTON: No, I'm sorry, I misspoke  
11           then. My friend wishes to make some submissions  
12           about whether or not some of the evidence that  
13           Mr. Musters will either be giving or has given in  
14           his affidavit fall outside the scope of his  
15           qualifications, as I understand it. I'll leave it  
16           to him to make those actual submissions.

17                        THE COURT: Which one of your friends?

18                        MR. WINTON: Mr. Borg-Olivier.

19                        THE COURT: Pardon?

20                        MR. WINTON: Mr. Borg-Olivier.

21                        THE COURT: Is this not something that  
22           can be left for argument at the end of the case?

23                        MR. BORG-OLIVIER: It is, Your Honour,  
24           I just wanted to be clear that to the extent we  
25           have an agreement between the parties, we are not

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1 conceding the point that everything in Mr. Musters'  
2 report necessarily falls within the scope of his  
3 expertise. We just wanted to alert you to that.

4 THE COURT: We'll leave it to the end  
5 of the case for argument. It works better.

6 MR. WINTON: Thank you, Your Honour.  
7 So subject to Your Honour's request for additional  
8 questions, we're asking that Mr. Musters be  
9 qualified as an expert in the field of computer  
10 forensic and cellphone forensics.

11 THE COURT: So the only objection to  
12 that is what Mr. Borg-Olivier said, subject to that  
13 I'll --

14 MR. WINTON: Subject to  
15 Mr. Borg-Olivier's reservation of rights to make  
16 argument. Correct, thank you, Your Honour.

17 THE COURT: You can proceed.

18 EXAMINATION IN-CHIEF BY MR. WINTON:

19 Q. Now, Mr. Musters, you have in  
20 front of you a brief, it's the expert brief which  
21 sets out some affidavits and other reports and  
22 information, and I just want to run through it with  
23 you quickly to summarize what's here.

24 If you'd turn to the index, sir, you'll  
25 see that tab 1 sets out -- turn to the tab and

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1 satisfy yourself that tab 1 is an affidavit that  
2 you swore in this proceeding back on June 26th,  
3 2014?

4 A. The affidavit is dated June 26,  
5 2012.

6 Q. It is. Okay, if we turn then --  
7 sorry, that's a typo and should have been  
8 corrected. If you turn to page 4 of the affidavit  
9 and you look at the jurat, it was sworn, the date  
10 is correct here?

11 A. That is correct. So the date was  
12 June 26, 2014. That's correct.

13 Q. And that accords with your  
14 recollection as to when you swore this affidavit?

15 A. Yes.

16 THE COURT: Look, do you remember what  
17 you did on June 26th, 2014?

18 MR. WINTON: I do because I was making  
19 this affidavit, Your Honour.

20 THE COURT: Let's not get too worried  
21 about all this.

22 MR. WINTON: Thank you, Your Honour.

23 BY MR. WINTON:

24 Q. And prior to testifying today,  
25 you've had an opportunity to review your affidavit

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1           once again?

2                         A.    I have.

3                         Q.    And you adopt the information  
4           that's in here?

5                         A.    Yes.

6                         Q.    As evidence you have given in the  
7           past and evidence you have given today?

8                         A.    Yes.

9                         Q.    I'm going to skip over tab 2 for a  
10          minute and get back to that, but if you turn to tab  
11          3, that is an affidavit that you swore on February  
12          15th, 2015?

13                        A.    That's correct.

14                        Q.    You reviewed that affidavit prior  
15          to testifying today?

16                        A.    Yes, I have.

17                        Q.    And subject to any qualifying  
18          evidence you give today, do you adopt this evidence  
19          as your evidence today?

20                        A.    I do.

21                        Q.    You swore at tab 4 a third  
22          affidavit on April 30th, 2015?

23                        A.    That's correct.

24                        Q.    And you reviewed that affidavit  
25          prior to testifying today?

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1 A. I did.

2 Q. And you adopt the evidence set out  
3 in that affidavit?

4 A. Yes.

5 Q. And finally at tab 5, there is a  
6 fourth affidavit from you sworn May 13th, 2015?

7 A. Yes.

8 Q. And you have reviewed that prior  
9 to today?

10 A. Yes, I did.

11 Q. And adopt that as your evidence  
12 today?

13 A. Yes.

14 Q. You also were cross-examined on  
15 two occasions, and those transcripts are at tab 6  
16 and 7. The first being on August 1st, 2014?

17 A. That's correct.

18 Q. And you reviewed that prior to  
19 testifying today, that transcript?

20 A. I have.

21 Q. And do you agree with the evidence  
22 that's set out there?

23 A. I do.

24 Q. And adopt it as your evidence?

25 A. Yes.



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1 Q. And in tab 7 there is the May  
2 19th, 2015 affidavit -- sorry, transcript, and you  
3 reviewed that prior to today?

4 A. I did.

5 Q. And adopt that as your evidence?

6 A. Yes.

7 Q. Now, we skipped over tab 2 and I  
8 want to go back to that right now because that has  
9 not yet been attached to any affidavit of yours.  
10 It's the report entitled "Re Brandon Moyse  
11 BlackBerry Q 10" dated July 9, 2014. It's prepared  
12 by CFI, Computer Forensics Inc. What is CFI?

13 A. Computer Forensics Incorporated is  
14 a company that I own.

15 Q. Do you know who prepared this  
16 report?

17 A. I did.

18 Q. All right. And for what purpose  
19 were you preparing or asked to prepare this report?

20 A. I was asked to do an analysis of  
21 the BlackBerry provided to me. In section 1 of the  
22 report it says you had asked me to retrieve all  
23 information possible from the BlackBerry.

24 Q. And that's at page 4?

25 A. That's correct.

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1 Q. And so what did you do in pursuit  
2 of that investigation?

3 A. Well, in order to extract  
4 information from a BlackBerry, I'll be specific in  
5 my comments to a BlackBerry as opposed to other  
6 types of smartphones, the first step is to turn it  
7 on, and after I turned the phone on, it would be  
8 normal process to enter in the pass code and put  
9 the phone into airplane mode.

10 When I turned the phone on, I noticed  
11 immediately that it was at its welcome screen,  
12 which tells me that the BlackBerry was  
13 reinitialized.

14 Q. You attached images from that  
15 investigation to this report?

16 A. Yes.

17 Q. All right. So am I correct the  
18 welcome screen is the screen at page 9?

19 A. That's correct.

20 Q. And in turning to page 10, what is  
21 that screen showing us?

22 A. The tabs at screen 9 and 10  
23 basically tell me that the phone was reinitialized,  
24 meaning that it would be the state that you would  
25 receive it if you were to go to the store, the

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1 Apple -- not the Apple store, I'm sorry, the Rogers  
2 or Bell or whoever. It's how you would receive the  
3 phone in its initial state.

4 Q. And so what effect did this have  
5 on your attempt to retrieve information from the  
6 phone?

7 A. Well, BlackBerrys are unique in  
8 that their file systems are encrypted, so that  
9 effectively means that you can't recover any data  
10 from the phone after it's been factory reset.

11 So from -- clearly the operating system  
12 of the phone is present, but all SMS, text  
13 messages, call logs, anything that was present on  
14 the device from a user perspective is no longer  
15 there. No longer retrievable, let me rephrase it  
16 that way.

17 Q. If we can turn to page 11 of your  
18 report, were you able to determine when the  
19 BlackBerry was initialized?

20 A. From the BlackBerry itself, no.  
21 But I did have access to Catalyst email and I found  
22 an email from Mr. Moyse where he sends an email to  
23 Lorne Creighton dated June 17th, 2014 at 3:59 p.m.,  
24 and you'll notice on page 12 it says sent from my  
25 BlackBerry 10 smartphone on a Rogers network.

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1           So from the phone itself, no, but from  
2           other information I was -- I can say that the  
3           BlackBerry was functioning as of June 9th, 2014 at  
4           3:59 p.m. It may have been functioning after that,  
5           so specifically to your question I can't --

6           THE COURT: You say June 9th. Did you  
7           mean to say June 17th?

8           THE WITNESS: June 17th, I'm sorry.  
9           Thank you, Your Honour.

10          THE COURT: You're welcome.

11          THE WITNESS: So I know it was working  
12          at that time. I can't tell you when it was wiped.

13          BY MR. WINTON:

14          Q. To your knowledge, if the owner of  
15          the BlackBerry was concerned about personal text  
16          messages on the phone that they would have wanted  
17          to keep confidential, would it be necessary to  
18          initialize the phone in order to delete those from  
19          the BlackBerry?

20          A. There would be two ways to do it.  
21          One would be to simply go into his text messages  
22          and delete the text messages that he was concerned  
23          about, or -- so that would be one way.

24          Q. And if one were to do so, would  
25          that delete them beyond the ability of a forensic

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1 investigator to recover from the phone?

2 A. Like I said, BlackBerrys are  
3 unique in that unless we're talking about special  
4 tools that the RCMP have, for all intents and  
5 purposes those messages are not recoverable.

6 Q. Do you have access to those tools?

7 A. No.

8 Q. To your knowledge do any civilians  
9 have access to those tools?

10 A. To my knowledge, civilians don't  
11 have access to those tools.

12 Q. So for today's examination, Your  
13 Honour, we're not going to touch on the other 2014  
14 affidavit. We're just going to turn to tab 3 and  
15 I'm going to examine Mr. Musters on his affidavits  
16 from 2015.

17 You have adopted the evidence but I  
18 wish to draw, because this was the subject of prior  
19 cross-examination which you also adopted, I want to  
20 draw your attention, Mr. Musters, to page 4 and ask  
21 that you review paragraphs 12 and 13 of your  
22 February 15, 2015 affidavit.

23 A. Which paragraphs? Just 12?

24 Q. 12 and 13, please.

25 A. (Witness reads document). Yes.

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1           Q. Now, first of all, let's say are  
2 you aware of whether the information set out in  
3 those paragraphs is entirely accurate?

4           A. It's not entirely accurate and I  
5 can explain, if you wish, or you can ask --

6           Q. Can you explain what portion of it  
7 is inaccurate?

8           A. Certainly. When I initially  
9 looked at -- and maybe I should just put a bit of  
10 context to this. There is a program called  
11 advanced system optimizer and it has many  
12 functions, one of them being a Secure Delete  
13 feature.

14           I was asked to look at that Secure  
15 Delete feature and had loaded it on to let's call  
16 it a test computer, a forensic work station, to  
17 have a look at it.

18           On a test machine, I loaded the  
19 software, went into the Secure Delete function, and  
20 I deleted some random files that I had myself  
21 created, and I noticed after that that there was a  
22 folder called Secure Delete created, which was a  
23 result of the actions that I had took, and in item  
24 number 12, I had indicated that -- I had mistakenly  
25 indicated that running the Secure Delete features

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1 and deleting a file created the Secure Delete  
2 folder as a remnant.

3 I was mistaken in that, in that  
4 launching the program creates the Secure Delete  
5 folder. You don't necessarily have to delete any  
6 files for that folder to be present.

7 Q. Okay. And can you explain to us  
8 today why it is that you did not understand that to  
9 be the case back at the time?

10 A. At the time I was aware that the  
11 ISS had flagged the purchase and installation of  
12 the program, more specifically the advanced system  
13 optimizer and the Secure Delete. So I was testing  
14 its functionality and I made an assumption that if  
15 one were to launch the program, one were to use the  
16 program. It's kind of like launching Word and not  
17 creating a document.

18 So I simply didn't think to look at the  
19 directory structure after I launched it. I kind of  
20 lumped it into one and said hey, I ran it, I  
21 deleted some files, look, here's that folder.

22 MR. WINTON: Now, Your Honour, just  
23 because there is some technical information  
24 involved in the expert evidence, I'm in your hands  
25 as to whether it would assist the court with a

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1 description of the way a file, a program such as  
2 Secure Delete works, or whether you feel that is --

3 THE COURT: Well, it's your case. Can  
4 I just ask you a question, Mr. Musters. I  
5 understand what you said, just launching a program  
6 creates the Secure Delete file. I understand that.

7 THE WITNESS: Secure Delete folder,  
8 Your Honour.

9 THE COURT: Folder. So does that mean  
10 that your conclusion in paragraph 13 isn't correct?

11 THE WITNESS: My conclusion remains the  
12 same, Your Honour. The steps in terms of when that  
13 folder got created is not correct.

14 BY MR. WINTON:

15 Q. Maybe we could --

16 THE COURT: Just a minute.

17 MR. WINTON: Sure.

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

23 THE WITNESS: Correct, Your Honour.

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



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1 THE WITNESS: That's correct.

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

5 THE WITNESS: The last sentence of 12  
6 is a mistake. My conclusion is based on a number  
7 of factors. The program was purchased and paid  
8 for. The Secure Delete feature is a function of a  
9 program called the advanced system optimizer, and  
10 when you load -- when you launch advanced system  
11 optimizer, you get a home screen, and the Secure  
12 Delete feature is not on the home screen. There  
13 are about five options, if you will, on the  
14 left-hand side, one of them is security and  
15 privacy.

16 If you then go to the security and  
17 privacy, it gives you, I believe, three options,  
18 one of them being Secure Delete. Underneath the  
19 Secure Delete it says this is how you permanently  
20 erase a file, its contents, never to be recovered,  
21 and then you launch -- then you click on that  
22 Secure Delete feature to launch that function.  
23 That's when the folder gets created.

24 I draw my conclusion in 13 on the fact  
25 that the program was bought, paid, installed, it

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1           wasn't easy to get to that function, and it was  
2           done on the night before the ISS was to examine the  
3           computer. So for those reasons, based on my  
4           experience, it makes no sense to me that number 13  
5           wouldn't remain valid.

6                         THE COURT: All right. Thank you.  
7           Yes, Mr. Winton.

8                         MR. WINTON: Thank you, Your Honour.

9                         BY MR. WINTON:

10                        Q. And I just want to make sure we  
11           are assisting the court. There is the opinion  
12           which is the first sentence of paragraph 13 and  
13           then there is the explanation which is the second  
14           sentence of paragraph 13. You see that in  
15           paragraph 13?

16                        A. Yes.

17                        Q. So just to make sure, the opinion  
18           reached is the same?

19                        A. The opinion -- my opinion is the  
20           same regardless of when the folder got created.  
21           It's certainly for the court to decide. The fact  
22           is that the folder was created at the time the  
23           program, the Secure Delete program was launched.  
24           It's my opinion that it was launched for a purpose  
25           and that purpose would be deleting files.

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1 THE COURT: Essentially you're saying  
2 he opened the thing up and launched it and he  
3 didn't do that for the sake of his health?

4 THE WITNESS: Correct. That's exactly  
5 what I'm saying.

6 THE COURT: Right, I understand.

7 BY MR. WINTON:

8 Q. Now, just turning to tab E of this  
9 affidavit, there is the -- there's some promotional  
10 material you attach regarding advanced system  
11 optimizer and on the third page is -- it's got a 28  
12 at the top right corner of tab 3-E of this brief.

13 A. I'm there.

14 Q. Okay. We may not have had this  
15 electronically on your iPad, Your Honour, so we'll  
16 attend to that during the break, but it is in a  
17 hard copy brief at page 3-E.

18 And this is just for context. Can you  
19 explain to the court how a program of that nature  
20 works and what is the effect of running a program  
21 of that nature?

22 A. If you will permit me to just give  
23 a bit of context technically to the answer?

24 Q. If you feel it's necessary, I  
25 think you should.

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1           A. A computer, and let's talk about a  
2 Windows operating system, has what's called a  
3 master file table, very much like an index entry in  
4 the old library systems. We had an index card  
5 showing us where the book was. So we have an index  
6 entry in the master file table that shows us where  
7 the file is.

8           On a normal basis, we simply delete the  
9 master file table entry but the book stays there.  
10 And what these programs do is they go to where the  
11 book is located, so that we as forensic  
12 investigators can no longer recover that data, and  
13 it writes the out random characters, meaningless  
14 random characters to overwrite the data, and once  
15 the data is overwritten it can't be recovered.

16           THE COURT: Unfortunately, Mr. Musters,  
17 I had another trial like this and I had far too  
18 much evidence about this and unfortunately I  
19 understand it.

20           MR. WINTON: All right, then, Your  
21 Honour, just one question.

22           BY MR. WINTON:

23           Q. Is it possible to detect that  
24 Secure Delete was run after it's been run just  
25 through a forensic examination of the hard drive?

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1           So it overwrites it but is it possible from that  
2 path to determine that something was overwritten?

3                   A. Well, that's a difficult question  
4 and I need to break that down into several pieces.  
5 If you simply gave me the hard drive and only  
6 looked at the area where files existed, Secure  
7 Delete talks about writing out a random pattern,  
8 there's no way that I can detect that a random  
9 pattern had overwritten this data. So in that  
10 sense, no.

11                   There may be clues in the registry, but  
12 we can get to that later, with respect to things  
13 that may have been done to the registry to remove  
14 certain data from there.

15                   And then we have the knowledge that the  
16 program was launched and some question in terms of  
17 whether or not it was launched for the purpose of  
18 simply being looked at or launched for the purpose  
19 of deleting files.

20                   So there are clues, but there's nothing  
21 definitive. And if I understand your question, can  
22 I look at the hard drive and say there used to be a  
23 file there, the answer is no.

24                   Q. Then turning to tab 4 of the  
25 brief, which is your affidavit sworn April 30th,

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1           2015, and as you note at paragraph 2, you're  
2           swearing this affidavit after having reviewed  
3           affidavits from Mr. Moyse and Mr. Lo. And you're  
4           familiar with who Mr. Lo is and his work?

5                   A. Yes, he is a person I know  
6           professionally in the industry.

7                   Q. And do you recall what was the  
8           gist of the evidence that was in Mr. Lo's affidavit  
9           dated April 2nd, 2015? Do you recall?

10                   A. I recall it. I wouldn't mind  
11           reviewing it if you would --

12                   Q. It's not in this brief, but if you  
13           look to paragraph 6 of your affidavit, you do  
14           include it in the summary. Perhaps you want to  
15           review paragraph 6.

16                   A. Thank you. (Witness reads  
17           document). So I disagree with Mr. Lo's conclusion  
18           in basically where he says that it did not contain  
19           the Secure Delete log, therefore his conclusion was  
20           that the Secure Delete program wasn't run.

21                   Q. Can you explain for the court what  
22           the Secure Delete log is?

23                   A. Okay. On a Windows computer, and  
24           I think His Honour is somewhat educated in this  
25           area, there is a registry and the registry keeps

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1 track of a whole lot of different things.  
2 Sometimes, and in this particular case, Secure  
3 Delete writes a log of the files that it deletes  
4 and keeps certain information in the registry as a  
5 result of its use.

6 Q. So turning to page 6 of your  
7 affidavit, what is that a screen shot of?

8 A. Is this page 622, big bold  
9 letters, 622?

10 Q. Yes, that's right. It's also on  
11 the screen in front of you for your reference.

12 A. Thank you. So when I ran the  
13 Secure Delete program, again simply in a very test  
14 environment, it gave me the following screen that  
15 said four files had been deleted, and the total  
16 amount of space wiped was 31 kilobytes.

17 Q. And turning over to the next page?

18 A. So when I went back into the  
19 program or its summary screen, it basically said I  
20 last ran that wipe on April 29th, I wiped four  
21 items, again that 31 kilobytes. So it's giving me  
22 a little history of what I've done so far with that  
23 Secure Delete program.

24 Q. All right. Did you make any  
25 efforts to reset or remove this information from

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1 the program?

2 A. Well, I was -- Mr. Lo had come to  
3 the conclusion that in the absence of this summary  
4 information, that the program hadn't been deleted,  
5 and I undertook it upon myself to understand how  
6 easy or hard it would be to make that summary go  
7 away.

8 I found these entries in the registry.  
9 I did a little bit of searching on the internet,  
10 found these entries in the registry and made them  
11 go away in the registry. And you'll see on page 9  
12 of my affidavit that with a little bit of knowledge  
13 I was able to make this screen appear.

14 So again, bringing it back to Mr. Lo's  
15 affidavit, he concluded in the absence of the  
16 summary data that the program hadn't been run, and  
17 I respectfully disagree with that conclusion.

18 Q. Now, at paragraph 20 you draw or  
19 refer to the conclusion as to what happened with  
20 the Secure Delete program on July 20th. Turning  
21 over to page 10, it's based on what's set out there  
22 within paragraph 20.

23 Can you review that and explain what  
24 conclusion you drew and why?

25 A. I'm guessing you don't want me to



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1 read points A to D?

2 Q. Not into the record, there's no  
3 need for that. But if you could explain what they  
4 mean?

5 THE COURT: If it's of any help to you,  
6 I understand what they mean. It's plain English.

7 BY MR. WINTON:

8 Q. Very well.

9 A. I would like to consider myself a  
10 computer investigator, I do a lot of criminal work  
11 for both the Crown and defense, I used to do a lot  
12 of Crown work, I do less of it today only because  
13 law enforcement has brought that work in-house. I  
14 do work for the College of Physicians and Surgeons,  
15 the College of Pharmacists, the College of Chinese  
16 Medicine, and every one of those is really trying  
17 to understand what's going on and why.

18 And my role, I feel, whether I'm  
19 representing the Crown or the defense, is to assist  
20 in understanding the facts and putting them  
21 together.

22 So I'm drawing this conclusion based on  
23 -- again, I won't read them, but trying to  
24 understand Mr. Moyse, his pattern of behaviour, the  
25 fact that this was done the night before. I mean,

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1 His Honour said it well, you know, he didn't just  
2 go into this the night before just for fun, in my  
3 opinion.

4 So I base my conclusions on that and --

5 Q. Okay. Turning to tab 5 in the  
6 brief, which is your affidavit sworn May 13th,  
7 2015, this affidavit concerns an issue regarding  
8 metadata in a registry editor.

9 Do you recall what the circumstances  
10 leading up to or what led you to swear this  
11 affidavit?

12 A. Yeah. Mr. Lo, and just for His  
13 Honour's information, I didn't have access to the  
14 computer forensic image so I was relying on  
15 information from whether it be the ISS or Mr. Lo,  
16 and having said that, Mr. Lo said there was no  
17 evidence that the registry editor program was run,  
18 therefore he couldn't have gone in and deleted  
19 registry entry keys.

20 Unfortunately, Mr. Lo was wrong in that  
21 conclusion and I wrote this affidavit and I believe  
22 Mr. Lo corrected that in a subsequent affidavit.

23 In a nutshell, Your Honour, in Windows  
24 7, Microsoft stopped updating the last access date  
25 so you can run a program or open a file and close

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1           it without changing it and the last access date  
2           won't be updated. It's only when the master file  
3           table entry gets updated for some other reason that  
4           the last access date gets updated.

5                        I simply ran RegEdit on my computer and  
6           closed, made some changes and closed it and there  
7           was no evidence to suggest I had run RegEdit.

8                        MR. WINTON: I have no further  
9           questions. Thank you.

10                       THE COURT: Thank you.

11                       CROSS-EXAMINATION BY MR. BORG-OLIVIER:

12                       Q. Nice to see you again,  
13           Mr. Musters.

14                       Your Honour, I plan to use only the  
15           hard copy brief. I apologize if you're going to  
16           the iPad, but that's the basis upon which I  
17           prepared.

18                       THE COURT: That's fine.

19                       BY MR. BORG-OLIVIER:

20                       Q. Mr. Musters, I know that  
21           Mr. Winton didn't really take you to the affidavit  
22           at tab 1, or if he did, didn't spend much time on  
23           it. I'd like to take you to it just for one  
24           moment, if you would, that's the one at tab 1.

25                       A. Yes.

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1 Q. That was sworn on June 26th, 2014  
2 notwithstanding that it says 2012 on the first  
3 page, correct?

4 A. Correct.

5 Q. If I could take you to paragraph  
6 11 of that affidavit, please.

7 A. Yes.

8 Q. So at paragraphs 11 through 16,  
9 you report on your analysis of the desktop computer  
10 that Mr. Moyses had at Catalyst?

11 A. Correct.

12 Q. Which you were retained to search?

13 A. Yes.

14 Q. And what you determined in  
15 paragraph 11 and then expanded on in the subsequent  
16 paragraphs is that Mr. Moyses accessed specific  
17 files on specific dates?

18 A. Correct.

19 Q. We went through that a bit with  
20 Mr. Riley this morning and the only thing I want to  
21 get from you here, Mr. Musters, is your  
22 confirmation that nowhere in this report or  
23 anywhere do you purport to express an opinion as to  
24 whether the documents accessed contained  
25 confidential information?

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1           A. I am not in -- you're absolutely  
2 correct. I am not in a position to make that  
3 determination. I can't tell you what's  
4 confidential or not to the Catalyst group.

5           Q. Thank you. With respect to the  
6 wiped BlackBerry, Mr. Musters, am I correct that to  
7 the extent Mr. Moyse had been sending emails from  
8 his Catalyst email account, you would expect those  
9 emails to survive on the Catalyst server  
10 notwithstanding the fact that the BlackBerry was  
11 wiped?

12           A. The emails absolutely, yes. And  
13 just to be specific, and you did raise it in your  
14 question, the Catalyst emails would be available at  
15 Catalyst, yes.

16           Q. Let's move to your second  
17 affidavit, the one sworn February 15, 2015 which is  
18 found at tab 3.

19           A. Yes.

20           Q. So Mr. Winton asked you a few  
21 questions about this, as did Justice Newbould, so I  
22 don't intend to belabour this. You understood that  
23 one of the reasons for which you were retained by  
24 Catalyst in this matter was to provide an opinion  
25 on the import or meaning of the existence of the

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1           Secure Delete folder on the imaged computer,  
2           correct?

3                     A.   Slightly broader than that, but  
4           yes.

5                     Q.   Absolutely.  I don't mean to  
6           suggest that was the entirety of your mandate but  
7           that was one of the critical questions you were  
8           looking at?

9                     A.   Certainly.

10                    Q.   And you understood that this was  
11           an important piece of information, your analysis,  
12           that you expected the court would likely rely on in  
13           reaching a conclusion with respect to Mr. Moyse's  
14           conduct?

15                    A.   Of course.

16                    Q.   And as Mr. Winton took you to  
17           originally, you came to the conclusion that the  
18           existence of the Secure Delete folder meant that  
19           somebody had used it to delete files?

20                    A.   Yes, that's what I said.

21                    Q.   Okay.  And in fact, at paragraph  
22           12 you said that folder is only created when a user  
23           runs the Secure Delete feature to delete a file or  
24           folder from his computer?

25                    A.   I did say that, yes.

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1 Q. And Justice Newbould took you to  
2 paragraph 13 and I just want to explore a little  
3 bit the answer that you provided His Honour.

4 Your position is that notwithstanding  
5 your admitted error as to your analysis in  
6 paragraph 12, your conclusion in paragraph 13  
7 remains unchanged?

8 A. That's correct.

9 Q. And the conclusion, as I  
10 understood it, was based, among other things, on  
11 the fact that the program had been purchased and  
12 paid for by Mr. Moyse?

13 A. Correct.

14 Q. And based on your experience, an  
15 assumption based on how you say somebody would act  
16 in that circumstance essentially?

17 A. Yes.

18 Q. And I just want to make sure, and  
19 to alert Your Honour, this was the point that we  
20 were making in the preamble, certainly you're not  
21 here qualified as an expert in psychology or human  
22 behaviour or anything like that?

23 A. I am not an expert in those areas.

24 Q. You have not been qualified as an  
25 expert in other cases?

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1                   A. Not in psychology or human  
2 behaviour, that's correct.

3                   Q. Your focus is on computer  
4 forensics?

5                   A. My focus is on computer forensics  
6 and I would like to -- there is an investigative  
7 aspect to that based on my experience in the many  
8 hundreds of cases that I've done.

9                   Q. But the expertise for which you  
10 are qualified both in this case and in the hundreds  
11 of other cases that are referred to in your CV and  
12 elsewhere is with respect to computer forensics and  
13 related matters?

14                   A. Correct.

15                   Q. So one of the questions that was  
16 asked to you, or I've got this down from your  
17 evidence in-chief, what you said was can I look at  
18 the hard drive and say there used to be a file  
19 there? The answer is no. And this was with the  
20 question of whether the Secure Delete file had been  
21 run, correct?

22                   A. Yeah, and I tried to clarify that  
23 in my chief. If I'm simply looking at the data on  
24 the hard drive, there's other factors, there's the  
25 registry, there's the master file table, but



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1           excluding those items for a minute, if we simply  
2           look at the data, you can't tell.

3                   Q.   When you say excluding those  
4           matters, are you intending to exclude the Secure  
5           Delete log?  Is that part of the registry and all  
6           the other things that you're excluding?

7                   A.   The Secure Delete log is part of  
8           the registry, yes.

9                   Q.   So let's now include that.

10                   A.   Sure.

11                   Q.   So typically you'd agree that when  
12           the Secure Delete program is run, a Secure Delete  
13           log is created?  I think you said that in-chief.

14                   A.   Typically, yes.

15                   Q.   And what that does is it records a  
16           log of the files that have been deleted?

17                   A.   Correct.

18                   Q.   So absent any other sort of  
19           intervention, that would be one place where you  
20           would look to determine whether the Secure Delete  
21           program was run?

22                   A.   Correct.

23                   Q.   And I take it that in doing your  
24           assessment of whether the Secure Delete program had  
25           been run, you aren't able to look for a log because

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1           you didn't have access to that computer?

2                   A.    I didn't have access to the  
3           computer.  There are other things that I would have  
4           done had I had access to the computer.

5                   Q.    Okay.  But you certainly reviewed  
6           Mr. Lo's report and you saw Mr. Lo's report that in  
7           fact there was no Secure Delete file on Mr. Moyse's  
8           computer, correct?

9                   A.    We can establish -- we can take as  
10          fact that there was no registry entries with  
11          respect to the Secure Delete log in the registry,  
12          yes.

13                  Q.    Okay.  And like I say, absent any  
14          other intervention, that would be a meaningful  
15          fact?

16                  A.    That would be a meaningful fact  
17          absolutely.

18                  Q.    And that would be a meaningful  
19          fact tending to suggest or tending to lead to the  
20          conclusion that the Secure Delete program had not  
21          been used to delete files?

22                  A.    Well, if I can put it in its  
23          opposite, had those logs been there, then we could  
24          have concluded that it was run.

25                  Q.    Sure.  But that's not precisely

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1           what I'm asking. The absence of a Secure Delete  
2           log --

3                     A. Yes.

4                     Q. -- is a meaningful factor in your  
5           analysis?

6                     A. It's a factor, clearly.

7                     Q. And it's a factor tending to  
8           suggest, tending to lead to the conclusion that the  
9           Secure Delete program had not been run to delete  
10          any files or folders?

11                    A. I'm not sure that I would agree  
12          with your conclusion. I'm just saying that it  
13          raises another question. Again, I didn't have  
14          access to the computer, but I would have -- a  
15          simple search of Mr. Moyse's internet searches had  
16          he done internet searches on how to delete registry  
17          entries, and I'm being hypothetical because again I  
18          didn't know that, that would have been meaningful  
19          as well. And there's other areas of the registry  
20          called shell bags which would have again been  
21          meaningful to try to answer these questions. None  
22          of that was in Mr. Lo's affidavit.

23                    So all I'm saying is that there were  
24          more questions in my mind than answers.

25                    Q. Absolutely. And I'm not quibbling

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1 with that. In fact, you've got a report at tab 4  
2 which deals with precisely this, right, the fact  
3 that the Secure Delete log can be changed, correct?

4 A. That's what I'm saying.

5 Q. Okay. And what I'm saying is that  
6 absent any of that sort of intervention of somebody  
7 tampering with the registry keys, if I can put it  
8 that way, to delete the Secure Delete log, the  
9 absence of a Secure Delete log on that computer  
10 would tend to lead to the conclusion that the  
11 Secure Delete program had not been run to delete  
12 files or folders?

13 A. I'm not sure we're saying the same  
14 thing and I'm not sure we're not saying the same  
15 thing. I feel that you're trying to draw me to the  
16 conclusion that in the absence of the registry  
17 entries, therefore the conclusion is it wasn't run,  
18 and I disagree with that.

19 Q. I'm not and I don't intend to be  
20 unfair to you. So let's explore this a bit with  
21 your affidavit. So let's go to tab 4, which is  
22 your affidavit sworn April 30, 2015.

23 A. Okay.

24 Q. Got that, Your Honour?

25 THE COURT: I do.

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1 BY MR. BORG-OLIVIER:

2 Q. And the section in which you deal  
3 with this issue that you and I have just been  
4 discussing is at paragraph 6 and following,  
5 correct?

6 A. Correct.

7 Q. So you note at paragraph 7 that  
8 Mr. Lo's conclusion that the Secure Delete program  
9 had not been used was based on the absence of the  
10 Secure Delete log-in registry?

11 A. Correct.

12 Q. At paragraph 8 and beyond, you  
13 explain to the court that we shouldn't read too  
14 much into the absence of the Secure Delete file?

15 A. It's a factor to be considered but  
16 let's not be blind-sided. Well, blind-sided is the  
17 wrong word. Let's not look at that in isolation.

18 Q. Let's not look at that in  
19 isolation. And the reason you say we shouldn't  
20 look at that in isolation in paragraph 8 is  
21 because, in your words, it's a relatively simple  
22 matter to reset Secure Delete to hide any trace of  
23 having run the program, correct?

24 A. That's what I said, yes.

25 Q. Okay. And at paragraph 8 you go

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1 on to say the following:

2 "A simple internet search on  
3 how to delete the remnant files of  
4 advanced system optimizer, the  
5 software program that contains the  
6 Secure Delete tool from a computer  
7 registry," I think that's a sentence  
8 fragment but that's how it reads,  
9 "this publicly available information  
10 walks a user through the steps  
11 necessary to open the registry,  
12 identify the Secure Delete files and  
13 delete those files so as to remove  
14 all traces of the user having run  
15 Secure Delete to delete files  
16 without a trace."

17 So in this paragraph you're describing  
18 certain publicly available information, correct?

19 A. Correct.

20 Q. And that, you say, is publicly  
21 available information derived from a simple  
22 internet search, correct?

23 A. Yes.

24 Q. And of course you haven't appended  
25 that publicly available information to your

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1 affidavit, correct?

2 A. At the time, no. I know it's in  
3 this brief.

4 Q. We're getting there.

5 A. Sorry.

6 Q. So the answer is no, it was not  
7 appended --

8 A. It wasn't appended to the  
9 affidavit, correct.

10 Q. Okay. But what you're describing  
11 here at paragraph 8, I put it to you, is a fairly  
12 specific process that presumably came from you  
13 having done this, namely a user being walked  
14 through the steps necessary to open the registry,  
15 identify the Secure Delete files and delete those  
16 files so as to remove all traces, correct?

17 A. That's what I did, yes.

18 Q. So you'll recall that at your  
19 cross-examination we looked a little bit at this,  
20 and you undertook through your counsel to provide a  
21 copy of the publicly available information referred  
22 to. Do you remember that?

23 A. Yes, you had asked me at that time  
24 what the search terms were and I said I didn't  
25 recall.

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1 Q. Right. So if we can turn up tab 8  
2 of your brief.

3 A. Yes.

4 Q. This is a letter from Mr. Winton  
5 to counsel for West Face and for Mr. Moyse dealing  
6 with the question that was taken under advisement  
7 on your cross-examination. If you have a quick  
8 look at this letter, Mr. Musters, when I say quick,  
9 obviously take as much time as you need, I take it  
10 that the information set out in this letter came  
11 via consultations between you and Mr. Winton?

12 A. Yes.

13 Q. And if I can draw your attention  
14 to the final paragraph on the first page, I'll read  
15 it into the record:

16 "Mr. Musters wishes to correct  
17 an error in his testimony. At  
18 question 162 Mr. Musters stated that  
19 it was incorrect, the information he  
20 was referring to provided advice as  
21 on the removal of the entire ASA  
22 program and not simply removal of  
23 the remnant files. Upon reviewing  
24 the publicly available information,  
25 Mr. Musters notes that the



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1 information includes advice on the  
2 removal of the entire ASA program  
3 and his answer to question 162 was  
4 incorrect."

5 Now, it occurs to me that I should  
6 probably have taken you to those questions before  
7 taking you to the letter so that Your Honour can  
8 follow on --

9 THE COURT: I'm following. Let's just  
10 move on.

11 MR. BORG-OLIVIER: Let's move on?  
12 Okay.

13 BY MR. BORG-OLIVIER:

14 Q. So attached to that letter is what  
15 you, through Mr. Winton, say is the publicly  
16 available information that was referred to in your  
17 affidavit, correct?

18 A. Correct.

19 Q. And what the correction as  
20 described by Mr. Winton says is that in fact the  
21 publicly available information talks only about  
22 removing the entire ASO software suite from  
23 someone's computer?

24 MR. WINTON: Sorry, I just rise because  
25 I don't think that's accurate.

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1 THE COURT: Pardon?

2 MR. WINTON: I don't think that's an  
3 accurate summary of what the letter says.

4 THE COURT: We've got the letter.

5 MR. WINTON: Okay.

6 BY MR. BORG-OLIVIER:

7 Q. Am I reading that correctly,  
8 Mr. Musters? You wished to correct your testimony  
9 through Mr. Winton, right?

10 A. Correct.

11 Q. And maybe I'm describing it  
12 incorrectly and this is your opportunity to tell me  
13 otherwise. As I understood this, what Mr. Winton  
14 was saying is that you wished to -- you wished to  
15 explain to the court that in fact the publicly  
16 available information that you had referred to  
17 spoke only to the removal of the entire ASO  
18 software suite from someone's computer and not in  
19 fact deletion of the individual Secure Delete log;  
20 is that correct?

21 A. Would you permit me to answer that  
22 without a yes or no?

23 Q. Sure.

24 A. Thank you. What I wished -- at  
25 the time you cross-examined me, I had in my mind

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1           that I found instructions, registry settings  
2           specifically for the Secure Delete program. That's  
3           the piece that I wish to correct. It was the  
4           registry keys for the advanced system optimizer  
5           program and it talked about all of the keys for  
6           that.

7                         So that's the thing that I wanted to  
8           correct, to say it wasn't about Secure Delete, it  
9           was about ASO and Secure Delete being a subset of  
10          ASO.

11                        Q.    Right.  So what you describe at  
12          paragraph 8 talking about a user being walked  
13          through the steps of opening the registry,  
14          identifying the Secure Delete files and deleting  
15          those files so as to remove all traces of the user  
16          having run Secure Delete to delete files without a  
17          trace -- sorry, are you with me, Mr. Musters?

18                        A.    I'm not, no, I'm not.

19                        Q.    Let's go back to your affidavit,  
20          tab 4.  I apologize.

21                        A.    Tab 4, what number?

22                        Q.    Tab 4, paragraph 8.

23                        A.    Thank you.

24                        Q.    And I'm focusing, Mr. Musters, on  
25          the last line in that paragraph.

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1                   A.    Yes.

2                   Q.    And I put it to you that what you  
3 say there, that the publicly available information  
4 walks a user through the steps necessary to open  
5 the registry identified as Secure Delete files and  
6 delete those files so as to remove all traces of  
7 the user having run Secure Delete to delete files  
8 without a trace, that statement is incorrect?

9                   A.    It's not incorrect and it's not  
10 particularly correct.  And I don't wish to mislead  
11 you or the court.  Let me clarify.

12                   The publicly available information was  
13 about the registry keys for the advanced system  
14 optimizer program, and if you go to that key, call  
15 it a tree structure, if you will, as soon as you  
16 open up that tree structure, you see Secure Delete,  
17 and it becomes obvious that there are keys specific  
18 to the Secure Delete program.

19                   So I can't begin to hypothesize what  
20 may or may not have been in Mr. Moyse's mind as he  
21 was doing this.  But I was trying to say, obviously  
22 not very well, that there's publicly available  
23 information on how the registry keys are structured  
24 for the ASO program, including Secure Delete.

25                   And the walking through, I can take you

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1 to the publicly available information to try to  
2 demonstrate to you what I mean, or at least show  
3 you what I mean.

4 Q. I think we're going to move on,  
5 Mr. Musters.

6 A. Okay.

7 Q. In paragraphs --

8 THE COURT: I just want to make sure I  
9 understand. I think I understand, Mr. Musters.  
10 What you're essentially saying is the publicly  
11 available information includes both how to remove  
12 the entire ASO program but it also includes how to  
13 deal with the registry for the Secure Delete?

14 THE WITNESS: It wasn't specific to  
15 Secure Delete, but it becomes obvious once you're  
16 there, is I guess what I'm trying to say. Any fool  
17 would be able to say oh, that's where this  
18 information is if they were looking for it.

19 THE COURT: And that's what you did?

20 THE WITNESS: That's exactly what I  
21 did.

22 THE COURT: That's what you did?

23 THE WITNESS: Yes.

24 BY MR. BORG-OLIVIER:

25 Q. And you did that at paragraphs 9

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1 and subsequent, right?

2 A. Yes.

3 Q. And I think what you said in your  
4 examination in-chief is that you were able to do  
5 that with a little bit of knowledge?

6 A. Correct.

7 Q. Right? And I put it to you,  
8 Mr. Musters, that you're being far too humble. You  
9 have a lot more than a little bit of knowledge in  
10 this area, don't you?

11 A. Well, I do. I'm a forensic  
12 investigator, but sure.

13 Q. So --

14 A. But thank you for the compliment.

15 Q. Well, you're very welcome. So  
16 what you were able to do is not necessarily at all  
17 indicative of what somebody with less training  
18 would be able to do, correct?

19 A. Well, clearly that's an obvious  
20 statement, yes.

21 Q. Let's move to paragraph 20 and 21  
22 of this affidavit.

23 A. Yes.

24 Q. So at paragraph 20 you say:

25 "In my experience as a computer

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1 forensic investigator, the most  
2 likely conclusion to draw from  
3 Moyse's conduct of June and July  
4 2014 is that he did in fact use  
5 Secure Delete to permanently delete  
6 files from his computer on July 20,  
7 2014."

8 And you base this conclusion on four  
9 facts set out at subparagraphs A, B, C and D; is  
10 that correct.

11 A. Right.

12 Q. And let's walk through those, if  
13 you would.

14 A. Sure.

15 Q. So the first one refers to  
16 Mr. Moyse exhibiting a pattern of conduct that is  
17 consistent with taking confidential information  
18 from his former employer as set out in my June  
19 26th, 2014 affidavit and my evidence given during  
20 my cross-examination held August 1st, 2014?

21 A. Right.

22 Q. Am I right, Mr. Musters, that when  
23 you're talking about the pattern of conduct prior  
24 to July 20th referred to in your June 26th, 2014  
25 affidavit, that's the accessing of the files that I

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1 took you to at the beginning of this?

2 A. That's correct.

3 Q. The ones that you said you  
4 expressed no opinion on as to whether they were  
5 confidential, correct? Those files?

6 A. That's correct.

7 Q. And without belabouring this  
8 point, to the extent that if the court was to draw  
9 the conclusion from its own analysis that in fact  
10 that conduct did not represent the taking of  
11 confidential information from Catalyst, I take it  
12 this factor would fall by the wayside?

13 A. Well, if we -- if we eliminate the  
14 word confidential information, the statement would  
15 still -- exhibited a pattern of conduct that is  
16 consistent with taking information, can we agree on  
17 those words? Whether it be confidential or not.

18 Q. Okay. Let me broaden it.

19 A. Okay.

20 Q. To the extent that the court  
21 concludes that there was nothing improper about  
22 Mr. Moyse accessing the files referred to there,  
23 can I assume that this factor falls by the wayside?

24 A. I just want to be reflective.

25 Sorry.



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1 Q. Absolutely.

2 THE COURT: One of the problems I have  
3 with this line of cross-examination,  
4 Mr. Borg-Olivier, is that in his opening Mr. Centa  
5 said that Mr. Moyse made mistakes and one of these  
6 was he sent these four memoranda to West Face that  
7 were marked confidential.

8 MR. BORG-OLIVIER: That's not what's  
9 referred to here, Your Honour. That's an entirely  
10 different thing. That doesn't bear on the forensic  
11 analysis whatsoever because that was simply sent by  
12 email. So this paragraph, to be clear, and I can  
13 pull up your affidavit if necessary, if Your Honour  
14 would like me to, but what's being referred to here  
15 is the accessing of the Stelco file, the Masonite  
16 file, the investment letters, Monday morning  
17 meeting notes and the telephone calls.

18 THE COURT: Right.

19 BY MR. BORG-OLIVIER:

20 Q. Correct?

21 A. Yes.

22 Q. Have you had the chance to reflect  
23 now on my question?

24 A. Assuming there was nothing  
25 improper, I see a pattern of accessing those types

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1 of files which, let's just say, that as an  
2 investigator seemed unusual.

3 Q. But in terms of forensic  
4 importance, I take it there's none. I mean, this  
5 is mere speculation on your part and nothing more?

6 A. Well, I don't have the big picture  
7 which you -- which you rightfully pointed out. I  
8 don't know the contents of all these files. I have  
9 no idea what happens inside the walls of Catalyst  
10 Capital. I have no idea what their business does.  
11 I can think -- I can speculate but I don't know  
12 what they do, really.

13 So it's not for me, as you said, to  
14 decide. I don't know what projects Mr. Moyses was  
15 working on or not. Again, I don't have context to  
16 answer your question properly. It seems an unusual  
17 pattern.

18 Q. But the reason that the pattern  
19 was relevant, from your perspective as an  
20 investigator or analyst, is because the pattern was  
21 suggestive of taking confidential information from  
22 the employer?

23 A. Yes, yes.

24 Q. So what I'm putting to you is to  
25 the extent that the court concludes that in fact he

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1           wasn't taking confidential information or he wasn't  
2           accessing information improperly, notwithstanding  
3           how unusual it might have looked --

4                     A.    Sure.

5                     Q.    -- it's not a meaningful data  
6           point at that point?

7                     A.    Assuming your assumptions are  
8           correct, yes.

9                     Q.    Next is the admitted conduct of  
10          Mr. Moyse of investigating how to clean his  
11          registry displays, and I don't think Mr. Winton  
12          took you to this and, Your Honour, I know that you  
13          have read the reports but maybe I can just place  
14          this in some context so it's clear what we're  
15          talking about here.

16                    Mr. Moyse provides evidence through his  
17          affidavits that in attempting to permanently delete  
18          his internet browser, he did some -- he did some  
19          internet research and determined that cleaning his  
20          registry would be the way to accomplish that.  
21          That's what you're referring to here?

22                    A.    Correct.

23                    Q.    And what you say is that his  
24          admitted conduct of admitting how to clean -- or  
25          investigating how to clean his registry displays a

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1 level of IT sophistication that exceeds that of the  
2 ordinary user. Do I have that right?

3 A. The average user wouldn't know  
4 what a registry was.

5 Q. Let's go to paragraph 3 of this  
6 affidavit, please.

7 A. Yes.

8 Q. And at paragraph 3 of this  
9 affidavit, you're responding to Mr. Moyse's  
10 evidence --

11 THE COURT: Just before you do that.  
12 Where is it?

13 MR. BORG-OLIVIER: I'm sorry, Your  
14 Honour, it's the same affidavit that we've been in,  
15 so it's tab 4. This is the affidavit of  
16 Mr. Musters sworn April 30, 2015.

17 THE COURT: I thought you meant  
18 Mr. Moyse's affidavit. Um-hmm.

19 MR. BORG-OLIVIER: I'm at the first  
20 page of that affidavit, Your Honour.

21 THE COURT: Yes, I have it.

22 BY MR. BORG-OLIVIER:

23 Q. At paragraphs 3 to 5, you respond  
24 to Mr. Moyse's affidavit about cleaning his  
25 registry, correct?

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1 A. Correct.

2 Q. And what you say here is that the  
3 explanation provided by Mr. Moyse, namely that he  
4 cleaned the registry of his computer before turning  
5 it over to be imaged in order to fully erase his  
6 worldwide web activity, makes no sense. That what  
7 you said here, correct?

8 A. Well, the registry doesn't contain  
9 web history.

10 Q. Right. And as a result of that,  
11 you say the explanation provided by Mr. Moyse  
12 doesn't actually make any sense?

13 A. Sure. That's correct.

14 Q. So to the extent that Mr. Moyse  
15 attempted to permanently delete his internet  
16 browsing history by cleaning the registry, he just  
17 got it completely wrong?

18 A. Well, in that sense, and again,  
19 I've never met Mr. Moyse, I know he's a smart guy,  
20 he has a math degree, like I do, so he's got to be  
21 a smart guy, so the question is why does he want to  
22 clean his registry? Like, why does he want to  
23 clean his internet history? What's he hiding,  
24 right? So those are the --

25 Q. That's not the question, to be

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1 fair.

2 A. I know that's not the question,  
3 but I'm trying to put context to my answer in terms  
4 of --

5 Q. Let me, with respect, cut you off  
6 and focus on the point here. Because what I'm  
7 interested in at this point --

8 THE COURT: I don't think that's fair.  
9 Mr. Musters was responding to you.

10 BY MR. BORG-OLIVIER:

11 Q. Okay.

12 A. When I see, even though we can all  
13 agree that the internet history is not stored in  
14 the registry, I ask myself the questions, why does  
15 he want to clean the registry, why does he want to  
16 clean his internet history? What's he hiding?  
17 What doesn't he want us to know?

18 And those are the things that are going  
19 through my head when I write some of these words  
20 with respect to cleaning his registry and for what  
21 purpose. Did he lie about his knowledge of the  
22 registry or not?

23 I have been trained to ask questions to  
24 try to find answers, and these are my comments with  
25 respect to why I drew that conclusion.

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1 Q. And the conclusion that you drew  
2 was if we take him at his word that he attempted to  
3 clean the registry to wipe his internet browser --

4 A. Yes.

5 Q. -- he got that wrong?

6 A. Sure.

7 Q. His explanation makes no sense?

8 A. Because it's not stored there, so  
9 yes.

10 Q. Because it's not stored there?

11 A. Yes.

12 Q. Correct. So let's flip back to  
13 the last page of that affidavit.

14 A. Okay.

15 Q. Sub-paragraph B.

16 A. Which affidavit, I'm sorry?

17 Q. Still the same one.

18 A. Yes.

19 Q. So are you with me --

20 A. Are we talking page 66?

21 Q. Yes.

22 A. Okay, thank you.

23 Q. Your Honour, are you there?

24 THE COURT: Yes.

25 BY MR. BORG-OLIVIER:

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1           Q.    So I put it to you, Mr. Musters,  
2           that in fact Mr. Moyse's conduct with respect to  
3           attempting to clean his registry displays the  
4           opposite of a high level of sophistication.  He  
5           couldn't even figure out how to delete his internet  
6           history.  That's what you've just told us, that his  
7           explanation made no sense.

8           A.    I have a different theory, if you  
9           allow me it.

10          Q.    Sure.

11          A.    Well, we know that he's a very  
12          bright research analyst and maybe five hours prior  
13          to these events he didn't know anything about the  
14          registry.  But he's a smart guy and he's figuring  
15          it out through publicly available information.

16                 And that's why I'd love to see his  
17          internet browsing history and maybe that's why he  
18          wants to get rid of it.  I'm being purely  
19          speculative.  I don't know any of these things.

20                 But again, I'm just saying -- I  
21          understand what you're saying, if he doesn't  
22          understand what's in the registry, then he clearly  
23          has got it wrong.  I understand that.

24          Q.    And it would be the opposite of a  
25          high level of IT sophistication?



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1           A.    And it would be the opposite.  At  
2           the same time, what's he trying to hide?  Why does  
3           he even bother?  Why doesn't he just hand over his  
4           machine?

5           Q.    And --

6           A.    No, I'm just saying it kind of  
7           plays both ways.

8           Q.    With respect, I think you're  
9           trying to play it both ways, Mr. Musters.  On the  
10          one hand you're suggesting that Mr. Moyse doesn't  
11          know what he's talking about, and on the other hand  
12          nine pages later you're suggesting that he displays  
13          a level of IT sophistication exceeding that of the  
14          ordinary user?

15          A.    If he's playing in the registry,  
16          he exceeds 50 percent of the population at least.

17          Q.    Even though he was there for  
18          completely the wrong reason based on erroneous  
19          research?

20          A.    I'm not sure of that.

21          Q.    Third, Moyse wiped the BlackBerry  
22          smartphone thereby permanently destroying evidence  
23          of his phone and data usage at a time when he knew  
24          litigation would likely result from his conduct.

25                 The only point I want to get from you

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1           here, Mr. Musters, is that perhaps that statement  
2           with respect to phone and data usage is overly  
3           broad; is that fair?

4                     A.   Well, and I never meant it to be  
5           that way. I used the word "user" as opposed to  
6           operating system. Clearly the BlackBerry is  
7           functioning. So what's missing? Is it text  
8           messages, BBM, BlackBerry messages? You can put in  
9           contacts that are not part of the network, personal  
10          email, you can have personal memos, any other  
11          information. You can copy files onto a BlackBerry  
12          that may or may not be the property of Catalyst  
13          Capital or not.

14                    Q.   Sure. My only point here,  
15          Mr. Musters, is to the extent that you're  
16          suggesting, for example, all evidence of his use of  
17          the phone would be permanently destroyed, you're  
18          not suggesting that because you know the records  
19          might continue to exist in the phone bills or  
20          elsewhere?

21                    A.   We have call logs and email that  
22          you've adequately pointed out.

23                    Q.   Right. And the last one that you  
24          point to here of course is the running of the  
25          Secure Delete program, and we've gone over this,

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1 but I take it that to the extent that a finding is  
2 made that in fact the Secure Delete program was not  
3 used for the purposes of deleting files or folders,  
4 this one falls by the wayside too?

5 A. I'm sorry, I don't understand the  
6 question you are asking me.

7 Q. The running of the Secure Delete  
8 program is relevant in your view because it was  
9 potentially used to delete file folders?

10 A. Correct.

11 Q. And to the extent the court should  
12 find that, in fact, it was not used for that  
13 purpose, that in fact all that was done was that it  
14 was launched but not used to delete, then this one  
15 falls by the wayside?

16 A. Sure.

17 MR. BORG-OLIVIER: Can I have a moment,  
18 Your Honour, please?

19 THE COURT: I beg your pardon?

20 MR. BORG-OLIVIER: May I have a moment?

21 THE COURT: Sure.

22 MR. BORG-OLIVIER: Those are all my  
23 questions, Your Honour. Thank you, Mr. Musters.

24 THE WITNESS: Thank you.

25 THE COURT: Any cross-examination by

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1 counsel for West Face?

2 MR. THOMSON: No, Your Honour.

3 THE COURT: Any re-examination?

4 MR. DIPUCCHIO: I'll let Mr. Winton  
5 respond.

6 MR. WINTON: No, Your Honour. I get to  
7 handle all the tough tasks like that.

8 THE COURT: Thank you, Mr. Musters.

9 THE WITNESS: Thank you.

10 -- WITNESS EXCUSED --

11 MR. WINTON: Now, at this point, Your  
12 Honour, we do have the physical briefs of read-ins  
13 which we're happy to circulate if they need to be  
14 filed before we close our case or else we can --

15 THE COURT: Why do I need those bound?  
16 Why don't you just put them on the laptop?

17 MR. WINTON: It's just a question of  
18 whether anyone is going to object to us doing that  
19 after we close our case.

20 MR. THOMSON: Not at all. We haven't  
21 had a chance to look at the read-ins, Your Honour.  
22 If we have an issue, we'll deal with that in due  
23 course, but we have no problem at all with filing  
24 them.

25 Do I take it then that subject to

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1 filing the read-ins, that is the case of Catalyst?

2 MR. DIPUCCHIO: Yes.

3 MR. WINTON: Of course, on the  
4 presumption that the defendant witnesses are  
5 called.

6 MR. THOMSON: But to be clear, Catalyst  
7 is now closing its case in-chief?

8 MR. WINTON: Yes.

9 MR. DIPUCCHIO: Yes.

10 THE COURT: Has Catalyst closed its  
11 case or not?

12 MR. DIPUCCHIO: Yes, yes, Your Honour.

13 MR. THOMSON: Your Honour, our next  
14 witness is Mr. Griffin, as I understand it, and I  
15 think he's on his way down.

16 THE COURT: Why don't we stop for the  
17 lunch break and come back at two o'clock. By the  
18 way, we'll start at 9:30 tomorrow morning, I've got  
19 a meeting at 9 o'clock, but it doesn't sound like  
20 that's going to be a problem.

21 MR. THOMSON: Thank you.

22 -- LUNCHEON RECESS AT 12:45 --

23 -- UPON RESUMING AT 2:05 --

24 MR. MILNE-SMITH: Your Honour, the  
25 order of proceedings that we have decided upon

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1           between the defendants is that West Face is going  
2           to call its witnesses first, followed by Mr. Moyse,  
3           and the first witness for West Face we'd like to  
4           call to the stand is Anthony Griffin.

5                         ANTHONY GRIFFIN: SWORN.

6                         MR. MILNE-SMITH: Your Honour,  
7           hopefully on your iPad you will have a folder  
8           dedicated to Mr. Griffin's examination in-chief and  
9           I do not intend to stray from that folder.

10                        EXAMINATION IN-CHIEF BY MR.MILNE-SMITH:

11                        Q. Mr. Griffin, could you please just  
12           briefly describe for the court your position at  
13           West Face?

14                        A. I'm one of four partners at West  
15           Face Capital.

16                        Q. And what are your responsibilities  
17           as partner?

18                        A. I sit on the West Face Investment  
19           Committee, I am responsible for finding investment  
20           ideas for the firm, also overseeing our junior  
21           staff, analysts and associates.

22                        Q. And do you recall swearing various  
23           affidavits in this proceeding in the past?

24                        A. Yes, I do.

25                        Q. Let's just walk through those so

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1 we have a common basis. First of all, you recall  
2 there was an affidavit dated March 7th, 2015 in  
3 connection with the injunction proceedings that  
4 year?

5 A. Yes.

6 Q. And you then filed a supplementary  
7 affidavit in that proceeding dated May 6th, 2015?

8 A. Yes.

9 Q. And most recently you have sworn  
10 an affidavit dated June 4 of 2016?

11 A. Yes.

12 Q. And do you adopt the contents of  
13 that affidavit as your evidence in-chief?

14 A. Yes.

15 Q. And Your Honour, the affidavit  
16 sworn June 4th, 2016 --

17 THE COURT: I have it.

18 MR. MILNE-SMITH: Okay.

19 BY MR. MILNE-SMITH:

20 Q. Now, just for the sake of  
21 completeness, you also swore an affidavit in a  
22 related proceeding; do you recall that?

23 A. Yes, I do.

24 Q. And that was the Plan of  
25 Arrangement for the sale of Mid-Bowline Group

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1 Corp., correct?

2 A. That's correct.

3 Q. Is there anything in any of the  
4 prior affidavits that you need to correct?

5 A. No.

6 Q. As a quick preliminary question,  
7 Mr. Griffin, we're going to talk mostly about Wind  
8 Mobile, but there is another wireless company I  
9 just want to get your evidence on. You're familiar  
10 with Mobilicity?

11 A. Yes, I am.

12 Q. And did West Face ever have an  
13 investment in Mobilicity?

14 A. Yes, we had a bond position in  
15 Mobilicity.

16 Q. And does West Face still hold that  
17 bond position in Mobilicity?

18 A. We do not.

19 Q. Okay. And when did you exit that  
20 investment?

21 A. That would have been in the first  
22 quarter of 2013.

23 Q. Thank you.

24 THE COURT: What was the size of that  
25 bond position in Mobilicity?



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1 THE WITNESS: I believe the face value  
2 of the bond position was less than \$10 million,  
3 approximately 9, if I recollect.

4 THE COURT: Thank you.

5 BY MR. MILNE-SMITH:

6 Q. Mr. Griffin, when did you first  
7 start following or analyzing Wind Mobile?

8 A. It would have been back in  
9 2008-2009 when the AWS1 auctions first occurred for  
10 spectrum in the Canadian telecom industry.

11 Q. And how did the AWS3 auction  
12 relate to Wind Mobile? What was the connection  
13 between those two events?

14 A. With the AWS3?

15 Q. Correct.

16 A. The AWS3 spectrum was necessary to  
17 allow the company to eventually migrate to an LTE  
18 standard with its customers.

19 Q. When was Wind itself founded?

20 A. I believe it just immediately sort  
21 of predated the 2008 period when the incentive  
22 auctions were created.

23 Q. And have you been following the  
24 company since that time?

25 A. We had at various points. We had

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1           been approached to provide financing in various  
2           capacities. The first time would have been an  
3           original proposed high yield financing to partially  
4           pay for their allocation of spectrum under the  
5           original AWS1 incentive auction process.

6                        Q. And in your history of following  
7           Wind Mobile, were you aware of regulatory issues  
8           being a factor for Wind Mobile or its owners?

9                        A. Yes.

10                      Q. How so?

11                      A. Well, under the original ownership  
12           structure where Orascom, an Egyptian company, was  
13           the ultimate parent, the CRTC had intervened and  
14           had suggested or taken the position that the  
15           ownership structure that Orascom had put in place  
16           made Wind non-compliant with foreign ownership  
17           restrictions and Canadian ownership requirements as  
18           they saw it at the time, and that was subsequently  
19           overturned by the federal government.

20                      Again, when VimpelCom ultimately  
21           acquired Orascom, and indirectly its interest in  
22           Wind Mobile, VimpelCom had sought to basically  
23           convert its majority economic -- minority voting  
24           position into a majority economic and majority  
25           voting position in the company and they had been

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1 blocked under the Investment Canada Act from doing  
2 so.

3 Q. Could you just explain to me the  
4 ownership structure of VimpelCom?

5 A. Well, as best I understand it, the  
6 ultimate parent company is, while Amsterdam based,  
7 is ultimately controlled by Russian interests and I  
8 believe it was that factor that played a role in  
9 the federal government's ultimate view that they  
10 were unpalatable as an owner of a Canadian  
11 telecommunications company.

12 Q. Were you familiar with 2011  
13 amendments to the Telecommunications Act concerning  
14 foreign ownership of so-called new entrants to the  
15 wireless industry?

16 A. Yes, that is all really what  
17 kicked off this initiative on the part of  
18 VimpelCom, is that the federal government decided  
19 that small market participants, companies that had  
20 less than 10 percent market share in Canada, would  
21 receive a form of exemption which would allow for  
22 foreign ownership of those entities.

23 And I believe VimpelCom ultimately  
24 thought that was an avenue for them to assert not  
25 only economic but also voting control over the

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1 business.

2 Q. And when you say small entrants  
3 who were under 10 percent, which companies would  
4 that description apply to?

5 A. Well, that would have specifically  
6 been at the time Public Mobile, Mobilicity and Wind  
7 Mobile.

8 Q. Okay. And just about two minutes  
9 ago you talked about VimpelCom's efforts to acquire  
10 a majority voting control of the company. Did that  
11 come before or after the 2011 telecommunications  
12 amendments?

13 A. That would have come after.

14 Q. Mr. Griffin, could you please turn  
15 to paragraph 29, or I should say, could we please  
16 call up paragraph 29 of Mr. Griffin's affidavit,  
17 tab 1.

18 So this states that on November 4, 2013  
19 you received a telephone call from Mr. Lacavera and  
20 the paragraph goes on to describe what it was  
21 about.

22 Could you just in your own words please  
23 summarize that call or the import of that call for  
24 the court?

25 A. Sure. Effectively what had been

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1           communicated to us was that VimpelCom was no longer  
2           interested in continuing to fund the Wind Mobile  
3           business indirectly through its interest in  
4           Orascom. Up this that point in time, it had been a  
5           series of shareholder loans that had funded the  
6           capital requirements insofar as capital  
7           expenditures and operating losses were concerned.

8                         And I think after a series of efforts  
9           to try to change the relationship that VimpelCom  
10          had with this company into a position where its  
11          voting control of the business reflected its true  
12          economic interest, with those efforts having been  
13          frustrated by the decisions of the federal  
14          government, they were effectively going to make a  
15          last attempt to either sell the business on a very  
16          expedited basis and exit entirely, cleanly and  
17          conclusively, or the company was likely going to  
18          fall into CCAA proceeding sometime in the future.

19                        Q.   As of the date of this phone call  
20          in November 2013, did you have any opinion or  
21          understanding regarding VimpelCom's approach to  
22          regulatory risk?

23                        A.   I think there had been a long  
24          series of frustrations that had been discussed  
25          publicly in the press.  Certainly their efforts to

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1 seek an ability to exercise voting control over  
2 this company were well known and the government's  
3 responses to that were well known.

4 Q. And how did you expect that to  
5 affect negotiations with VimpelCom for a potential  
6 transaction?

7 A. Well, I think given the history  
8 with the federal government, they were distrustful  
9 of the Canadian federal government, they were  
10 frustrated given the amount of money that had been  
11 invested in the firm, and I think they wanted to  
12 wash their hands of the situation as quickly as  
13 possible.

14 Q. Did you have an understanding at  
15 the time as to Wind's cash flow position?

16 A. We knew that at the time Wind had  
17 a history of losing money, whether it was, you  
18 know, operationally or operations combined with  
19 capital expenditures necessary to fund and build  
20 out the business. It had been a serial capturing.

21 Q. And how about their debt  
22 structure?

23 A. The company had actually, as a  
24 consequence of VimpelCom and/or Orascom being  
25 unable to put in voting actually as a means of

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1 funding the company, they had reverted to vendor  
2 financing for at least part of the network  
3 construction in an amount of about \$150 million at  
4 the time, and they had also reverted to advancing  
5 money pursuant to shareholder loans and it was  
6 actually the shareholder loans that comprised the  
7 majority of the capital that had been invested in  
8 the company.

9 Q. Do you know the approximate amount  
10 of the shareholder loans?

11 A. Yes. Between money that was spent  
12 to acquire spectrum, money that was spent to build  
13 out the network, and money that was spent to  
14 effectively fund operating losses, my recollection  
15 it was on the order of \$1.4 billion cumulatively  
16 that had gone into the company.

17 Q. And you referred earlier to the  
18 vendor debt of 150 million. Do you have any  
19 understanding as to when that was due, if at all?

20 A. That was one of the issues that  
21 was a concern to the company and certainly driving  
22 some of the timing was that vendor debt was due in  
23 April of the following year. Or end of May  
24 effectively, excuse me.

25 Q. And you talked about the cash flow

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1 situation and ongoing losses. Did VimpelCom ever  
2 express an attitude about --

3 THE COURT: Just before that, you said  
4 April of the following year. That would be April  
5 of 2014? Or May, you said.

6 THE WITNESS: I believe the ultimate  
7 maturity date was April 30th of that year.

8 THE COURT: It's the year I'm asking  
9 about.

10 THE WITNESS: Yes.

11 THE COURT: The following year you're  
12 referring to is 2014?

13 THE WITNESS: That's correct.

14 THE COURT: Thank you.

15 BY MR. MILNE-SMITH:

16 Q. Just to make sure that the court  
17 has it, you're talking there about the vendor debt,  
18 not the shareholder --

19 THE COURT: I understand that.

20 MR. MILNE-SMITH: Okay.

21 BY MR. MILNE-SMITH:

22 Q. And we also talked briefly about  
23 the cash flow position. Did the ongoing losses  
24 have any effect on VimpelCom's position regarding  
25 the timeline for the transaction?



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1           A.    The company was either going to  
2           run into one of two eventualities.  One was a  
3           default triggered by the maturing of that vendor  
4           financing.  The other date was effectively running  
5           out of cash liquidity in the business.

6                    Which of those two things was going to  
7           happen sooner, it looked to us like the vendor debt  
8           was going to predate an exhaustion of liquidity in  
9           the company.

10           Q.   And was VimpelCom willing to  
11           continue to fund the company's obligations as they  
12           came due?

13           A.   Not as we understood it at the  
14           time, no.

15           Q.   Okay.  If we could fast-forward a  
16           little bit in the timeline.  As of the beginning of  
17           May 2014, did you have an understanding as to what  
18           price VimpelCom was seeking for its interest in  
19           Wind?

20           A.   Yes.  They had engaged UBS  
21           Securities as their financial advisor and it had  
22           been clearly communicated to us that an enterprise  
23           valuation on the order of \$300 million Canadian was  
24           the price that they had established.

25                    And that was a fairly unique piece of

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1 information in terms of other processes that we'd  
2 been involved in. We seldom had had or gone into a  
3 process where the price was effectively stipulated  
4 at the outset and a price that was very low with  
5 respect to the cumulative amount of investment that  
6 had gone into this business.

7 Q. Can you just explain that a little  
8 bit more, how the price was very low in relation to  
9 the cumulative investment in the business?

10 A. Sure. Well, we looked  
11 historically at the amount of money that had been  
12 committed to build a network within their core  
13 markets, and, as I said previously, that was on the  
14 order of about a half a billion dollars just  
15 discretely on that one element.

16 There had been another billion dollars  
17 invested, roughly equally split between their prior  
18 acquisitions of spectrum under the licensing rounds  
19 for AWS1, and about \$500 million invested in  
20 funding cumulative operating losses as the company  
21 grew its subscriber base over time.

22 And so that was certainly one goal-post  
23 with which I would reference the price would be in  
24 the context of how much had gone into the business  
25 to get it to that point.

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1 Q. So given that they had effectively  
2 set the price at the beginning, as you just  
3 described, what were they negotiating about? What  
4 was VimpelCom's ask?

5 A. As best we could tell, the only  
6 other available alternative to the company was to  
7 -- to VimpelCom, that is, was to put Wind into a  
8 CCAA proceeding, and so this process was clearly  
9 set up to provide a more expedient alternative with  
10 which to provide VimpelCom with some level or  
11 recovery of proceeds on the capital they had  
12 invested into the company on an expedient basis.

13 Q. Could we pull up tab 3, please.  
14 This is WFC0109163. Mr. Griffin, just have a look  
15 at that and then just describe for the court, if  
16 you could, the context in which this email was  
17 sent.

18 A. Okay. So this was a response from  
19 their financial advisor to the very first proposal  
20 that we could put into the company.

21 Q. And what was the nature of that  
22 proposal?

23 A. The nature of that proposal was  
24 really one where we were trying to stage our  
25 investment at West Face, such that we did not put

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1 up a full \$300 million initially, that we really  
2 stepped into a position of being in the first  
3 instance creditors effectively stepping into the  
4 shoes of the preexisting providers of vendor  
5 financing.

6 Q. Right.

7 A. Replacing them, taking away the  
8 immediate pressure on the business that existed  
9 from its pending maturity. We would then also  
10 contemplate concurrently an equity investment but  
11 not for a hundred percent of the outstanding  
12 equity. It would have left VimpelCom in a position  
13 of having a continued financial interest, albeit a  
14 minority interest in the company, and we believed  
15 that we could provide them with a means of  
16 liquidity at a later stage.

17 Part of this was due to the fact that  
18 the risk profile associated with the investment we  
19 were making, if we went in as credit for a lesser  
20 amount of money, was substantively different.

21 And the other factor we were trying to  
22 control for was we knew that because the company  
23 was burning money at the time and there were some  
24 additional capital expenditure requirements in  
25 front of us, we had to keep some powder dry to

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1 allow us or to facilitate that incremental  
2 investment. So we were really trying to stage our  
3 entry.

4 Q. So just to look at the substance  
5 of the email then, this is you writing to Greg  
6 Boland and then to numerous other people at West  
7 Face?

8 A. That's correct.

9 Q. And can you just describe who  
10 these people are, what this circulation list  
11 represents?

12 A. Sure. So Peter Fraser, Tom Dea,  
13 Greg Boland, Yu-jai Zhu and Alex Singh are all  
14 individuals internal to West Face, members of the  
15 deal team effectively involved in the Wind  
16 transaction. The remaining individual, Patrick  
17 Barry, was our external legal advisor on the  
18 transaction from Davies, Ward.

19 Q. I'm not sure, I can't remember if  
20 Justice Newbould would have heard this in evidence  
21 so far. You describe yourself as one of the  
22 partners of West Face. Who are the other partners?  
23 Are they on this email?

24 A. All of the other remaining  
25 partners are on that email, being Greg, Peter and

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1 Tom.

2 Q. And who is Alex Singh?

3 A. He was our general counsel at the  
4 time.

5 Q. And what position did Yu-jai hold?

6 A. He was vice-president of the  
7 company. Still with us.

8 Q. And so you say that VimpelCom  
9 provided feedback on your proposal and it asked  
10 that you amend the offer to simply contemplate a  
11 purchase of 100 percent of their equity interest  
12 for cash. They did not wish to have any rollover  
13 equity participation in the business.

14 Do you recall who you had that  
15 conversation with?

16 A. That would have been with a  
17 combination -- well, that would have been expressed  
18 through UBS Securities, with Jonathan Hirsch and  
19 Francois Turgeon.

20 Q. And did you make a further  
21 proposal in response to this feedback?

22 A. We did make another proposal.

23 Q. Tab 4. This is WFC0106772. So  
24 you see the date is May 4th, that's two days after  
25 the email we just looked at, and this is being sent

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1 to Globalive Wireless Management Corp. So that's  
2 Wind Mobile itself?

3 A. Yes.

4 Q. And it's being sent to VimpelCom  
5 and we've talked about them?

6 A. Yes.

7 Q. And it's being sent to Global  
8 Telecom Holdings SAE. Who were they?

9 A. That, I believe, is the legacy  
10 company that had been set up under Orascom to hold  
11 the interest in Wind.

12 Q. Okay. And just --

13 A. And so Orascom at that time was a  
14 subsidiary under VimpelCom.

15 Q. That was my question. So  
16 VimpelCom controlled GTH?

17 A. That's correct.

18 Q. And AAL Holdings?

19 A. That was the Lacavera company.

20 Q. Okay. Just to make sure we  
21 covered it, we talked about the debt structure  
22 earlier and you sort of alluded to the equity  
23 structure. Can you just briefly describe what the  
24 equity structure was of the ownership of Wind  
25 Mobile at this time?

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1           A.    Sure.  So VimpelCom indirectly  
2           through Orascom effectively owned a one-third  
3           voting interest and two-thirds economic interest in  
4           the company.  The Canadian group or the Lacavera  
5           group, as you may refer to them, owned basically  
6           the reciprocal interest.  They owned a minority  
7           one-third economic interest and two-thirds voting  
8           interest.

9           Q.    So if we flip over to page 2 of  
10          this letter, and you see that paragraph, it says  
11          the transaction would have two key elements?

12          A.    Yes.

13          Q.    So what was the basic structure of  
14          this proposal?

15          A.    Well, again, here we were trying  
16          to tailor our initial investment with 200 million  
17          of first lien debt financing to the company in the  
18          form of senior secured notes and we appended a term  
19          sheet outlining those terms.

20                 And then we would make a follow-on  
21          contribution or follow-on investment that was  
22          contingent on certain outcomes occurring in the  
23          future.

24          Q.    Okay.  And just under "Valuation  
25          and structure," what was the enterprise value that



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1 was the basis for your deal?

2 A. Right. This was predicated on  
3 enterprise value that was responsive to their ask  
4 which was \$300 million Canadian.

5 Q. And in this offer did you ask for  
6 any condition precedent that West Face obtain any  
7 regulatory concessions from the government?

8 A. No. This wasn't based on, I call  
9 it -- we understood that there would be regulatory  
10 approvals required, which were part and parcel with  
11 any transaction, including Industry Canada approval  
12 and Competition Bureau approval, amongst others.  
13 That was well understood to be a feature of this  
14 transaction and many others that we looked at.

15 One of the things that we were very  
16 concerned about for the company going forward was  
17 that they have access to additional spectrum in the  
18 future, and that was important insofar as ensuring  
19 that the business could transition from a 3G  
20 standard to LTE and that was only going to be  
21 possible by being furnished that additional  
22 spectrum in the future.

23 Q. We're going to come back and talk  
24 about that in a little more length. Could we come  
25 back to page 4 of the document now, please.

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1 THE COURT: Just wait a second, please.

2 MR. MILNE-SMITH: Sorry, Your Honour,  
3 did you have any questions about page 2 before we  
4 moved on?

5 THE COURT: No, I'm just making a note.  
6 You're going a little fast for me, that's all.

7 MR. MILNE-SMITH: My apologies.

8 BY MR. MILNE-SMITH:

9 Q. So page 4 and then if we could  
10 scroll down to the bottom, the section headed  
11 "Conditions." You'll see that the second last  
12 bullet there, Mr. Griffin, says:

13 "Receipt of any necessary or  
14 desirable regulatory and  
15 governmental approvals and third  
16 party consents on terms satisfactory  
17 to us."

18 Now, what sort of regulatory approvals  
19 were you referring to there?

20 A. Sure. Well, those were the ones  
21 that I just mentioned previously which was what we  
22 understood to be requirement for Industry Canada  
23 approval, Competition Bureau approval, and then  
24 also when you work up the chain in terms of the  
25 required shareholder approvals that would be

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1 required, that would include obviously the Canadian  
2 ownership group and I believe both the boards of  
3 Orascom and VimpelCom as the case would have been  
4 at the time.

5 Q. Did West Face ever speak to the  
6 government about regulatory issues?

7 A. We did. We visited with Industry  
8 Canada and made presentation to them.

9 Q. Could we go to tab 5, please.  
10 This is WFC0106480. And do you recognize this  
11 presentation?

12 A. Yes, I do.

13 Q. And was this the presentation you  
14 delivered to Industry Canada?

15 A. Yes, that's correct.

16 Q. Just skip ahead two pages to the  
17 executive summary. Just before we get into the  
18 details, could you just describe for me the purpose  
19 of this presentation to Industry Canada?

20 A. Well, one of the principal  
21 objectives here was to ensure that Industry Canada,  
22 being one of the parties whose consent would be  
23 required to consummate any transaction, we wanted  
24 to go in there and basically introduce ourselves  
25 very simply and try to convince them that we were a

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1 counterparty who had the expertise and financial  
2 wherewithal, and a Canadian-based investor for that  
3 matter, who we thought would be a suitable  
4 counterparty to own Wind if we were successful in  
5 acquiring it.

6 Q. Why did the fact that you were  
7 Canadian-based matter?

8 A. Well, clearly it had been an issue  
9 historically in terms of establishing ownership of  
10 Canadian telecom companies more generally, even  
11 though some specific carve-outs had been created  
12 that you referenced previously for small market  
13 participants.

14 We thought it was a good and logical  
15 step to have that dialogue with Industry Canada to  
16 familiarize them with us.

17 Q. Okay. And just on this page,  
18 point number 4 refers to West Face activity to  
19 date, so I'd just like to walk through this so the  
20 court can understand what you had done as of this  
21 presentation.

22 Sorry, do you recall, this is on the  
23 cover page it indicated May of 2014. Is that when  
24 the presentation occurred?

25 A. Yes, that's correct.

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1           Q.   So as of May 2014, West Face  
2           activity to date, it says you engaged two teams of  
3           telecom consultants. Who are they?

4           A.   Sure. So we engaged one of the  
5           leading telecom consultants called Altman Vilandrie  
6           based out of the United States. We also engaged a  
7           local boutique consultancy run by two individuals  
8           named Peter Rhamey and George Horhota. We engaged  
9           Davies, Ward as our legal counsel. And then we had  
10          also talked to two of the major Canadian accounting  
11          firms, or international firms I should say, about  
12          an engagement for a quality of earnings review and  
13          accounting review for the company.

14          Q.   And what sort of work did the  
15          teams of telecom consultants do?

16          A.   It was quite expansive. We had  
17          given them a list of questions that we wanted to  
18          have answered before we stepped off the curb and  
19          bought this company. Everything from an analysis  
20          of the subscriber base that existed at the time,  
21          the competitive pricing environment and competitive  
22          dynamics in the Canadian market specifically and  
23          how that might evolve in the future, an analysis of  
24          the specifics of the pricing strategy that this  
25          company was adopting in the market vis-à-vis not

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1           only the other small market participants but also  
2           the large incumbent firms in Canada.

3                         We ultimately wanted to develop a  
4           suitable financial forecast that we could predicate  
5           our investment thesis on, and part of that was  
6           trying to estimate when and to what degree this  
7           company would turn from and under what conditions  
8           they would turn from generating losses to levels of  
9           sustained profitability.

10                        We also had to estimate what the  
11           additional spectrum requirements of this business  
12           would be going forward, not only to support the  
13           growth in the subscriber base, but also to support  
14           the transition that we have discussed previously in  
15           terms of the technical standards on which this  
16           network was operating and how it was evolving.

17                        Q.   You referred to transition from  
18           losses to profits and to spectrum requirements, so  
19           that's a perfect segue if we could move to page 9.  
20           Just scroll down a little bit more.   There.

21                        So you'll see that the third heading on  
22           this page is "Wind appears to be at a favourable  
23           inflection point operationally"?

24                        A.   Yes.

25                        Q.   Could you just explain that and

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1 square that with your earlier testimony about  
2 ongoing losses?

3 A. Sure. Well, as we viewed the  
4 situation, we had an ultimate vendor in VimpelCom  
5 who was selling the business at a very favourable  
6 price, at a very inopportune moment for reasons  
7 that weren't motivated by economics.

8 And the reason I say that is because  
9 after years of losses and a billion five of  
10 cumulative funding into the company, we knew the  
11 business was within striking distance of having  
12 enough subscribers, as one indicia of success, to  
13 turn from years of cumulative operating losses to a  
14 position of profitability.

15 And there was a few other things that  
16 were happening concurrently through the course of  
17 our diligence process that really strengthened that  
18 belief. We had new developments in terms of tower  
19 sharing and wholesale roaming that the CRTC had  
20 been overseeing, that had a very positive impact on  
21 all small market participants, but Wind  
22 particularly.

23 We had two of the three new market  
24 entrants, Public Mobile and Mobilicity, which had  
25 really sort of, I won't say left the picture, but

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1           their prior behaviour in terms of being antagonist  
2           pricers in the market or discounters created a much  
3           more rational pricing environment for Wind and we  
4           had seen the average revenues per user really  
5           trough and start to move back upwards after those  
6           small market entrants started to have less of an  
7           influence in the market.

8                         And we also started to see more  
9           rational pricing behaviour from the incumbents, and  
10          we believed that this company, as the incumbents  
11          slowly raised prices, would always continue to  
12          operate discounted service but would do it under an  
13          umbrella where incumbent pricing rates were  
14          increasing.

15                        And so the last component of this was  
16          we needed some clarity on what was going to happen  
17          with AWS3 and the spectrum auctions, and the  
18          Canadian government came out in short order, I  
19          believe it was in July of that same year, this was  
20          really the last thing we were waiting to see, and  
21          said look, we know some of the factors that are  
22          important to creating a sustainable fourth carrier  
23          nationally in the country and we've heard loud and  
24          clear that availability of additional spectrum is  
25          key and we understand that a great set of



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1 conditions for creating success would be to have  
2 another set-aside auction, and that's what they  
3 ultimately delivered was an AWS3 set-aside auction  
4 where Wind was really one of the few remaining  
5 participants that had the financial wherewithal to  
6 participate as a bidder.

7 So you had this confluence of factors  
8 all converging at once, and yet through the piece  
9 the vendor never adjusted their price expectations,  
10 and yet the certainty and our conviction in the  
11 ability of this business to survive on its own as a  
12 fourth market entrant just increased through the  
13 period.

14 Q. Now, you referred to the --

15 THE COURT: Just a second. When you  
16 talk about a set-aside auction, you talk about  
17 setting aside for new entrants apart from the  
18 incumbents? Is that what you mean by that?

19 THE WITNESS: That's correct, yes.

20 BY MR. MILNE-SMITH:

21 Q. In fact, just on that point, Your  
22 Honour, why don't we just pull up tab 9 right now  
23 because it addresses this very point. So this is  
24 WFC0109450.

25 It's a Government of Canada news

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1 release titled "Harper government to release more  
2 valuable spectrum to strengthen competition in  
3 Canada's wireless industry."

4 If you just go down a little bit, you  
5 will see the date is July 7, 2014. To the best of  
6 your recollection, is that when this new policy was  
7 announced?

8 A. Yes, that's what I recall.

9 Q. And the paragraph there at the  
10 bottom says:

11 "Today, the Government of  
12 Canada took another step in  
13 delivering for consumers by  
14 unveiling details of a new spectrum  
15 auction. Beginning next year, AWS3  
16 spectrum licenses will be made  
17 available to wireless companies.  
18 AWS3 spectrum is ideal for  
19 delivering fast, reliable service to  
20 Canadians on the latest smartphones,  
21 tablets and mobile devices."  
22 Go down to the next page. Stop there.

23 So it says:

24 "Consistent with the  
25 government's previous spectrum

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1                    auctions, the AWS3 spectrum auction  
2                    will have rules designed  
3                    specifically to put Canadian  
4                    consumers first. These include: A  
5                    large 30 megahertz block of spectrum  
6                    set aside for new operating  
7                    entrants."

8                    Just so we're all clear on that, would  
9                    Rogers, Bell and Telus be able to bid on this  
10                   spectrum.

11                   A. No, they would have been excluded  
12                   from that process.

13                   Q. And what, if any, competition  
14                   would Wind have faced for that spectrum?

15                   A. Well, we thought it was going to  
16                   be quite limited. Mobilicity could certainly have  
17                   participated, the estate of Mobilicity.

18                   Q. Did Mobilicity ultimately  
19                   participate in the auction?

20                   A. They did not, to our  
21                   understanding.

22                   THE COURT: Well, I think they did. I  
23                   think they put in an initial bid and then they  
24                   didn't make the final bid.

25                   THE WITNESS: That's correct. That's

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1 correct, Your Honour. There was a deposit  
2 requirement that had to be put up and, to the best  
3 of my recollection, they did not meet the deposit  
4 obligation.

5 There were a number of --

6 THE COURT: They put up the original  
7 deposit, they put the initial deposit in to keep  
8 themselves in the game, but when it came time to do  
9 the bidding, in the end they didn't.

10 MR. MILNE-SMITH: Of course the court  
11 is intimately familiar with the Mobilicity saga.

12 THE WITNESS: There were a number of  
13 other small regional participants who could  
14 certainly have participated in the process.

15 BY MR. MILNE-SMITH:

16 Q. Right.

17 A. I believe at the time Public  
18 Mobile or the new owners of Public Mobile were  
19 likely not precluded from participating.

20 But suffice to say we thought the range  
21 of participants that would provide, you know, any  
22 sort of fierce competition to us and in the  
23 quantity of spectrum we were looking to acquire was  
24 quite limited, and consequently we didn't know but  
25 we certainly hoped that the spectrum would be

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1           acquired at, you know, in a perfect world the  
2           reserve price that had been established by the  
3           government.

4                   Q.   And when it came time, when push  
5           came to shove, were you able to acquire spectrum?

6                   A.   Yes, we were.

7                   Q.   And at what price?

8                   A.   Effectively without getting into  
9           the minutia, basically at or near the reserve price  
10          that was established.

11                   Q.   Once this spectrum issue had been  
12          dealt with, did West Face believe the business of  
13          Wind Mobile needed any further regulatory  
14          concessions to be viable?

15                   A.   We were never looking for  
16          concessions. I mean, that was not what this  
17          investment was predicated on at any point in time.

18                   Q.   And you described earlier, when we  
19          were looking at the presentation made to Industry  
20          Canada while you throughout the business was at a  
21          positive inflection point, with all the benefit of  
22          hindsight now, how did your projections fare?

23                   A.   Quite accurately during the period  
24          of our ownership. In the first year of our  
25          ownership -- actually, let me backtrack. Before we

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1 even closed the transaction --

2 THE COURT: I think what you're talking  
3 about, you say we acquired, we closed, you're  
4 talking about the consortium?

5 THE WITNESS: Yes, Your Honour.

6 Comparing our own internal projections at West Face  
7 as against what the business actually produced, it  
8 had, actually before we closed the transaction, it  
9 had stopped burning money at the EBITDA level so it  
10 was producing neutral operating cash flow, and we  
11 actually turned into a position of profitability  
12 for the first time in the first 12 months under our  
13 ownership. So that was a very material swing in  
14 the performance of the business.

15 And then we also acquired this AWS3  
16 spectrum at a price that met our most optimistic  
17 expectations as to what we could acquire it for.

18 BY MR. MILNE-SMITH:

19 Q. At any time between that first  
20 conversation we described in November of 2013 right  
21 through until you closed the transaction or the  
22 consortium closed the transaction in December of  
23 2014, did you or anyone at West Face believe that  
24 Wind or the purchasers of Wind would need the  
25 ability to sell Wind spectrum to an incumbent after

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1 five years?

2 A. We did not.

3 Q. How could --

4 THE COURT: Just wait, please. Go  
5 ahead.

6 BY MR. MILNE-SMITH:

7 Q. And, Mr. Griffin, you of course  
8 wouldn't be aware of this because you haven't heard  
9 any of the testimony given in this case, but since  
10 it has been a point of controversy in this trial,  
11 could you please explain to the court how you  
12 thought that the consortium would be able to obtain  
13 financing to acquire and then build out a network  
14 for the company without a confirmed ability to sell  
15 the spectrum to an incumbent without restrictions?

16 A. Well, I think we'd actually  
17 established that fact right at the outset only  
18 insofar as when we refinanced the original vendor  
19 financing that was connected to Wind when we closed  
20 the transaction, from the outset we had an arm's  
21 length third party called Canyon Group, who is not  
22 a member of the consortium and had no other  
23 financial interest in the company, willing to  
24 provide, if you will, a go-forward or exit facility  
25 for this business under its new ownership

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1 structure.

2 In addition to that, we were confident  
3 that the network infrastructure that would be built  
4 in the future, there was significant vendor  
5 financing and bank financing available to the  
6 company that was, in fact, put in place after we  
7 acquired ownership that would have facilitated  
8 those capital plans.

9 And so we never viewed this as being an  
10 issue, the transferability of the spectrum. This  
11 was a business that could stand on its own two feet  
12 with the right ownership structure, the right  
13 oversight from management. We knew this was a  
14 business that would turn into a solid business and  
15 a credit that arm's length parties would be willing  
16 to underwrite.

17 Q. And you said that you refinanced  
18 the original vendor financing that was connected to  
19 Wind. That was the 150 million that you talked  
20 about before?

21 THE COURT: You have to keep watching.  
22 I'm trying to make a note here. If you want me to  
23 follow this, don't just keep looking down at your  
24 notes and turn on the wheel. Go ahead.

25 BY MR. MILNE-SMITH:



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1 Q. So in your last answer, Mr.  
2 Griffin, you referred to refinancing the original  
3 vendor financing that was connected to Wind. That  
4 was the 150 million we talked about earlier?

5 A. Yes, that's correct.

6 Q. And when did you obtain that  
7 commitment, roughly?

8 A. It would have been contemporaneous  
9 or, well, shortly before the closing. We walked  
10 into the closing of this transaction with that  
11 commitment in hand.

12 Q. Now, we talked earlier about  
13 spectrum and the availability of the set-aside  
14 auction. Can you briefly describe to the court why  
15 that spectrum was needed or why it mattered?

16 A. Sure. The handsets that the  
17 company was using --

18 Q. Sorry, the handset, that means?

19 A. The actual telephone units or  
20 mobile devices themselves were operating on a 3G  
21 wireless standard on AWS1 spectrum. The reason  
22 that was the case was that one of the largest US  
23 mobile carriers, T-Mobile, had adopted this  
24 standard in the United States.

25 The problem going forward was that if

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1           that large US carrier moved to offer that standard  
2           and they had publicly discussed the fact that they  
3           would, and that they would be moving to an LTE  
4           system, and that the handset inoperability would be  
5           an issue for anyone on the old 3G standard on AWS,  
6           there was no standing still in this business.

7                        The cell phone manufacturers themselves  
8           would never manufacture units that were specific to  
9           the standards that had been adopted by a small  
10          market participant like Wind, and as a consequence  
11          of that, we cannot presuppose that we could just  
12          continue to operate indefinitely on that standard  
13          on those handsets. We had to really transition  
14          over as the industry standards changed and evolved.

15                       As a consequence of that, the spectrum  
16          was an absolute necessity as one piece of the  
17          puzzle.

18                       The other piece being the rollout of  
19          additional network infrastructure to support the  
20          standard and the growth of the customer base.

21                       Q.   What would additional spectrum  
22          allow you to do?

23                       A.   Well, the additional spectrum  
24          would include -- well, really very simply this was  
25          about improving the quality of the customer

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1 experience with the handsets. Everything from  
2 signal propagation within the network, reducing  
3 dropped call frequency, improving the extension of  
4 the network's service area, the speed of delivery,  
5 particularly of data, not so much voice but rather  
6 data, all of these were necessary components to  
7 improving the customer experience with Wind.

8 Q. So tab 7, please. This is  
9 WFC0106765. And it is another letter from West  
10 Face dated June 3rd, 2014 now. And I'd like to go  
11 down to the bottom of the page, actually over to  
12 the carry-over paragraphs, so maybe we can bridge  
13 pages 1 and 2.

14 You see the paragraph starting at the  
15 bottom to summarize, it says:

16 "Our new proposal for the  
17 transaction is as follows.

18 1. The West Face funds would  
19 provide bridge financing to be  
20 funded 14 days from the date of your  
21 signing of this letter, allowing you  
22 to repay the company's existing  
23 vendor debt.

24 2. We would enter into a share  
25 purchase agreement contemporaneously

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1 with funding this bridge loan for  
2 deferred contingent consideration of  
3 \$100 million, payable on our  
4 obtaining sufficient spectrum within  
5 12 months to support the company's  
6 LTE rollout strategy..."

7 And just pausing there, is that the  
8 issue we were just discussing?

9 A. That is correct.

10 Q. And:

11 "3. The West Face funds would  
12 be responsible for funding the  
13 company's working capital after  
14 funding of the bridge loan."

15 A. Yes.

16 Q. So just to pause there to make  
17 sure we've got the chronology right because we've  
18 jumped around a little bit, this letter is dated  
19 June 3rd, 2014 and the announcement of the  
20 set-aside spectrum came later on July 7th, 2014,  
21 correct?

22 A. That is correct.

23 Q. So was this offer acceptable to  
24 VimpelCom?

25 A. No, this also was not acceptable

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1 to VimpelCom.

2 THE COURT: Can I just ask you a  
3 question. The bridge financing that you're  
4 proposing here would be in what amount?

5 THE WITNESS: That was to take out the  
6 entirety of the vendor financing.

7 THE COURT: So 150?

8 THE WITNESS: It was a little bit more  
9 than that at the time.

10 THE COURT: So this proposal then was a  
11 little in excess of 250?

12 THE WITNESS: That is correct. If I  
13 could just add as well, by this time --

14 BY MR. MILNE-SMITH:

15 Q. Yes?

16 A. -- the vendor financing was in  
17 fact technically in default or forbearance. They  
18 were in a forbearance period with the vendors and  
19 so this was an acutely important issue for the  
20 company to solve in terms of the debt.

21 Q. So let's then look at VimpelCom's  
22 response at tab 8. This is WFC0058252. And it's  
23 an email from Francois Turgeon at UBS, who I think  
24 you said already was the investment bankers for  
25 VimpelCom, correct?

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1 A. Yes, that's correct.

2 Q. And it's sent to you?

3 A. Yes.

4 Q. So this is June 10th and he says:

5 "Tony, the delayed settlement  
6 feature you proposed does not work  
7 for VimpelCom has the objective  
8 still a clean exit at \$300 million  
9 EV. My client is not prepared to  
10 have any portion of the proceeds  
11 contingent on a future event, in  
12 this case the acquisition of  
13 spectrum."

14 A. Yes.

15 Q. Did VimpelCom ever waver from this  
16 position, being that they wanted a clean exit at  
17 300 million? Did they ever waver from that  
18 position in their discussions with West Face?

19 A. At no point did they waver on that  
20 issue.

21 Q. Now, just take a moment for a  
22 quick aside here. We're in June of 2014. What  
23 awareness, if any, did you have of other potential  
24 bidders for Wind Mobile?

25 A. Well, there had been a significant

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1 amount of press speculation as to who may be  
2 involved or who may be coming back that might have  
3 been previously involved. There was a whole series  
4 of names that were batted around in the papers.  
5 Verizon Communications was one. The Tennenbaum  
6 group, given their involvement as one of the  
7 holders of the vendor financing which they had  
8 acquired through the secondary market was my  
9 understanding.

10 Q. Right.

11 A. Birch Hill, a private Canadian  
12 equity group. We knew the incumbent firms, if they  
13 thought there was a way to wrest control of this  
14 business, would certainly love to own it but that  
15 seemed to be a bit of an impossibility given the  
16 legislative backdrop.

17 Q. And did you have any understanding  
18 as to whether Catalyst might potentially be  
19 interested?

20 A. We had -- you know, there was  
21 press discussion of their potential involvement in  
22 both Mobilicity and Wind going back to 2013, I  
23 believe was the first time we saw any mention of  
24 it, where one of the principals of the firm had  
25 been discussing the possibility of combining

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1 Mobilicity and Wind into a large fourth national  
2 carrier.

3 Q. Tab 15, please. This is  
4 WFC0068142. And if we could go to the bottom of  
5 this email string on page 2, so this is an email  
6 from you, Mr. Griffin, to Anthony Lacavera on June  
7 the 4th of 2014 and you see you ask him:

8 "What is your change of control  
9 payment under a Catalyst or  
10 Tennenbaum deal - i.e. what do we  
11 have to work with in our bid? Is it  
12 a fixed number if you have a  
13 negotiated deal?"

14 Were you asking Mr. Lacavera about the  
15 terms of a Tennenbaum or Catalyst deal with  
16 VimpelCom?

17 A. What I was asking about was the  
18 terms of a deal that the Canadian management group  
19 had mentioned in our dialogue that they had  
20 understood or had structured with VimpelCom. Our  
21 understanding was effectively that regardless of  
22 what value the business traded for, if it traded to  
23 a third party buyer, that there was some minimum  
24 threshold consideration that VimpelCom would  
25 provide the Canadian management group for providing



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1 their consent or support to the transaction.

2 Q. When you say the Canadian --  
3 sorry. When you say the Canadian management group,  
4 who do you mean by that? Which company?

5 A. This would be AAL and chiefly --  
6 chiefly the principals, Mr. Lockie, Mr. Scheschuk,  
7 Mr. Lacavera, amongst others.

8 Q. Okay. So just so I make sure I  
9 understand your answer, you were asked about the  
10 terms of an agreement between AAL or its principals  
11 in VimpelCom?

12 A. That's correct.

13 Q. If we could then go up to page 1.  
14 Stop there. So we just skipped past an email where  
15 Mr. Lacavera asked about what would be a good time  
16 to talk and you replied back and say:

17 "Tony, I think it might make  
18 the most sense for us to pick up the  
19 conversation with the Tennenbaum  
20 group and discuss the possibility of  
21 joining that syndicate. We're not  
22 going to be able to better them on  
23 value and I think theirs is the only  
24 real proposal in front of the  
25 company outside of ours - Catalyst

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1                   seems to be a lot of air."

2                   What did you mean by that, "Catalyst  
3 seems to be a lot of air"?

4                   A. Well, I guess to put it in  
5 layman's terms, for all the smoke and discussion  
6 about their potential involvement, we had nothing  
7 to substantiate that they were there, that they  
8 were serious or credible. I didn't know.

9                   Q. Now, just to jump ahead in time,  
10 we've looked at Mr. Turgeon's email where he talked  
11 about a clean exit at \$300 million EV. Do you  
12 recall that?

13                   A. Yes.

14                   Q. And what did your winning offer or  
15 the consortium's winning offer ultimately provide  
16 in relation to what Mr. Turgeon described as  
17 VimpelCom demands?

18                   A. Well, in short strokes we met that  
19 requirement. In fact, the initial consideration  
20 was a little bit less than that and we had a  
21 commitment to follow up that initial investment  
22 with additional working capital support by the  
23 consortium, effectively I'd call it almost  
24 back-stop equity to make sure that the business was  
25 sufficiently funded.

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1 Q. And was --

2 THE COURT: Once you acquired the  
3 company, the working capital support would be  
4 irrelevant to VimpelCom. Did you say you met the  
5 300 or was it a little bit less than the 300?

6 THE WITNESS: The initial purchase  
7 price, as I remember, was 285 million as split  
8 between the debt and equity. But the total  
9 financing commitment that the consortium had  
10 provided was -- provided for additional equity  
11 support into the business, and that was an  
12 important condition, as you rightly cite, perhaps  
13 not so much for VimpelCom, but rather for the  
14 business itself, the management and for the  
15 consortium members.

16 BY MR. MILNE-SMITH:

17 Q. Was Mr. Turgeon's email that we  
18 just looked at the only time that UBS and VimpelCom  
19 expressed a desire for a clean exit?

20 A. No, we finally got the message and  
21 they never wavered in that desire in either value  
22 nor the terms of the exit.

23 Q. Let's just look at one further  
24 example of that. Tab 10, please. Scroll down  
25 along the page, please. Do you have that, Your

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1 Honour?

2 THE COURT: I do.

3 BY MR. MILNE-SMITH:

4 Q. So this is an email from Francois  
5 Turgeon on June 23rd now and he says:

6 "This mark-up is really not  
7 helpful as it seems to be completely  
8 redoing the SPA or starting with the  
9 form your lawyers have put together.  
10 As discussed on Friday, our client  
11 is looking for a clean exit on as-is  
12 basis with an SPA very close to what  
13 we have sent you. As we told you,  
14 this is a competitive process and  
15 others are further advanced on their  
16 due diligence and have provided a  
17 much lighter mark-up to our form of  
18 SPA."

19 So, let's turn then to tab 14, just to  
20 see what Mr. Turgeon was talking about. So this is  
21 WFC -- sorry, Your Honour. Tab 14.

22 THE COURT: Go ahead.

23 MR. MILNE-SMITH: WFC0075344.

24 BY MR. MILNE-SMITH:

25 Q. Mr. Turgeon is asking for an SPA

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1 very close to what we have sent you. What is this  
2 document that I have just brought up?

3 A. Well, when we received the, I  
4 guess, common form of SPA from UBS, we went back to  
5 our legal advisors at Davies and talked about the  
6 document, and their opinion was that it was so far  
7 off-base to what we actually needed, why don't we  
8 just start with, you know, a sort of common  
9 template draft share purchase agreement from the  
10 Davies people, skinny it down to a very minimal set  
11 of reps and warranties and other conditions, and  
12 send it back to them in the hopes that we could  
13 start with that document.

14 I believe when we did that, UBS asked  
15 us to black-line the document to that original  
16 common form of SPA that they had sent out to  
17 parties, and I believe that's what you've got in  
18 front of us here, is that black-line.

19 Q. Sorry, let's just be -- so I'll  
20 tell you this isn't a black-line. So you see this  
21 is dated May 9th. Do you recall who had drafted  
22 this document? Was it a VimpelCom document or a  
23 West Face document?

24 A. This -- can you just scroll  
25 through it so I can see -- all right. This would

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1 have been our document because it included a set of  
2 reps and warranties.

3 Q. Hang on a second. Go to section  
4 7.3, please, which is on page 32. Stop there.

5 A. I'm sorry, okay.

6 Q. Do you recognize that provision?

7 A. Yes. Sorry, this was the SPA that  
8 was provided by -- well, by VimpelCom effectively  
9 through UBS.

10 THE COURT: The file reference at the  
11 bottom of every page is WS Legal. Who is WS Legal,  
12 does anybody know?

13 BY MR. MILNE-SMITH:

14 Q. Do you know?

15 A. I don't know the answer to that.

16 MR. MILNE-SMITH: I can advise the  
17 court it's not Davies, Ward.

18 BY MR. MILNE-SMITH:

19 Q. Just to make sure we're all on the  
20 same page now, I think you just said this was the  
21 VimpelCom draft, correct?

22 A. That's correct.

23 Q. Okay. And we've talked before  
24 about regulatory approval conditions. Is that what  
25 we're looking at here in 7.3?

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1           A.   Those were the two chief  
2           conditions that I think everyone understood have to  
3           be fulfilled, being Competition Act approval and  
4           Industry Canada approval.

5           Q.   So based on this draft and your  
6           communications with UBS about using their form that  
7           we just looked at, did you have an understanding  
8           about whether any competing bid would similarly  
9           contain a condition of regulatory approval like the  
10          one found here at 7.3?

11          A.   It would be impossible that it  
12          wouldn't contain that condition.  It was a  
13          necessity.

14          Q.   Why is that?

15          A.   Well, I think it had been well  
16          established in almost any telecom transaction that  
17          you looked at in the Canadian market that Industry  
18          Canada certainly had an ability to determine, you  
19          know, transfer of licenses to a successor  
20          purchaser, and similarly the Competition Bureau had  
21          an ability to opine on whether the transaction  
22          would positively or negatively impact competition  
23          in the wireless industry in Canada.  There was  
24          never any doubt.

25          Q.   Moving forward in time, did you

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1 eventually learn that another party had gone into  
2 exclusivity with VimpelCom?

3 A. Yes, we had been informed of that.

4 Q. And did you know who it was?

5 A. At the time we had been guessing  
6 as to who it was. There were theories as to who it  
7 was. I don't think we, you know, ever knew  
8 definitively. Our supposition was, though, that  
9 Catalyst was the party in exclusivity with  
10 VimpelCom.

11 Q. And do you recall or did you  
12 eventually learn when Catalyst's exclusivity period  
13 ultimately expired?

14 A. We did. I think that was  
15 communicated through UBS and I believe the original  
16 date was the 18th of August.

17 Q. Did West Face ultimately  
18 participate in an offer to VimpelCom during  
19 Catalyst's period of exclusivity or during the  
20 period of exclusivity that you guessed was  
21 Catalyst?

22 A. Yes, we submitted an offer.

23 Q. Didn't that breach the  
24 exclusivity?

25 THE COURT: When you say "we," you're



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1 talking about the consortium, aren't you?

2 MR. MILNE-SMITH: Consortium, yes.

3 THE COURT: The question was West Face.

4 MR. MILNE-SMITH: I apologize.

5 THE COURT: I think I know what you're  
6 talking about.

7 THE WITNESS: Yes, that consortium of  
8 bidders submitted a proposal.

9 BY MR. MILNE-SMITH:

10 Q. And were you permitted to do that  
11 during the period of exclusivity?

12 A. We understood there to be no  
13 constraints insofar as what we were able to do in  
14 that process. We had seen it done frequently. We  
15 were not bound by that agreement.

16 Q. Could we go to tab 12, please.

17 THE COURT: Go ahead.

18 BY MR. MILNE-SMITH:

19 Q. This is WFC0040932. You see the  
20 letterhead refers to Tennenbaum Capital Partners,  
21 West Face Capital Inc. and LG Capital Investors  
22 LLC?

23 A. Yes.

24 Q. Was that the consortium as it  
25 existed at that time?

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1 A. Yes, that's correct.

2 Q. And the date of this offer is  
3 August 7th, 2014, correct?

4 A. Yes.

5 Q. You see the third bullet on this  
6 page says:

7 "Our offer is not subject to  
8 any regulatory, financing, diligence  
9 or any other conditions that are  
10 outside the control of the parties  
11 to this transaction."

12 Now, you had just told me in looking at  
13 draft VimpelCom SPA that regulatory approval was a  
14 requirement of any deal, so how were you able to  
15 make this offer not subject to any regulatory  
16 condition?

17 A. So this was predicated effectively  
18 on a transaction whereby the consortium would step  
19 into the shoes of VimpelCom as shareholder and  
20 effectively purchase their position in the company  
21 as they requested on an as-is/where-is basis, with  
22 limited conditionality, and we would assume their  
23 one-third voting and majority economic interest for  
24 a period of time and basically allowed them to make  
25 a clean exit from the business.

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1                   As a consequence of that transaction  
2                   and given the fact that management that controlled  
3                   the company was not being affected in our view just  
4                   by virtue of purchasing their share interest, we  
5                   had the view and our advisors had the view that  
6                   that first stage of the transaction didn't require  
7                   the regulatory consents that would otherwise be  
8                   required in the prior deals we had contemplated.

9                   Q.   Now, in your answer you just  
10                  referred to the first stage of the transaction.  
11                  Was there a subsequent stage?

12                  A.   Yes, there was a share  
13                  reorganization, in fact, as a second stage.

14                  Q.   And was regulatory approval  
15                  required for that stage?

16                  A.   Yes.

17                  Q.   And what exactly did you do with  
18                  this share reorganization?

19                  A.   Well, effectively we restruck the  
20                  ownership such that the Canadian management  
21                  contingent or Canadian ownership group stepped into  
22                  minority voting and economic interest and all the  
23                  parties ultimately went to voting interests that  
24                  reflected their proportionate share of the  
25                  investment in the deal.

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1                   So it was very much a pari passu voting  
2 structure, if you will.

3                   Q. Do you recall how long it took you  
4 to obtain that regulatory approval?

5                   A. I believe start to finish it was  
6 approximately six weeks.

7                   Q. So we've talked before about  
8 VimpelCom's desire for a clean exit on an as-is  
9 basis. How did this August 7 proposal address that  
10 desire?

11                   A. Well, for them I think it was a  
12 pretty elegant solution. They got a cheque, they  
13 washed their hands of the business. The release of  
14 proceeds was contingent only on the consortium  
15 providing the funding. They had no further  
16 financial support that they would have to make to  
17 the business. They really just washed their hands  
18 of it and walked away.

19                   Q. As of the date of this offer on  
20 August the 7th, did you have an understanding of  
21 how West Face and the other consortium members were  
22 perceived by VimpelCom at the time?

23                   A. Well, I can only speak insofar as  
24 our impression of West Face insofar as VimpelCom  
25 was concerned. We had had a whole series of false

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1 starts, proposals that had sought to do something  
2 different than what they were requesting insofar as  
3 an exit was concerned, and I believed at the time  
4 that if they couldn't find a buyer for the business  
5 they were quite determined to just file the company  
6 for CCAA protection as their best alternative.

7 And I think they doubted, given the  
8 history and the time that elapsed since we started  
9 discussions with them, that we would necessarily  
10 get to the finish line.

11 Q. And how did that understanding  
12 affect your strategy?

13 A. Well, we knew that we had to put  
14 up something that was, you know, very concrete,  
15 that addressed their requirements in terms of an  
16 expedient exit, and whereby the complication of the  
17 regulatory aspects of this transaction and the time  
18 that may be required to wait for approval and the  
19 question of who was funding or bridging that  
20 business during the period, I think they were just  
21 so fatigued with the whole situation we really  
22 wanted to try to shoulder a bit more of that  
23 burden.

24 THE COURT: Do I understand what you  
25 said a few minutes ago, the two stages, the first

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1 one was you and your advisors didn't think you  
2 needed regulatory approval, the second stage, the  
3 share reorganization, you did. Was the offer to  
4 VimpelCom conditional at all upon approval of the  
5 second stage or was that just a risk you took?

6 THE WITNESS: That was a risk that we  
7 assumed, Your Honour.

8 THE COURT: Thank you.

9 BY MR. MILNE-SMITH:

10 Q. And if you can remember, whose  
11 idea was this structure?

12 A. Well, it didn't emanate with us.  
13 This was something that had been floated as an idea  
14 at one point in time, and I think ultimately came  
15 back to us as a proposal from Larry Guffey in a  
16 discussion with Michael Leitner at Tennenbaum  
17 Capital as being a fairly elegant solution.

18 Q. Let's talk then about Brandon  
19 Moyse for a little bit. So switch gears here.

20 THE COURT: Would this be a good time  
21 to take the afternoon break for 15 minutes?

22 MR. MILNE-SMITH: Sure, of course, Your  
23 Honour.

24 -- RECESS AT 3:25 --

25 -- UPON RESUMING AT 3:49 --

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1 BY MR. MILNE-SMITH:

2 Q. Sorry, Mr. Griffin, before we move  
3 on to Brandon Moyses, just using the document we  
4 have up here, which again for the record is tab 12  
5 of my cross-examination binder, or examination  
6 in-chief binder, document WFC0040932, see the first  
7 bullet point that's listed here says:

8 "The purchase price for  
9 VimpelCom's interest will be \$135  
10 million. Our proposal contemplates  
11 that AAL Holdings Corp. and Anthony  
12 Lacavera will waive their rights to  
13 any fees or payments to which they  
14 may be entitled in connection with  
15 the sale of GIHC/GWMC - the net  
16 proceeds to VimpelCom will be the  
17 full \$135 million pursuant to the  
18 purchase agreement."

19 What's that referring to there? What  
20 are they waiving?

21 A. This is what I was referring to  
22 previously insofar as a consent or support fee was  
23 concerned on the order of \$15 million, and so in  
24 effect instead of paying VimpelCom \$150 million, we  
25 pay them a net 135 and have the Lacavera group or

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1 AAL effectively participate in the consortium  
2 investment going forward.

3 THE COURT: I thought the price was  
4 around \$300 million?

5 THE WITNESS: Yes, so to --

6 THE COURT: That was the enterprise  
7 value and this is just VimpelCom's interest?

8 THE WITNESS: Yes, that is correct.

9 THE COURT: Thank you.

10 THE WITNESS: I could try to explain  
11 the difference. If you take the 135, add the \$15  
12 million of consent payments to get to the 150, and  
13 then add in the debt value, which was roughly 150,  
14 that corresponds to the 300 million you're  
15 referencing.

16 BY MR. MILNE-SMITH:

17 Q. So under your proposal is  
18 VimpelCom going to have to pay anything to AAL and  
19 Anthony Lacavera?

20 A. No, they would not.

21 Q. Okay. And under the previous  
22 agreements like their draft share purchase  
23 agreement that they sent you, that we looked at,  
24 the May 9th one, would they have had to pay  
25 VimpelCom -- sorry, would they have had to pay AAL?



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1           A. That's our understanding of what  
2 Mr. Lacavera communicated with us, is that there  
3 was a minimum consent payment regardless of what  
4 the transaction value was that provided a minimum  
5 condition, if you will, in terms of value that  
6 would flow to them.

7           Q. So you're just cutting out the  
8 middleman?

9           A. Correct.

10          Q. Let's talk about Brandon Moyse  
11 then. As I understand it, the hiring process for  
12 Mr. Moyse took place over sort of March to May of  
13 2014. Why was West Face looking to hire someone at  
14 that time?

15          A. We had started a new credit  
16 investment fund called the alternative credit fund,  
17 and we needed someone who had particular experience  
18 in all forms of credit, but we also needed  
19 additional analyst resources generally, and so the  
20 intention was to hire individuals who would be able  
21 to assist with the analysis of investments for this  
22 alternative credit fund.

23          Q. And did you have any involvement  
24 in the hiring of Mr. Moyse?

25          A. I interviewed him but it was

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1 chiefly my partner, Tom Dea, who was responsible  
2 for the hiring process.

3 Q. Do you recall roughly how long  
4 your interview with Mr. Moyse took?

5 A. It was between 15 and 20 minutes.

6 Q. And what do you recall, if  
7 anything, discussing with him?

8 A. We talked about his educational  
9 background, we talked about the training that he  
10 had received at some of the large, one in  
11 particular, US investment firm that he looked at  
12 which I believe was Credit Suisse. We talked  
13 generically about what his interests were going  
14 forward and why he wanted to make a change.

15 Q. Did you discuss any specific  
16 files, mandates, companies or opportunities he  
17 worked on at Catalyst, specifically identifying the  
18 names of the entities involved?

19 A. We did not.

20 Q. Did you discuss Wind Mobile or the  
21 telecom industry with Mr. Moyse?

22 A. No, I did not.

23 Q. How can you be so sure?

24 A. The subject never came up.

25 Q. Did you support the hiring of

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1 Mr. Moyse?

2 A. I did.

3 Q. Do you recall ever expressing any  
4 concerns about his hiring during the process?

5 A. Yes. At one point he had  
6 circulated some writing samples or memos that he  
7 had put together and I believe these originally  
8 came to my partner, Tom Dea, and they were  
9 circulated within the firm to -- well, I don't  
10 remember the distribution list but certainly I  
11 received a copy.

12 And I was concerned about the fact that  
13 some of this information was marked private and  
14 confidential and I raised this concern with  
15 Mr. Dea.

16 Q. Tab 13, please.

17 THE COURT: Go ahead.

18 BY MR. MILNE-SMITH:

19 Q. This is WFC0109149. How does this  
20 email relate to the evidence you just gave me?

21 A. Well, the original email that my  
22 partner Tom sent reflected his ongoing discussions  
23 with Mr. Moyse, and I emailed him here on April  
24 24th raising the concerns I have just enumerated  
25 insofar as the memos that he sent to us, and I was

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1 specifically concerned about albeit he was a young  
2 person, he showed a bit of a lack of judgment in  
3 terms of sending that information, and I didn't  
4 know if nor was I willing to take a risk as to  
5 whether the information was in fact private and  
6 confidential.

7 But I certainly didn't want to take any  
8 chances so I'm flagging the issue for Tom and  
9 asking him to weigh in on the matter.

10 Q. Was it unusual for West Face to  
11 request writing samples from a job applicant?

12 A. No, it was not. This is something  
13 we frequently did.

14 Q. Why was that?

15 A. We wanted to see whether they had  
16 an ability to string together a coherent sentence  
17 in a very basic basis because part of the  
18 investment process that we run through involves  
19 circulating memos to our limited partners and  
20 internal members of our Investment Committee, and  
21 that's certainly one of the jobs that someone like  
22 Brandon would be responsible for.

23 We will also frequently give them  
24 specific projects as a test of their ability to  
25 analyze a company, do things like basic modelling,

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1 presentation, and understanding how to pull  
2 together the structure of a memo.

3 Q. You expressed these concerns to  
4 Mr. Dea but you've already indicated you did  
5 support his hiring. Could you just explain why you  
6 were willing to hire him in spite of the concern  
7 you expressed?

8 A. Well, I don't think there was any  
9 malicious intent. Clearly he made a mistake, but,  
10 you know, I think it was an honest mistake. I  
11 don't think, again, there was any malicious intent.  
12 I felt it incumbent upon myself to point out this  
13 issue and ask Tom to speak with our general counsel  
14 as well.

15 And I also said, you know, if we do  
16 hire him, we have to have an express discussion  
17 with him before he's hired about issues of  
18 confidentiality and handling of information because  
19 this is something we understand to be important,  
20 but I didn't think it was something that he should  
21 be hung on, if you will.

22 Q. And are you aware of whether West  
23 Face took any such steps once it decided to move  
24 ahead with hiring Mr. Moyse?

25 A. I understand Tom Dea spoke to

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1 Mr. Moyse directly.

2 Q. Yes.

3 A. And there was also subsequent  
4 discussion or discussions, excuse me, of similar  
5 nature with our chief compliant officer, Supriya  
6 Kapoor, and our general counsel, Alex Singh, all  
7 roughly along the same lines.

8 Q. Do you have any understanding as  
9 to what they said to him?

10 THE COURT: Why is that helpful? It's  
11 complete hearsay.

12 MR. MILNE-SMITH: Fine, Your Honour.

13 BY MR. MILNE-SMITH:

14 Q. Speaking of the writing samples  
15 attached to the March 27th email, did you review  
16 them?

17 A. I opened one of the documents.

18 Q. And do you remember what it was  
19 about?

20 A. I remember the name on the  
21 document being Homburg, and in the header of the  
22 document there was the confidential moniker  
23 attached to it and I didn't get much further than  
24 that before emailing Mr. Dea.

25 Q. After Mr. Moyse had been hired,

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1 did you become aware of any concerns raised by  
2 Catalyst about his hiring?

3 A. There was a letter and contact  
4 that we received from counsel to Catalyst and there  
5 was a flag raised about concern with the telecom  
6 deal and Brandon's or Mr. Moyses's involvement in  
7 that file.

8 Q. And did West Face take any steps  
9 in specific response to those concerns raised by  
10 counsel to Catalyst?

11 A. We did. We established a  
12 confidentiality wall with respect to the only  
13 telecom investment that we were working on at the  
14 time, which was Wind Mobile.

15 Q. And did you have any discussions  
16 on the Wind deal team as to how to deal with that  
17 ethical wall on a day-to-day basis?

18 A. Yes, at the outset our chief  
19 compliance officer communicated to everyone in the  
20 firm, particularly to the investment personnel and  
21 Mr. Dea also provided or asked for a sit-down with  
22 all the investment personnel, to discuss what it  
23 meant in terms of establishing a confidentiality  
24 wall and the rules that had to be adhered to in  
25 connection with that.

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1 Q. And what were those rules?

2 A. Effectively, you know, Mr. Moyse  
3 would be completely precluded from any  
4 conversations of any kind regarding Wind Mobile as  
5 an employee of West Face, that we weren't to  
6 discuss the file except behind closed doors with  
7 the deal team, and that he wouldn't have access to  
8 any of the West Face folders with any of the  
9 supporting materials in connection with any of our  
10 work on Wind Mobile.

11 Q. And did you abide by those  
12 restrictions?

13 A. Yes, we did.

14 Q. Did you have any communications  
15 with Brandon Moyse about Wind at any time?

16 A. No.

17 Q. To your knowledge did anyone else  
18 on the Wind deal team or any West Face investment  
19 professionals ever discuss Wind with Brandon?

20 A. No.

21 Q. Before, during or after his time  
22 working at West Face, did you ever communicate with  
23 Brandon about the telecom industry?

24 A. No.

25 Q. How can you be so sure?



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1           A. I would recollect that  
2 conversation if it occurred. I can tell you  
3 definitively it did not.

4           MR. MILNE-SMITH: Thank you very much.  
5 Those are my questions.

6           THE COURT: Thank you. Just before you  
7 do, I don't know whether, Mr. Centa, do you have  
8 any questions for this witness?

9           MR. CENTA: No questions.

10          THE COURT: Thank you. Mr. DiPucchio?

11          MR. DIPUCCHIO: Thank you, Your Honour.

12          CROSS-EXAMINATION BY MR. DIPUCCHIO:

13          Q. Good afternoon, Mr. Griffin. You  
14 had a discussion with your counsel just moments ago  
15 about the investment memos that were sent by  
16 Mr. Moyse to Mr. Dea on March 24th and -- sorry,  
17 27th, I misspoke, and you said that those were sent  
18 in response to a request for writing samples; is  
19 that correct?

20          A. Yes, that's correct.

21          Q. And you said -- I just want to  
22 correct something in terms of the chronology as you  
23 stated it, I believe you said in relation to the  
24 email that you looked at with Mr. Milne-Smith where  
25 you were talking to Mr. Dea about the concern that

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1           you had, I believe you said that you had just made  
2           your way through one page of the Homburg memo, saw  
3           that it was marked private and confidential, and  
4           then stopped and emailed Mr. Dea; was that your  
5           evidence?

6                     A.   That's the best of my  
7           recollection, yes.

8                     Q.   But you know, sir, that Mr. Dea  
9           had forwarded those memos to you on the morning of  
10          March 27th. Were you aware of that?

11                    A.   Yes.

12                    Q.   Okay. And, in fact, you  
13          interviewed Mr. Moyse on April 15th; do you recall  
14          that?

15                    A.   Yes.

16                    Q.   All right. So it's unlikely then,  
17          I suggest to you, that you were first reading the  
18          memos on April 24th, the morning that you emailed  
19          Mr. Dea.

20                    A.   I don't know when he received the  
21          original email.

22                    Q.   You don't know when who received  
23          the original email?

24                    A.   Mr. Dea.

25                    Q.   No, no, you're not following me.

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1 You received the memos from Mr. Dea on March 27th?

2 A. Yes.

3 Q. And you interviewed Mr. Moyse on  
4 April 15th?

5 A. Yes.

6 Q. So I'm suggesting to you that you  
7 weren't reading his so-called writing samples on  
8 the morning of April 24th which was when you email  
9 Mr. Dea to say don't we have a concern about the  
10 internal memos?

11 A. Could you please bring up the  
12 email that Mr. Milne-Smith --

13 Q. You want the email that you sent  
14 to --

15 A. Yes, to Mr. Dea.

16 Q. -- to Mr. Dea. Mr. Milne-Smith  
17 will have to help me out because they're not part  
18 of my documents.

19 MR. MILNE-SMITH: Tab 15.

20 THE COURT: It's tab 13.

21 MR. MILNE-SMITH: Tab 13, yes.

22 THE WITNESS: Could you please repeat  
23 the question?

24 BY MR. DIPUCCHIO:

25 Q. My question to you, Mr. Griffin,

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1 is, and it was actually a suggestion, that your  
2 evidence is incorrect in that you testified that  
3 you were reading the Homburg memo and only got  
4 about a page into it when you realized it was  
5 marked privileged and confidential and then you  
6 immediately emailed Mr. Dea and that's the email we  
7 see here. That was your evidence.

8 A. Right. I spoke to Mr. Dea as well  
9 in the intervening period and that's not reflected  
10 in this email chain.

11 Q. All right.

12 A. This is a reiteration of that same  
13 thought.

14 Q. All right.

15 A. Not trying to confuse the issue,  
16 sorry.

17 Q. Well, you have for me, so let's  
18 break it down a little bit because I thought your  
19 evidence was pretty clear but now you're saying it  
20 was a conversation. So am I right that you would  
21 not have been reading the Homburg memo on the  
22 morning of April 24th? Your evidence was incorrect  
23 in that regard?

24 A. I don't think I was ever asked a  
25 question when I read the original memo. I was

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1           trying to provide a chronology of when Tom received  
2           the memos, when those were circulated, when I  
3           originally brought up the concern with him, which  
4           is verbally, and then the reiteration of the  
5           concern in this email on April 24th. So I'm not  
6           trying to be argumentative, I'm just trying to lay  
7           it out to you as best I recollect it.

8                   Q. That's fine. So let me take a  
9           step back then. When do you say you read the memos  
10          or at least the one memo?

11                  A. It would have been shortly after  
12          Tom circulated them. I don't have that specific  
13          email in front of me.

14                  Q. On or about March 27th?

15                  A. Probably within a few days, yes.

16                  Q. Do you want to look at the email  
17          whereby Mr. Dea forwards the memos to you?

18                  A. If you'd like to ask me a question  
19          on it.

20                  Q. Let me just find it quickly. Tab  
21          1 of our folder, Your Honour, which you should have  
22          on your iPad.

23                  THE COURT: The other thing I want to  
24          do, Mr. DiPucchio, I know you're not trying to be  
25          unfair, but you put to Mr. Griffin that he had said

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1 he read the first page, which wasn't my  
2 recollection. And what he did say in his evidence  
3 in-chief, he said I remember the name on the  
4 document being Homburg and in the header of the  
5 document there was the confidential moniker  
6 attached to it, and I didn't get much further than  
7 that.

8 MR. DIPUCCHIO: That's fair, Your  
9 Honour.

10 BY MR. DIPUCCHIO:

11 Q. So you never even read the first  
12 page, you just looked at the first page?

13 A. That's correct.

14 Q. Here's the email, we have it up on  
15 the screen now, it's WFC0075126, just for the  
16 record, and we see the original email from  
17 Mr. Moyse at the bottom part of the first page.  
18 Correct, Mr. Griffin?

19 A. Yes.

20 Q. Then at the top Mr. Dea forwards  
21 that on to Mr. Boland, Mr. Fraser, yourself and  
22 Yu-jai Zhu?

23 A. Yes.

24 Q. And he forwards it on some hours  
25 later, 10:28 a.m., correct?

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1 A. Yes.

2 Q. Now, if you read the first page or  
3 didn't read the first page, I apologize, looked at  
4 the first page of the Homburg memo and had this  
5 concern about confidentiality, did you raise that  
6 at all in your interview with Mr. Moyse on the  
7 15th?

8 A. No, I didn't speak to him about  
9 it.

10 Q. It wasn't important enough for you  
11 to raise with him?

12 A. No, it was a very important issue  
13 and that's why I raised it with Mr. Dea and I asked  
14 Mr. Dea to speak with our general counsel Alex  
15 Singh at the time. So I'm not trying to deflect  
16 the importance of the issue but I didn't feel it  
17 incumbent upon me to bring it up in the interview  
18 for no reason.

19 Q. Well, aren't you trying to assess  
20 Mr. Moyse's character in this 15 or 20-minute  
21 interview that you have with him on the 15th?

22 A. I would say that's a fair  
23 component of it, yes.

24 Q. And yet part of that didn't  
25 include mentioning to Mr. Moyse "By the way, you

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1 sent out some memos to us that apparently were  
2 marked privileged and confidential, you shouldn't  
3 have done that"?

4 A. I did not bring it up with him.

5 Q. And --

6 THE COURT: Was that the 15th of April  
7 when you sat down with Mr. Moyse? Was it the 15th  
8 of April or May?

9 MR. DIPUCCHIO: I believe that's what  
10 the witness said.

11 THE COURT: 15th of April?

12 THE WITNESS: Yes.

13 THE COURT: Thank you.

14 BY MR. DIPUCCHIO:

15 Q. I take it you and I can agree, Mr.  
16 Griffin, that you obviously had a strong view that  
17 Mr. Moyse ought not to have sent those memos to  
18 anybody at West Face?

19 A. Certainly anything with a private  
20 and confidential heading on it gives rise to that  
21 concern, yes.

22 Q. And from the West Face  
23 perspective, you certainly would never want one of  
24 your analysts, vice-presidents, partners, to  
25 circulate investment memoranda to a third party?



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1           A. Unless it was with our express  
2 approval or pursuant to an NDA that covers those  
3 parties, I would agree with that.

4           Q. It's just crystal clear in your  
5 business, I take it, that an investment memoranda  
6 is a confidential, proprietary piece of work; is  
7 that fair?

8           A. Yes.

9           Q. And did you have any similar  
10 concerns that you have expressed about Mr. Moyse  
11 and his judgment in relation to the judgment that  
12 your partner, Mr. Dea, had in circulating the  
13 privileged and confidential memos internally to  
14 your partners?

15           A. It's a difficult question for me  
16 to answer because I don't know if Tom really  
17 analyzed what was in the contents of this before he  
18 sent it. But I know he shared the same respect for  
19 confidentiality of information that we all do.

20           Q. Well, all right. I take your  
21 answer. At the moment when Mr. Dea became aware  
22 definitively that he had done so, let's say first  
23 time that you brought it to his attention, right,  
24 there were no steps taken thereafter to deal with  
25 that breach of confidence by West Face; is that

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1 fair?

2 A. No, I don't think that's fair. I  
3 went to Tom and highlighted the issue for him. My  
4 understanding, which would be corroborated by any  
5 evidence that he could provide, is that he spoke to  
6 our general counsel, Alex Singh, and Alex was made  
7 aware of the issue.

8 So it's not that the issue was a small  
9 one, it was one that I trusted Dea would deal with  
10 appropriately and particularly our general counsel.

11 Q. But what you didn't do or what  
12 anyone at West Face didn't do was actually take  
13 steps to delete the confidential information that  
14 you had improperly received. You didn't take that  
15 simple step?

16 A. Well, I'm not sure how we could  
17 delete it. It's effectively imbedded on our  
18 servers.

19 Q. You're not sure how you can delete  
20 or destroy a copy of a document that you have  
21 received improperly?

22 A. No, I don't mean the act of just  
23 deleting it. I mean permanently erasing it from  
24 our servers, if that's what you meant.

25 Q. West Face has IT professionals on

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1 staff, right?

2 A. I didn't feel it incumbent on me  
3 personally to deal with this issue once our general  
4 counsel had been informed of it. I trusted that he  
5 would deal with it.

6 Q. So you washed your hands of it  
7 once you had raised your concern?

8 A. I wouldn't say I washed my hands  
9 of it. I remained concerned about it but I felt  
10 the appropriate channels had been informed about  
11 the issue.

12 Q. You didn't even take the simple  
13 step of deleting it from your own computer?

14 A. When I was instructed to, yes.

15 Q. When was that?

16 A. I don't recollect the date. There  
17 would probably be an email exchange with our  
18 general counsel.

19 Q. All right. And do you agree with  
20 me that at the time that you became aware, at  
21 least, that this confidential information had been  
22 improperly communicated to West Face, that nobody  
23 at West Face reached out to Catalyst to tell  
24 Catalyst that its confidential information had  
25 found its way into your hands?

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1                   A. I don't know what steps Mr. Singh  
2 took after our initial exchange.

3                   Q. And you certainly didn't do  
4 anything?

5                   A. I did not personally, no.

6                   Q. Without having looked at those  
7 deal memos, were you able to evaluate then  
8 Mr. Moyses's writing ability?

9                   A. No, not with this. This was not  
10 going to provide the content with which to do that.

11                   Q. Did you ever subsequently receive  
12 content from him with which to evaluate his writing  
13 ability?

14                   A. My understanding is that one of  
15 the vice-presidents who interviewed Mr. Moyses had  
16 given him an assignment which was meant to  
17 effectively speak to some of those qualifications  
18 and he followed up with him independently.

19                   Q. Did you ever receive it?

20                   A. I did not personally.

21                   Q. Now, on May 30 you referred in  
22 your evidence in-chief to some counsel letters that  
23 were going back and forth so I want to take you to  
24 the chain of correspondence. If we can turn up tab  
25 2 in the cross-examination brief, Your Honour,

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1           that's -- I'm just going to read out the document  
2           number, CCG0018692.

3                         And you should be looking, Mr. Griffin,  
4           at a letter dated May 30, 2014 from my firm to,  
5           amongst others, Mr. Boland. Correct?

6                         A. Yes.

7                         Q. And Mr. Boland is your CEO?

8                         A. That's correct.

9                         Q. And in the letter there is a  
10          number of statements that are made about Mr. Moyse  
11          and his employment?

12                        THE COURT: Can I ask you why it was  
13          sent to Mr. Hopkins?

14                        MR. DIPUCCHIO: Mr. Hopkins at the time  
15          was representing Mr. Moyse.

16                        THE COURT: Thank you.

17                        BY MR. DIPUCCHIO:

18                        Q. And in the letter, one of the  
19          statements that's made is that Moyse is in  
20          possession of highly sensitive and confidential  
21          information. Would you agree with me?

22                        A. Sorry, the paragraph you're  
23          referring to is which one?

24                        Q. Turn to the next page, you see at  
25          the top sort of first full paragraph:

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1                   "The information received and  
2                   generated by Mr. Moyse in his  
3                   capacity as an employee of CCGI was  
4                   highly sensitive and confidential."

5                   A.    Yes.

6                   Q.    And West Face was then provided  
7                   with a copy of a portion of Mr. Moyse's employment  
8                   agreement as it related to the duty of  
9                   confidentiality, and then further on down on that  
10                  page his non-competition covenant?

11                  A.    Yes.

12                  Q.    And you were aware of that?

13                  A.    I was not involved in this  
14                  correspondence until it was presented to me during  
15                  the examination process.

16                  Q.    All right.  And in fact, this  
17                  wouldn't surprise you, in any event, because West  
18                  Face has very similar provisions in its own  
19                  employment agreements with its employees; is that  
20                  correct?

21                  A.    I'd say confidentiality clauses  
22                  are common.  I do not know if we have  
23                  non-competition agreements in those employment  
24                  agreements as well.

25                  Q.    Okay.

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1 A. I don't handle HR for our firm.

2 Q. At minimum, though, of course you  
3 were aware that there were confidentiality  
4 provisions?

5 A. Yes.

6 Q. And then if you go to the bottom  
7 of page 3 of this letter, you're going to see a  
8 paragraph right at the bottom of the page that ends  
9 with the words:

10 "Moreover, our client is  
11 concerned, reasonably in our view,  
12 that Mr. Moyse has imparted..."  
13 And then go over to the next page:

14 "...or will be imparting  
15 confidential information to West  
16 Face that he acquired in the course  
17 of his employment with CCGI, thereby  
18 causing irreparable harm to CCGI.  
19 This confidential information  
20 includes, but is not limited to,  
21 current investment strategies of  
22 CCGI..." et cetera et cetera.

23 So were you aware at that time that the  
24 position that was being taken on behalf --

25 THE COURT: Well, didn't the witness

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1 say he didn't see this stuff until examinations?

2 MR. DIPUCCHIO: Yes, that's why I'm  
3 asking if he was aware at that time.

4 BY MR. DIPUCCHIO:

5 Q. Were you aware at that time that  
6 counsel for Catalyst was taking the position that  
7 they were concerned that Mr. Moyse would be or may  
8 have already imparted confidential information to  
9 West Face?

10 A. I hadn't seen the correspondence  
11 that's reflected here on the screen. I was aware  
12 generally there was some issues with his hiring as  
13 it pertained to non-competition. Beyond that, I  
14 was not involved in any of the discussion or  
15 dialogue about these issues.

16 Q. My question was a little  
17 different. My question was were you aware as of  
18 May 30th that counsel for Catalyst had taken the  
19 position that Catalyst was concerned that  
20 confidential information had been imparted by  
21 Mr. Moyse or would be imparted by Mr. Moyse to West  
22 Face? Were you aware that that was a concern on  
23 May 30th?

24 A. No, I was not personally aware of  
25 that.



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1 Q. Nobody brought that to your  
2 attention?

3 A. Not that specific issue, no. And  
4 let me -- if I could expand on that, my  
5 understanding at the time was it really pertained  
6 to whether Brandon had to go on some form of garden  
7 leave, if you will, as it's sort of commonly  
8 referred to in the industry, and that's about all I  
9 knew about the situation. I was not directly  
10 involved in it whatsoever.

11 Q. All right, fair enough. Do you  
12 agree with me -- well, the letter will speak for  
13 itself, but I'm suggesting to you, Mr. Griffin,  
14 that this letter doesn't refer at all to a telecom  
15 deal. You would disagree? It says what it says?

16 THE COURT: Your statement is right, it  
17 does speak for itself.

18 MR. DIPUCCHIO: Thank you, Your Honour.

19 BY MR. DIPUCCHIO:

20 Q. So whatever understanding you may  
21 have had that the concern related around a telecom  
22 deal, it didn't come from this letter?

23 A. No, there was another letter that  
24 I believe was sent by Lax O'Sullivan as well that  
25 raised the issue or originally a phone call that I

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1 was informed of.

2 Q. Which one is it, a letter or a  
3 phone call?

4 A. I don't know what predated,  
5 whether the phone call was first or the letter was  
6 first.

7 Q. Okay.

8 A. But I was informed of this by, I  
9 believe, originally one of my partners.

10 Q. All right. And I want to take a  
11 look at what the response is on behalf of West Face  
12 to this concern that had been expressed by Catalyst  
13 early on in the piece. So let's go to tab 4 of the  
14 brief, and this is document CCG0018693, and what  
15 we're looking at here, Mr. Griffin, is a letter  
16 addressed to me by Dentons, or from Dentons,  
17 rather, on June 3rd, 2014.

18 Do you recall that at the time your  
19 lawyers were Dentons?

20 A. I was informed of the fact that  
21 Dentons had been engaged.

22 Q. Okay. And do you know who engaged  
23 Dentons on your behalf?

24 A. I don't. I would assume it was  
25 our general counsel, Alex Singh.

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1 Q. Were you aware that this letter  
2 was being sent out?

3 A. No.

4 Q. And the letter --

5 THE COURT: What's the point? What's  
6 the point? He didn't receive this letter. What's  
7 the point of putting it to him?

8 MR. DIPUCCHIO: I'm just going to ask  
9 him one little piece that's basically reflected in  
10 the letter, Your Honour, and then we'll move on  
11 from that, obviously.

12 THE COURT: All right.

13 BY MR. DIPUCCHIO:

14 Q. If you go to page 2 of the letter,  
15 the comment is made at the top of the page:

16 "Notwithstanding the above, you  
17 have provided no evidence to support  
18 your allegation that your client has  
19 suffered irreparable harm. Your  
20 assertion that West Face induced  
21 Mr. Moyse to breach his contractual  
22 obligations to CCGI is similarly  
23 baseless. In any event, West Face  
24 has impressed upon Mr. Moyse that he  
25 is not to share or divulge any

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1 confidential information that he  
2 obtained during his employment with  
3 CCGI."

4 Did you know that that was the position  
5 that was being taken by your lawyers at that time?

6 A. No, I haven't seen the letter.  
7 Sorry, no.

8 Q. All right. And did you have any  
9 knowledge or do you have any knowledge as to why  
10 your counsel wasn't instructed to inform Catalyst  
11 that you had received investment memos at that  
12 point in time?

13 A. No.

14 Q. Then on June 5th, 2014, just to  
15 close the loop on this little point, Mr. Moyse's  
16 counsel responds. This is at tab 6 of the brief,  
17 Your Honour. And I take it, Mr. Griffin, that you,  
18 obviously, not having seen your own counsel's  
19 letter, probably didn't see Mr. Moyse's counsel's  
20 letter either?

21 A. No, I did not.

22 Q. All right. And did you know that  
23 Mr. Moyse was taking the position that he hadn't  
24 breached his confidentiality obligations at this  
25 point in time?

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1           A. I didn't have any knowledge of the  
2 contents of this letter on any point, including  
3 that.

4           Q. All right. Let's leave the  
5 letters because apparently you weren't part of any  
6 of the drafting of these letters or whatever  
7 discussions may have occurred prior to sending the  
8 letters, right? Is that fair?

9           A. That's fair.

10          Q. So you became aware, I take it, at  
11 some stage that Catalyst wasn't satisfied with the  
12 assurances it was being given with respect to the  
13 protection of its confidential information in that  
14 it threatened to move for an injunction to prevent  
15 Mr. Moyse from coming to work for West Face. Did  
16 you know that?

17          A. I remember a discussion of that  
18 being raised, yes.

19          Q. And obviously West Face had taken  
20 the position at that point in time that it wasn't  
21 prepared to agree to any form of garden leave for  
22 Mr. Moyse?

23          A. I honestly don't know what the  
24 position was. Maybe if I could just explain, in  
25 terms of my day-to-day function at the firm, other

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1 than working with the analysts who we have on staff  
2 and analyzing investments, I don't play any role in  
3 the HR function the firm, and any of this  
4 communication and decisions with respect to whether  
5 Brandon was retained immediately or whether there  
6 was a waiting period, I have no knowledge of any of  
7 this dialogue.

8 Q. But at the very least, you had had  
9 a discussion with Mr. Singh where your concerns  
10 were brought to the floor, right?

11 A. No, to go back to what I  
12 originally said, I went straight to Mr. Dea and  
13 asked that he speak to Mr. Singh.

14 Q. Okay.

15 A. I didn't go directly to Mr. Singh.

16 Q. And do you understand that Mr. Dea  
17 had had that discussion?

18 A. To the best of my knowledge, yes.

19 Q. All right. So could we just turn  
20 up tab 10 of the brief. I actually promised you I  
21 wasn't going to go back to another letter but I do  
22 want to take you to this one.

23 This is on June 19th now, which is  
24 quite a bit after all of this has occurred, the  
25 sending of the memos and your interview of

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1 Mr. Moyse and your conversation with Mr. Dea and  
2 all the rest, right? That had all occurred in  
3 March and April; is that fair?

4 A. Yes.

5 Q. So in this letter this is your  
6 counsel now basically writing to my firm and the  
7 position taken in paragraph 2 is, reading from the  
8 last sentence in that paragraph, Mr. Griffin:

9 "Your client has not provided  
10 any evidence that Mr. Moyse has  
11 breached any of his confidentiality  
12 obligations to Catalyst."

13 Do you see that?

14 A. Yes.

15 Q. And you'll agree with me at  
16 minimum that that's a misleading statement by this  
17 point in time?

18 A. I'm not going to take a position  
19 on it because I did not draft this letter.

20 Q. Well --

21 A. This came from Dentons.

22 Q. I appreciate you haven't drafted  
23 the letter. We all heard that evidence. What I'm  
24 asking you now is for your fair assessment based on  
25 what you knew at that time as to whether that was a

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1 misleading statement?

2 A. Well, I will agree with you that  
3 the memos that we received which were marked  
4 private and confidential, or at least the one that  
5 I opened, gave rise to that concern. As to whether  
6 we were in fact in possession of confidential or  
7 material non-public information, I don't know  
8 definitively because I didn't read the memos.

9 Q. Well, let's just take a step back  
10 because are we going to get into a discussion now,  
11 you and I, about what confidential information is,  
12 because I thought you had agreed with me that by  
13 your logic, investment memos were considered  
14 confidential by West Face?

15 A. I'm not going to take a position  
16 on it. I said I respected confidentiality of  
17 information and I raised a concern to Mr. Dea when  
18 I opened the memo and saw it was marked private and  
19 confidential. It wasn't something that I was going  
20 to take a risk on because there was no upside to it  
21 and I went and informed Mr. Dea of that fact and  
22 asked him to speak to our counsel.

23 I haven't seen this correspondence at  
24 the time that Dentons has sent, so I don't know  
25 what more you want me to say on the matter.



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1 Q. All right.

2 A. I don't know the contents of the  
3 memo so I'm not arguing with you about  
4 confidentiality of information. That's not the  
5 objective.

6 Q. What I want to understand from  
7 you, just so we don't continue to have this debate,  
8 is I understood your evidence to be that it really  
9 doesn't matter what the contents of the memos are,  
10 your understanding is that any investment research  
11 that your firm does is confidential vis-à-vis your  
12 firm?

13 A. Yes.

14 Q. Right? So the content doesn't  
15 matter, it's the analysis that's confidential?

16 THE COURT: I'm not sure where all this  
17 is going to get anybody. Dentons says or denies  
18 he's breached his confidentiality obligations to  
19 Catalyst. What those confidentiality obligations  
20 to Catalyst are, I don't see there what they are.  
21 What this witness thinks about this letter that he  
22 hasn't seen, I don't understand how that's going to  
23 help anybody.

24 MR. DIPUCCHIO: In fairness, Your  
25 Honour, the confidentiality obligations were

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1 outlined in the original letter.

2 THE COURT: But this witness didn't see  
3 that either.

4 MR. DIPUCCHIO: No, I agree with that.  
5 I guess what I'm trying to understand from the  
6 witness now is whether we have a dispute that the  
7 internal work product, the analysis, is  
8 confidential.

9 THE COURT: But this letter talks about  
10 the obligations of Mr. Moyses to Catalyst.

11 MR. DIPUCCHIO: Yes.

12 THE COURT: I doubt very much this  
13 witness knows what those obligations to Catalyst in  
14 fact were.

15 MR. DIPUCCHIO: Right. Your Honour,  
16 I'm not asking him about what the obligations are  
17 to Catalyst. What I'm asking him now is a question  
18 that arises out of one of the answers he gave.

19 BY MR. DIPUCCHIO:

20 Q. So what I'm asking him is whether  
21 he agrees with me that it's the analysis that's  
22 being done by, for example, a person like Mr. Moyses  
23 or one of your analysts at West Face that makes the  
24 investment memo confidential?

25 A. If we're talking in the abstract

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1 as opposed to the contents of the letter and the  
2 judgment of Dentons and whoever else was involved  
3 in drafting this in terms of determining whether  
4 Mr. Moyse had breached confidentiality, I have to  
5 plead ignorance on that matter.

6 Insofar as the investment memos are  
7 concerned in the prior conversation we had, yes, I  
8 agree with that, memos are confidential and should  
9 be treated as such. And I raised that concern with  
10 Mr. Dea for that specific reason, because we take  
11 those provisions seriously and I personally take it  
12 seriously.

13 Q. Okay. And you don't have any  
14 knowledge, do you, as to whether your partners read  
15 those investment memos?

16 A. I have no personal knowledge, no.

17 Q. And do you recall, sir, that one  
18 of the confidential memos, maybe you became aware  
19 of this after the fact, one of the confidential  
20 memos that Moyse sent to West Face was concerning a  
21 company called Arcan Resources?

22 A. I was made aware of that through  
23 the production of this through the examination  
24 process.

25 Q. And it's your evidence here today

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1           that you never looked at the memo as it related to  
2           Arcan?

3                     A.    I did not.  I opened the Homburg  
4           memo only and I didn't need to get much further  
5           than that to know that this was an issue that  
6           needed to be flagged.

7                     Q.    And your evidence, as I understand  
8           it from your affidavit that's been filed, is that  
9           you had been following Arcan for a number of years?

10                    A.    That's correct.

11                    Q.    And on Mr. Moyse's first day, very  
12           first day at the office, you sent him an email of  
13           your analysis concerning the Arcan opportunity.  Do  
14           you remember that?

15                    A.    Yes.

16                    Q.    And we can bring it up, Your  
17           Honour, it's tab 11 of the cross-examination brief.  
18           And it's your evidence, as I understand it, Mr.  
19           Griffin, that you did this completely innocently;  
20           that is, you didn't even know that Mr. Moyse had  
21           been involved in analyzing an Arcan opportunity on  
22           behalf of Catalyst; is that right?

23                    A.    That's correct.  On this day in  
24           question, my backup, one of my responsibilities at  
25           West Face is covering the energy sector broadly.

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1 Arcan would fall under that coverage universe. On  
2 the day in question that this was sent, an  
3 unsolicited proposal had been made for the company  
4 by a third party named Aspenleaf Financial which is  
5 a private equity group, backed by private interests  
6 and I believe Ontario Teachers' Pension plan and  
7 Arc Resources.

8 So until that transaction was  
9 announced, you know, and we are an event-oriented  
10 investment fund, this really gave rise to doing  
11 work on the proposal that had been tabled, and  
12 what's reflected in this email is some analysis  
13 that I did myself on the announcement of the deal  
14 and the consideration in terms of it.

15 I did not know that Brandon had ever  
16 looked at Arcan. It was an effort to get this new  
17 analyst started on something, anything, given he  
18 had just started. And so I copied him and our  
19 trader, Pat McGuire, who is cc'd on this email.

20 Q. By that point in time, June 23rd,  
21 by that point there's actually been threats of  
22 litigation. I believe there's even been a claim  
23 commenced; is that right?

24 A. I don't know, honestly, what was  
25 happening in the background.

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1 Q. Actually, I misspoke. I think the  
2 litigation actually formally gets commenced on the  
3 25th, two days later, but there's been discussion  
4 amongst counsel.

5 A. I am not aware of that.

6 Q. You weren't even aware of the  
7 threat of litigation that had been made in relation  
8 to Mr. Moyse?

9 A. Oh, I think we could see where it  
10 was potentially leading. You didn't have to make  
11 much of a leap to come to that conclusion. But  
12 again, in terms of my day-to-day activities and  
13 what I'm doing personally is really very squarely  
14 focused on the investment process and those matters  
15 are not under my purview.

16 Q. When you forwarded this analysis  
17 to Mr. Moyse, I take it Mr. Moyse himself didn't  
18 approach you to say "You may not know this, but I  
19 actually had done an analysis and have done some  
20 work at my previous employer in relation to Arcan"?  
21 I take it Mr. Moyse never came to you and had that  
22 conversation?

23 A. I don't think when I sent this  
24 email at 10:41 p.m., I was sending this from my  
25 residence, I don't think we ever had a chance to

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1 talk to one another on the day that this was  
2 actually distributed.

3 So I left the office and performed this  
4 analysis after the market had closed and sent this  
5 email from my residence. So yes, certainly at the  
6 time that this was sent there was no opportunity to  
7 have a conversation about that.

8 Q. At some point, I take it, you  
9 returned to the office?

10 A. Yes.

11 Q. All right. And Mr. Moyses never  
12 took the opportunity ever to come to you and say "I  
13 have been working or have worked on Arcan for my  
14 previous employer, I sent you a memo by mistake in  
15 relation to Arcan, I probably shouldn't be working  
16 on this"?

17 A. This issue was actually flagged to  
18 me not by Mr. Moyses but by our general counsel,  
19 Mr. Singh, and I believe, to the best of my  
20 recollection, it was on the following day in the  
21 office, in the morning that Mr. Singh approached me  
22 before trading hours and spoke to me about this  
23 email that I had sent and informed me that any  
24 correspondence or discussion with Brandon on this  
25 name is not to go any further.

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1 Q. And do you know the circumstances  
2 that led Mr. Singh to intervene?

3 A. He didn't provide me a lot more  
4 detail than that.

5 Q. And you didn't ask any further  
6 questions?

7 A. Quite honestly, I didn't  
8 personally care, only insofar I had done all the  
9 work myself, I knew that situation inside and out,  
10 I knew exactly what I wanted to do going into the  
11 next trading day in terms of our investment  
12 decision. I talked to my partners about it, and  
13 whether Brandon was involved in any capacity, it  
14 wasn't going to be particularly additive to the  
15 investment decision for us which needed to be made  
16 that morning.

17 Q. Well, am I understanding your  
18 evidence right now that notwithstanding you sent  
19 this to Mr. Moyse, you didn't expect him to do  
20 anything?

21 A. I said my expectation was that if  
22 there was additional work to be done beyond the  
23 immediate decision of accumulating a position in  
24 this company, I will look to get him involved if he  
25 had the capacity to do so, depending on what other



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1 work had been assigned to him.

2 I was simply trying to extend an olive  
3 branch to get this kid started on something given  
4 it was his first day on the job and I thought, you  
5 know, this is an interesting situation, let's see  
6 if this is a good test case for him.

7 The fact that he did any work on it  
8 before was purely coincidental.

9 Q. Well, you're jumping ahead of me.  
10 First of all, my question is, did you actually ask  
11 him to do any work?

12 A. No, not when I sent this email.  
13 This was information.

14 Q. At any time, at any time did you  
15 ask him to do any work?

16 A. I didn't have the opportunity to.

17 THE COURT: You mean on Arcan?

18 BY MR. DIPUCCHIO:

19 Q. On Arcan, yes.

20 A. I didn't have an opportunity to.  
21 I would have the next morning when I came into the  
22 office, but Mr. Singh interceded.

23 Q. Did Mr. Moyse call you or speak to  
24 you to say "Thank you, I'll take a look at this"?

25 A. No. I don't recall unless there

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1 was a curt email response from him anywhere in the  
2 record, I don't recall any dialogue on this.

3 Q. Do you recall he might have said  
4 that to you?

5 A. We certainly did not have a verbal  
6 conversation. What I don't know is if you're going  
7 to produce an email where he would have said  
8 "Thanks, talk tomorrow" or something of that  
9 nature.

10 Q. You seem to be afraid that I'm  
11 going to produce an email. That's not the point.  
12 The point is, do you recall having a conversation  
13 with him where he said "Thanks, I'm going to take a  
14 look at this"?

15 A. No.

16 Q. And that might have happened or it  
17 might not have happened?

18 A. No, I definitively did not have a  
19 conversation with him about the situation.

20 Q. All right. Can we bring up Mr.  
21 Griffin's cross-examination transcript from May  
22 8th, 2015, which is tab 46, Your Honour. Mr.  
23 Griffin, if you go to page 27 of that transcript,  
24 question 118:

25 "Question: All right. And

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1           Mr. Moyse, I take it, never  
2           responded to your email?"

3           This is now a reference to the email we  
4           just looked at in regards to Arcan. And your  
5           answer is:

6                         "I don't recollect a response.  
7                         There could have been a short one, a  
8                         thank you or I will look at this."  
9                         Was that your answer at the time?

10           A. Well, strangely it's almost  
11           verbatim to what I just said to you.

12           Q. No, no, what you just said, Mr.  
13           Griffin, is that you definitively recollect that  
14           there was no such discussion.

15           A. Yeah, I have no better evidence of  
16           a discussion than what I have attested to here.

17           Q. So are you accepting that there  
18           could have been a short discussion?

19           A. I do not recall one, so I would  
20           say no.

21           Q. And in fact, despite what you say  
22           was no conversation and no instruction to do any  
23           analysis, Mr. Moyse actually did start working on  
24           an Arcan analysis, correct?

25           A. I didn't -- I was not aware of

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1           that at the time. I was informed of that during  
2           the examination process.

3                   Q. So you were informed during the  
4           examination process and you're aware now --

5                   A. Yes.

6                   Q. -- that in fact Mr. Moyse  
7           performed a financial analysis of the proposed deal  
8           and summarized Arcan's financials? You're aware of  
9           that now?

10                  A. I've never seen the work product  
11           that he's done on that file.

12                  Q. You didn't even look at it at the  
13           time you were being cross-examined in May?

14                  A. I don't remember it being  
15           produced.

16                  Q. All right. Well, why don't we  
17           take you to it very briefly. I think we're going  
18           to have to pull it up, WFC0080746.

19                  THE COURT: What's the tab number?

20                  MR. DIPUCCHIO: I don't think this is  
21           actually -- 53, sorry. No, that's right.  
22           Paragraph 55.

23                  BY MR. DIPUCCHIO:

24                  Q. If we go to paragraph 55 of the  
25           affidavit, there may be a reference to it. This is

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1 your affidavit. You say in paragraph 55, Mr.  
2 Griffin, and just for the record this is the  
3 affidavit that you swore on March 7, 2015, you say:

4 "I now understand that at some  
5 time between June 24 and June 26,  
6 2014, Mr. Moyse performed a  
7 financial analysis of Arcan's  
8 proposed deal with Aspenleaf and  
9 summarized Arcan's financials."

10 Do you see that?

11 A. Yes.

12 Q. And where did you get that  
13 information from?

14 A. That was likely through the  
15 examination process that I discussed.

16 Q. But you never saw the actual  
17 analysis; that's your testimony here?

18 A. Yes. I don't recall any work that  
19 he did on this file being presented to me during  
20 the cross-examination process. You know, again, in  
21 the following sentence I also make note of the fact  
22 that he did not do so at my request and I was not  
23 at the time provided copies of the analysis and nor  
24 was I informed of its contents.

25 Q. I understand what your evidence

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1 is. And I'm going to suggest to you, Mr. Griffin,  
2 that that's just simply flat-out wrong, that in  
3 fact you did request Mr. Moyse to perform work for  
4 you; otherwise he wouldn't have been taking up the  
5 task in performing a financial analysis?

6 A. Is there a question in there?

7 Q. The question is, I'm suggesting  
8 that to you. Do you agree?

9 A. I disagree.

10 Q. So this was Mr. Moyse acting on  
11 his own initiative just simply having received an  
12 email out of the blue from you?

13 A. Yes.

14 Q. And your evidence today was that  
15 Mr. Singh, the reason that this didn't go any  
16 further, correct, was that Mr. Singh approached you  
17 the following morning before you even had an  
18 opportunity to communicate with Mr. Moyse and told  
19 you that there was a problem, right, Mr. Moyse  
20 couldn't work on this project for you? That's your  
21 evidence, right?

22 A. Yes.

23 Q. Okay. And Mr. Singh's  
24 instructions are followed because he's the general  
25 counsel. It's a serious discussion, right? You

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1 would expect his instructions to be followed?

2 A. Yes.

3 Q. So can you explain for me why in  
4 your affidavit at paragraph 55 that work continues  
5 on the file between June 24th and June 26th?

6 A. I can't -- you'd have to produce  
7 to me the exact record when Mr. Singh spoke to him  
8 and to me. I just can't recollect.

9 Q. Well, these aren't my words. This  
10 is your affidavit.

11 THE COURT: This doesn't say when  
12 Mr. Singh spoke to Mr. Moyse.

13 MR. DIPUCCHIO: No, that was his  
14 evidence here.

15 THE COURT: No. It wasn't.

16 MR. DIPUCCHIO: Yes, it was.

17 THE COURT: The accepted was that  
18 Mr. Singh came to Mr. Griffin himself.

19 BY MR. DIPUCCHIO:

20 Q. Yes. Oh, no, no, I agree with  
21 that, Your Honour. I'm just saying do you have any  
22 explanation for why Mr. Moyse continued to work on  
23 the matter between June 24th and June 26th?

24 A. I wasn't -- I wasn't party to the  
25 conversation he had with Mr. Singh and I didn't

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1 pursue this any further. I mean, once I was told,  
2 it was black and white. So what Brandon did or  
3 didn't do, I have no knowledge of it.

4 Q. And do you have any knowledge as  
5 to how Mr. Singh knew to speak to you the next  
6 morning?

7 A. I don't know personally.

8 Q. It wasn't through anything you  
9 said to Mr. Singh?

10 A. No.

11 Q. And if you look at Mr. Singh's  
12 affidavit, which was filed in July of 2014, 51,  
13 Your Honour -- sorry, this is the cross-examination  
14 transcript. I want his affidavit of July 7, 2014.

15 There should be a folder on your iPad,  
16 Your Honour, called the Singh affidavit.

17 THE COURT: Oh, okay. Just a second.

18 MR. DIPUCCHIO: It's just a separate --

19 THE COURT: It's not in your cross --

20 MR. DIPUCCHIO: It is, but it's an  
21 actual folder.

22 THE COURT: One second. I don't know  
23 where to find it.

24 MR. DIPUCCHIO: You can't find it in  
25 the root directory, the cross-examination



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1 directory?

2 THE COURT: I've got the Catalyst  
3 cross-examination Griffin directory.

4 MR. DIPUCCHIO: Your Honour, you know  
5 what, let's leave it.

6 THE COURT: Oh, I see, it's right at  
7 the beginning. Singh affidavit, July 7?

8 MR. DIPUCCHIO: Yes, July 7. It's  
9 WFC0075056/1, for the record.

10 BY MR. DIPUCCHIO:

11 Q. And, Mr. Griffin, having regard to  
12 your previous answers, I'm going to take it that  
13 you didn't see this affidavit when it was filed in  
14 July of 2014, you had no involvement in it?

15 A. No.

16 Q. You don't know that it was filed  
17 in relation to an injunction motion that had been  
18 provided?

19 A. Look, I've never looked at it or  
20 at its contents so I don't know anything about that  
21 process.

22 Q. That's fair enough. It's a very  
23 briefly affidavit but Mr. Singh doesn't mention  
24 this episode of speaking to you in June and  
25 speaking potentially to Mr. Moyse about the Arcan,

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1 it's not mentioned at all in that affidavit. Do  
2 you know why that would be the case?

3 A. I don't know.

4 Q. So in addition to sending you the  
5 four Catalyst deal memos that were part of the  
6 email of March 27, 2014, one of the other things  
7 that Mr. Moyse sent you was a deal sheet, right?

8 A. Could you produce that? I don't  
9 recall that document.

10 Q. If we go back to the email which  
11 was tab 1, I think it may be the last page of this  
12 document so we're going to have to flip through  
13 quite a bit to get there, this was the deal sheet  
14 that Mr. Moyse sent along to you, he sent it to Mr.  
15 Dea and it was flipped to you by Mr. Dea?

16 A. Was it in fact?

17 Q. Yes, it was part of that email  
18 chain.

19 A. I don't recall.

20 Q. Well, one step at a time. It's  
21 part of the email chain that I referred you to  
22 earlier in which Mr. Dea was flipping these memos  
23 to you.

24 A. I remember the email with the four  
25 memos you reference. I apologize, I just don't

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1 specifically remember this sheet.

2 Q. All right. So you don't recall --  
3 that's fair, you don't recall looking at this deal  
4 sheet?

5 A. No, I don't. If you can produce  
6 an email at which point it was sent to me, I'm  
7 happy to have you prove me wrong but I just don't  
8 recall.

9 Q. It was sent to you as part of the  
10 same email as the deal memos?

11 THE COURT: Where do I find it?

12 MR. DIPUCCHIO: It's right at the last  
13 page of that big package. It's the email that  
14 Mr. Moyse sent and it's the attachments --

15 THE COURT: Oh, I see.

16 MR. DIPUCCHIO: -- to that email, Your  
17 Honour. It's called "Detailed deal experience -  
18 completed transactions."

19 THE WITNESS: This is the first time  
20 I've seen this document.

21 BY MR. DIPUCCHIO:

22 Q. That's fair, that's fair. And  
23 you'll agree with me that the experience that  
24 Mr. Moyse is saying he has includes, for example,  
25 building waterfall models for each of Homberg's 50

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1 plus operating companies. Do you see that right at  
2 the top?

3 A. Yes.

4 Q. Leading the due diligence process  
5 including on-site visits to companies' real estate  
6 holdings, and then representing Catalyst at  
7 management/advisory meetings and reviewing data  
8 room materials. Do you see that at the second  
9 bullet point?

10 A. Yes.

11 Q. He says he's drafted press  
12 releases, investor presentations, media scripts, in  
13 the third bullet point?

14 A. Yes.

15 Q. And then providing ongoing support  
16 through negotiation stages by modelling Catalyst's  
17 and other stakeholders' returns under different  
18 scenario/deal structures, including combinations of  
19 payments, in cash, new shares, new debt,  
20 convertible notes and tracking shares. Do you see  
21 that?

22 A. Yes.

23 Q. And then he tells you about his  
24 day-to-day responsibilities at Advantage Rent A  
25 Car, right? Where he describes himself as the

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1 day-to-day deal team leader. Do you see that?

2 A. Okay.

3 Q. And I presume you'll agree with me  
4 that the credentials that he has are quite  
5 impressive?

6 A. I was going off his credentials on  
7 his resume. Clearly we thought good enough to hire  
8 him. I'm not going to dispute that.

9 Q. And he had done quite a bit of  
10 high-level work?

11 A. Again, I'm seeing this for the  
12 first time so I'm not sure what the -- is there a  
13 question?

14 Q. Well, did you understand that from  
15 his resume and from your discussion with him?

16 A. We had primarily hired him to do  
17 debt transactions, negotiated financing and  
18 secondary market debt. The most important  
19 component of that was in terms of the observable  
20 experience he had, obviously was working at credit  
21 oriented shops, but also the fact that he'd done  
22 his training in leveraged finance as I -- he had  
23 done his training in leveraged finance, I believe  
24 it was at CFSB in the US and so we thought --

25 Q. That's Credit Suisse?

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1           A.    Yes.  So we thought his skills  
2           would be very much applicable to the alternative  
3           credit fund, the credit vehicle that we had.

4           Q.    And certainly his experience at  
5           Catalyst would have been applicable to the  
6           alternative credit fund?

7           A.    It could be.  Certainly -- I mean,  
8           a general investment experience.  I don't profess  
9           to understand their investment strategies and how  
10          they're set up, I just don't know, but certainly I  
11          think any background investment experience, work  
12          experience, a quality shop like that, that that  
13          would be valuable.

14          MR. DIPUCCHIO:  Your Honour, I'm about  
15          to turn to another complete area.  Should we break  
16          here for the day?

17          THE COURT:  That's fine.  Can you tell  
18          me what's on tap for tomorrow?

19          MR. MILNE-SMITH:  So, actually, Your  
20          Honour, I wanted to address timing for tomorrow.  
21          The issue we have tomorrow is we have two witnesses  
22          coming in from New York, Mr. Burt and Mr. Leitner,  
23          who are under some time constraints.  Mr. Burt has  
24          to actually fly to Europe --

25          THE COURT:  Is there anybody in New

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1 York who is not under a time constraint?

2 MR. MILNE-SMITH: It's just these two.  
3 Everybody else is flexible. But we need to get  
4 them both in tomorrow morning because they both  
5 have to fly out, Mr. Burt to Europe actually and  
6 Mr. Leitner to a function in New York tomorrow  
7 night.

8 What we were hoping to do is to have  
9 them go first tomorrow morning, sort of put Mr.  
10 Griffin on hold and complete Burt and Leitner who I  
11 think both of us agree are going to be relatively  
12 short, and then come back to Mr. Griffin.

13 THE COURT: Is that agreeable to you?

14 MR. DIPUCCHIO: It is a bit awkward  
15 just because of my line of questioning to this  
16 witness to then examine Leitner first. I don't  
17 want to derail anything, Your Honour. I'll  
18 accommodate if that's the request, but it does  
19 present me with a little bit of a problem since I'm  
20 in the middle of my cross.

21 THE COURT: I understand. How long do  
22 you think you'll be in cross?

23 MR. DIPUCCHIO: I'm going to say I'll  
24 probably be another hour and a half to two hours.

25 THE COURT: If we start at 9:30, that

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1 takes us to 11:00. Who is going to be first?

2 MR. MILNE-SMITH: Mr. Burt.

3 THE COURT: Why can't Leitner go after  
4 lunch?

5 MR. MILNE-SMITH: Because he needs to  
6 be able to catch a flight, I think, by two o'clock.

7 THE COURT: Why?

8 MR. MILNE-SMITH: To get back to New  
9 York for an event.

10 THE COURT: What's the event?

11 MR. MILNE-SMITH: I don't know. We  
12 have -- he's in the hotel now.

13 THE COURT: Well, you'd better talk it  
14 through with counsel. I don't like to upset  
15 arrangements, but I appreciate what Mr. DiPucchio  
16 is telling me.

17 MR. MILNE-SMITH: As do I.

18 THE COURT: I think you'd better have a  
19 chat with these fellows to just see how important  
20 it is. All right. We'll come back at -- we can  
21 start at 9:30 sharp, okay?

22 -- Whereupon court adjourned at 5:00 p.m.

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REPORTER'S CERTIFICATE

I, KIMBERLEY A. NEESON, RPR, CRR,  
CSR, CCP, CBC, Realtime Systems Administrator,  
Certified Shorthand Reporter, certify;

That the foregoing proceedings were  
taken before me at the time and place therein set  
forth;

That the testimony of the witness  
and all objections made at the time of the  
examination were recorded stenographically by me  
and were thereafter reviewed but not certified for  
100% accuracy. Quotes are as read (not checked).

Dated this 8th day of June, 2016.

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NEESON COURT REPORTING INC.

PER:KIM NEESON, RPR, CRR, CSR, CCP, CBC  
REALTIME SYSTEMS ADMINISTRATOR