

Court File No. CV-14-507120

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants

**SUPPLEMENTARY REPORT OF THE INDEPENDENT SUPERVISING  
SOLICITOR**

**PART I - BACKGROUND**

1. On February 12, 2015, following the release of my draft Report, a conference call was convened among myself, Andrew Winton (one of the counsel for the Plaintiff) and Jeff Hopkins and Justin Tetreault (counsel for Moyse). In the course of that call, Plaintiff's counsel asked that Moyse's counsel consider agreeing to a request that I prepare a supplemental report addressing four inquiries as to the outcome of the search process. A copy of the Minutes of this conference call are attached as **Appendix "A"**.
2. After considering this proposal, Moyse's counsel replied later on February 13, 2015 advising that they did not consent to this supplemental report being prepared and released. A copy of this email correspondence is attached as **Appendix "B"**.
3. On March 12, 2015, I was advised by Mr. Winton by email correspondence that Moyse's new counsel had reconsidered this position and now agreed that the requested

supplemental report should be completed and provided. A copy of this email correspondence is attached as **Appendix "C"**.

## **PART II - THE MATTERS IN ISSUE**

4. This Report considers four issues summarized in the following headings, based on the Minutes reproduced at Appendix A.

(a) **Which documents were produced as responsive to the second set of search terms supplied on January 8, 2015?**

5. The following table contains filenames and descriptions of each of those documents, together with an indication of which search term the documents were responsive to:

| <b>Document name</b>                    | <b>Description</b>  | <b>Search Term</b> |
|---|---|--------------------|
| Desert War Readme.doc                   | An instruction manual for the "Desert War" expansion for the computer game "Sid Meier's Civilization IV"          | Leader             |
| 09-03-12 Brandon Moyse Cover Letter.pdf | A 2012 employment-seeking cover letter for Moyse while still employed by Credit Suisse in New York                | Leader             |
| Penn Alumni Interviews.docx             | Reports on interviews by Moyse of candidates to enter the undergraduate program at the University of Pennsylvania | Leader             |
| Redswoosh Click Thru.doc                | A software end-user license agreement for the software "Redswoosh Library for Actionscript API"                   | Provision          |
| Miami_International_Airport.pdf         | A 2012 Airport Air Service Profile outlining traffic  | Xchange            |

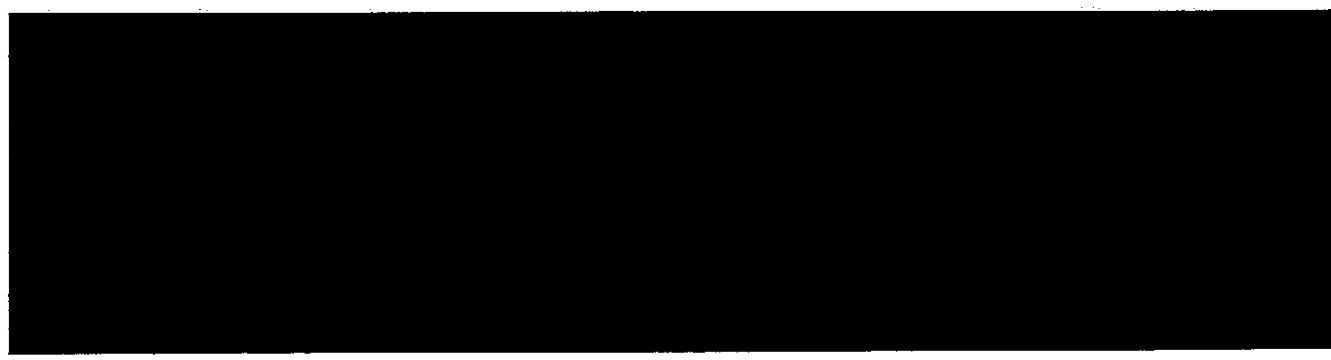
|  |   |  |
|--|---|--|
|  | patterns at Miami International Airport for 2012. |  |
|--|---|--|


6. As is evident from our principal Report, none of these documents were judged to be relevant or to contain Catalyst Confidential Information.

7. In addition to these five documents, we were supplied with a further .pst file containing a total of 233 additional emails, all of which were reviewed. None of the emails related to Moyses's work at Catalyst, with the likely exception of numerous automatic "Google Alerts" emails which alert the subscriber to the appearance in the news media of a corporate search term. Terms which Moyses appears to have subscribed to using Google Alerts and which appear to relate to his work for Catalyst include Hertz, Avis, Europcar, Fresh Market and Whole Foods.

**(b) What total number of hits would have resulted from the second set of search terms, had deduplication filters not been applied to exclude from production and review those items that had already been produced in response to the first set of search terms?**

8. I requested that Wayne Doney of Digital Evidence International perform this analysis. On March 26, 2015 Mr. Doney advised me that he had done so and of the total number of hits reported by the forensic software on these search terms prior to deduplication, as follows:





9. As described below in response to questions (c) and (d), there are several factors which account for the divergence between these initial “hit counts” and the ultimate number of unique documents produced for our review.

**(c) Explain the variance between the total number of hits resulting from the initial search terms related to WIND Mobile and “Project Turbine”, and the number of total documents produced for our review.**

10. On December 23, 2014, after Moyses’s devices had been supplied and the search terms had begun to be run, I was advised by the forensic expert of the initial “hit count” reported in respect of the full list of search terms. This raw “hit count” included all instances of data resident on the hard drive of the computer in which the four characters “WIND” or the seven characters “TURBINE” appeared, whether or not contained in a contiguous file, or a user-readable file. This is an ordinary occurrence, and generally results in the need to make choices to limit the documents being produced through a variety of filters. In this case, multiple filtering techniques were adopted, dependent on the search term, as described in our earlier report.

11. In the case of "TURBINE", the initial hit count was 756. Ultimately, after deduplication, a total of four unique documents were provided responsive solely to this search term. This total of four items does not include email items or their attachments.

12. In the case of "WIND", a total of 26,118 hits were initially generated. After deduplication, a total of thirty-six unique documents were provided responsive solely to this search term. This total of thirty-six items does not include email items or their attachments.

13. I have again consulted with Mr. Doney to confirm and supplement my understanding of the reasons for the divergence in these cases, which is as follows:

(a) File-type exclusions. In the case of "WIND", we were instructed to systematically exclude all files which were "hits" from our review, unless they fell within an agreed list of document types which would ordinarily be expected to be user-readable, specifically: Microsoft Word documents; Microsoft Excel spreadsheets; Microsoft PowerPoint presentations; E-mail messages; and Adobe PDF files. (In the case of "TURBINE", which generated a far smaller number of hits, we were instructed to review all documents.) The "WIND" hits, therefore, would already be subject to a strict limiter that would remove the possibility of system files or fragments of deleted material from being provided for our review.

(b) Deduplication. In accordance with our advice, the parties agreed to automated deduplication. This process ensured that a document produced as responsive to one search term, would not then be produced a second time for duplicative manual review if it were to attract a second search term. Thus, while there may be more than thirty-six items containing the term "WIND" that we reviewed, the additional items would already have been produced as responsive to other search terms.

(c) E-mail Messages. Although included in the initial hit counts, e-mail messages were not then recorded among the individual files noted above. So while there may have been only thirty-six documents stored directly on Moyses's hard drive in native

format responsive to "WIND", this figure would not include e-mail messages containing that sequence of characters. The set of characters "WIND" also is a component of other English words, which likewise would have been produced for our manual review. We did manually review substantial volumes of email, much of which was (as noted in our earlier report) itself duplicative because Mr. Moyses appears to have structured his email accounts in such a fashion as to create multiple backup folders of the same items, and evaluated each such message to determine whether it was producible under the Protocol.

(d) Post-2007 Microsoft Office Document Fragmentation. Finally, Mr. Doney has advised that more recent versions of Microsoft Office (from the 2007 edition forward) employ a new file management method that also generates additional hit figures. These documents are those which utilize the file extensions ".xlsx", ".docx", ".pptx", etc., as opposed to the former extensions ".xls", ".doc", ".ppt" for Excel, Word and PowerPoint documents respectively. I understand from Mr. Doney that these files are stored in multiple parts such that, when a computer is forensically analyzed, each part or fragment of such a document will register as a separate "hit". When the documents are produced for manual review, they are produced as single readable items, and not as individual fragments.

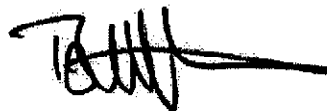
14. Other than the possibility of mechanical error, which we have no basis to believe at this stage was an issue in the forensic imaging or in the automated search and production process, we conclude that the above are the reasons for the divergence between the initial reported "hit count" and the final number of documents produced.

(d) Explain the variance between the total number of hits resulting from the initial search terms related to Mobilicity, and the number of total documents produced for our review.

15. In the case of "MOBILICITY", the initial hit count was 765. Ultimately, after de-duplication, there were zero unique documents provided responsive solely to this search term. Again, this does not include email items.

16. The same four reasons I have described in paragraph 12, above, are applicable to this instance. I asked Mr. Doney, in assisting my understanding of the technical reasons for the divergence, to confirm specifically in the case of Mobilicity that these factors accounted for it, and he confirmed this to be the case.

March 30, 2015



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**Stockwoods LLP**  
Barristers  
TD North Tower  
77 King Street West, Suite 4130  
P.O. Box 140, Toronto Dominion Centre  
Toronto, Ontario M5K 1H1

**Brendan Van Niejenhuis** LSUC#: 46752J  
Tel: 416-593-2487  
Fax: 416-593-9345

Independent Supervising Solicitor

**Minutes of Conference Call 12 February 2015 3:00 p.m.**

For Catalyst Capital: Andrew Winton  
For Brandon Moyse: Jeff Hopkins and Justin Tetreault  
For ISS: Brendan van Niejenhuis

- At the outset, Moyse's counsel expressed the view that ISS has jurisdiction to make any necessary determination, and Catalyst cannot bypass the protocol and seek further information without a motion. Moyse's counsel also expressed the need for West Face to agree to any variation of the protocol, but indicated that subject to this being clear, they were content to hear Catalyst's comments and concerns.
- Catalyst's counsel indicated that Catalyst does not want to hold up finalization of draft report and indicated that if further work is needed, it take the form of a short supplementary report. He emphasized that the purpose of the discussion is to raise some areas of inquiry and make an effort to obtain answers without the necessity of a formal motion.
- Moyse's counsel agreed that he should proceed to outline the issues.
- Catalyst's counsel raised the following four issues:
  1. The additional search terms that were supplied on January 8, 2015 apparently yielded only five independent documents for review by the ISS. He proposed to ask the ISS to indicate which specific terms yielded those results. Depending on which terms generated those "hits", Catalyst may or may not continue to have a concern that an error occurred in the evaluation having regard to the uniqueness of the terms, particularly with regard to "Callidus" and associated terms.
  2. Catalyst proposed that the ISS also advise about the total number of hits which would have resulted, had the second set of terms been run without regard to deduplicating previously-produced items (i.e., items produced as a result of raising a 'hit' under the original set of search terms supplied in December).
  3. Catalyst expressed the concern that the number of hits associated with WIND Mobile and directly related search terms such as "Turbine" exceeded the actual number of documents identified in the search process by a very wide margin. He proposed that ISS should provide an explanation, if possible, for the divergence between the number of "hits" and the ultimate number of documents found and identified in the report.
  4. Finally, Catalyst expressed the same concern with respect to hits associated to Mobilicity and directly-related search terms, asking again for an explanation as to the large difference between the raw hit-count identified in the initial results and the ultimate number of documents identified.



- 2 -

- In each case, Moyses's counsel expressed an understanding of the purpose of the request, while also expressing concern that the process remain contained within the parameters of the Protocol. Moyses's counsel committed to consider the issue in good faith and to respond promptly with their position, possibly by the end of the day.
- During the articulation of Catalyst's concerns and in response to a specific question, ISS explained that deduplication had been directed and performed by the Expert at the stage the second set of search terms was run, for the purpose of not requiring re-production of items previously produced in the first set of search terms. Therefore, it is possible that the second set of search terms would have generated items that were also in place on the first list.
- At the conclusion of the call, Moyses's counsel confirmed that they were working on their objections which would be circulated by Friday, February 13. ISS advised that, subject to the nature and quantity of objections, it was likely that the Report could be finalized very shortly thereafter but noted his absence from Canada the week of February 16.
- The call concluded at 3:32 p.m.

**From:** [Jeff C. Hopkins](#)  
**To:** "[Andrew Winton](#)"; [Brendan Van Niejenhuis](#); [Rocco DiPucchio](#); [Justin Tetreault](#)  
**Cc:** [Naomi Greckol-Herlich](#); [Theresa \(Terry\) Vandervoort](#)  
**Subject:** RE: Conference call request [IWOV-CLIENT.FID45653]  
**Date:** Thursday, February 12, 2015 4:26:40 PM

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Andrew:

After further consideration of Catalyst's requests our position remains the same.

As we outlined on the call, the information Catalyst seeks is work product, which it is explicitly excluded from receiving by the terms of the DRP. Providing Catalyst with data such as "hits" is not informative or helpful to the process given the fact that the ISS has reviewed the results of the hits and made the determination of what documents contained Catalyst's confidential information. Furthermore, the DRP does not require the ISS to explain why he did not consider certain documents to be confidential. In fact, to do so would reveal documents that are personal to Moyse and protected by the terms of the DRP.

Catalyst's requests seem to stem, not from the belief that any specific document has been inadvertently excluded but from Catalyst's belief that the ISS must have missed documents generally or mistakenly concluded that documents were not confidential. In fairness, rather than seeking clarification or clearing up a misunderstanding, these requests are better described as challenging the accuracy and / or completeness of the report. We have no reason to doubt that the ISS has properly fulfilled his mandate and cannot agree to any of Catalyst's requests. Accordingly, pursuant to paragraph 11 of the DRP Catalyst's recourse is to bring the appropriate motion.

Jeff.

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Jeff C. Hopkins  
Partner



390 Bay Street, Suite 1100, Toronto, Ontario, M5H 2Y2  
Tel: 416-364-9599 Fax: 416-364-2490  
[www.grosman.com](http://www.grosman.com)

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**From:** Andrew Winton [mailto:[awinton@counsel-toronto.com](mailto:awinton@counsel-toronto.com)]  
**Sent:** Wednesday, February 11, 2015 2:21 PM  
**To:** 'Brendan Van Niejenhuis'; Rocco DiPucchio; Justin Tetreault; Jeff C. Hopkins  
**Cc:** 'Naomi Greckol-Herlich'  
**Subject:** RE: Conference call request [IWOV-CLIENT.FID45653]

Brendan,

I will try to clear this up. We would like to hold a conference call with you and counsel for Mr. Moyse

to discuss the possibility that certain files were mistakenly classified as not containing Catalyst's confidential information.

We think that a brief conversation will go a long way towards helping us understand why certain decisions were made and to possibly identify a misunderstanding as to facts that led to documents being excluded in error.

We asked that Jim Riley of Catalyst participate to help explain, if necessary, why Catalyst would consider certain documents, which appear to have been omitted from the report, to be confidential.

We acknowledge that the Document Review Protocol ("DRP") does not expressly provide for this opportunity. It states at paragraph 11 that if Catalyst believes a document was improperly excluded, it may bring a motion for production of that document.

The goal of our request is to avoid the need for a motion if a short call is all it will take to clear up a misunderstanding that led to documents being excluded. We are trying to do things as efficiently as possible.

We would like to know if you and Naomi are willing to participate in such a call.

Thanks,

Andrew

**Andrew Winton**  
Lax O'Sullivan Scott Lisus LLP

Direct: (416) 644-5342

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**From:** Brendan Van Niejenhuis [<mailto:BrendanVN@stockwoods.ca>]  
**Sent:** February-11-15 1:39 PM  
**To:** Rocco DiPucchio; Justin Tetreault; Jeff C. Hopkins; Andrew Winton  
**Cc:** Naomi Greckol-Herlich  
**Subject:** RE: Conference call request [IWOV-CLIENT.FID45653]

All,

I'm not sure what response I can usefully give at this point. If there are concerns about the process that has been employed on our end, and there is room within the Protocol to address them, then I will do so when and if I know what they are. If there is no room for me to respond to them while remaining within the bounds of the Protocol, then depending on what they are I suppose I would either decline to do anything, or potentially seek direction on my own initiative from Justice Lederer. Beyond that I don't have anything to add for the moment.

Brendan.

**Brendan van Niejenhuis**  
**STOCKWOODS LLP**

T: 416.593.2487

F: 416.593.9345

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**From:** Rocco DiPucchio [<mailto:rdipucchio@counsel-toronto.com>]  
**Sent:** Wednesday, February 11, 2015 10:31 AM  
**To:** Justin Tetreault; Jeff C. Hopkins; Andrew Winton; Brendan Van Niejenhuis  
**Subject:** Re: Conference call request [IWOV-CLIENT.FID45653]

Respond to what? I'm not aware of any restrictions on our ability to correspond with the ISS.

Sent from my Samsung Galaxy smartphone.

----- Original message -----

**From:** Justin Tetreault <[jtetreault@grosman.com](mailto:jtetreault@grosman.com)>  
**Date:** 02-11-2015 10:21 AM (GMT-05:00)  
**To:** Rocco DiPucchio <[rdipucchio@counsel-toronto.com](mailto:rdipucchio@counsel-toronto.com)>, "Jeff C. Hopkins" <[jhopkins@grosman.com](mailto:jhopkins@grosman.com)>, Andrew Winton <[awinton@counsel-toronto.com](mailto:awinton@counsel-toronto.com)>, 'Brendan Van Niejenhuis' <[BrendanVN@stockwoods.ca](mailto:BrendanVN@stockwoods.ca)>  
**Cc:**  
**Subject:** RE: Conference call request [IWOV-CLIENT.FID45653]

Rocco,

We would appreciate if you would give Brendan an opportunity to respond before you write to him with Catalyst's concerns.

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Justin Tetreault

390 Bay Street, Suite 1100 Toronto, Ontario, M5H 2Y2  
Tel: 416-364-9599 Fax: 416-364-2490  
[www.grosman.com](http://www.grosman.com)

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**From:** Rocco DiPucchio [<mailto:rdipucchio@counsel-toronto.com>]  
**Sent:** Wednesday, February 11, 2015 10:12 AM  
**To:** Jeff C. Hopkins; Andrew Winton; 'Brendan Van Niejenhuis'; Justin Tetreault  
**Subject:** Re: Conference call request [IWOV-CLIENT.FID45653]

Jeff, we don't agree that our client would have no opportunity to discuss the report with the ISS, especially since your client is involved in any discussions. If you don't want to participate in a conference call, then we will likely write to the ISS and copy you.

Sent from my Samsung Galaxy smartphone.

----- Original message -----

From: "Jeff C. Hopkins" <jhopkins@grosman.com>

Date: 02-11-2015 10:07 AM (GMT-05:00)

To: Rocco DiPucchio <rdipucchio@counsel-toronto.com>, Andrew Winton <awinton@counsel-toronto.com>, 'Brendan Van Niejenhuis' <BrendanVN@stockwoods.ca>, Justin Tetreault <jtetreault@grosman.com>

Cc:

Subject: RE: Conference call request [IWOV-CLIENT.FID45653]

Rocco:

All we are saying is that the terms of the DRP are clear, and those terms don't give Catalyst the right to make what we view as essentially an objection to the findings of the draft report.

Moreover, since all parties are eager to conclude this process, this will only serve to further delay the final report. There is also the issue of Catalyst not being permitted to receive any work product from the ISS, which would make any discussion about what may be contained in the image, or excluded from the report, difficult if not practically impossible.

Accordingly, subject to Brendon's thoughts, we simply feel that given the stated purpose below, a call for this purpose would not be proper or meaningful in the circumstances.

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Jeff C. Hopkins  
Partner

390 Bay Street, Suite 1100, Toronto, Ontario, M5H 2Y2

Tel: 416-364-9599 Fax: 416-364-2490

[www.grosman.com](http://www.grosman.com)

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**From:** Rocco DiPucchio [mailto:rdipucchio@counsel-toronto.com]

**Sent:** Tuesday, February 10, 2015 10:24 AM

**To:** Jeff C. Hopkins; Andrew Winton; 'Brendan Van Niejenhuis'; Justin Tetreault

**Subject:** Re: Conference call request [IWOV-CLIENT.FID45653]

Jeff. Are you suggesting that we are not entitled to follow up at all with the ISS about the contents of his draft report and legitimate concerns we may have or even his final report for that matter? Please let me know whether that is the case as I would like to rely on your client's response for the record.

If you continue to object to a simple call which you can participate in, we will attend before Justice Lederer with the draft report in hand and seek his direction on the matter, with the ISS in attendance. I suggest that would be a waste of everyone's time.

Sent from my Samsung Galaxy smartphone.

----- Original message -----

From: "Jeff C. Hopkins" <jhopkins@grosman.com>  
Date: 02-10-2015 9:59 AM (GMT-05:00)  
To: Andrew Winton <awinton@counsel-toronto.com>, 'Brendan Van Niejenhuis' <BrendanVN@stockwoods.ca>, Justin Tetreault <jtetreault@grosman.com>  
Cc: Rocco DiPucchio <rdipucchio@counsel-toronto.com>  
Subject: RE: Conference call request [IWOV-CLIENT.FID45653]

Brendan, Rocco and Andrew:

We cannot provide an update on the status of Mr. Moyses's objections beyond stating that we will be objecting to certain documents, we are continuing to work on the objections, and we intend to comply with the timeline contained in the DRP.

With regard to your second point, we are unsure of the basis upon which Catalyst asserts that Confidential Information may have been excluded from the Draft Report. Catalyst has no access to the Images and thus no knowledge of the information contained within. The results contained in the Draft Report were based on the dozens of search terms provided by Catalyst to the ISS, who engaged in a comprehensive and exhaustive process to locate and identify Catalyst's Confidential Information. We have no reason to doubt that he has properly fulfilled his mandate and exercised his discretion to include documents that he believes contain Catalyst Confidential Information (subject to Mr. Moyses's objections). Finally, and most importantly, while the DRP provides an opportunity for Mr. Moyses to object to information that has been included in the Draft Report, Catalyst is not provided with a similar opportunity to object and, particularly, has no right to suggest that information has been improperly excluded.

As such, we do not think a conference call is necessary or appropriate at this time.

Jeff.

---

Jeff C. Hopkins  
Partner

390 Bay Street, Suite 1100, Toronto, Ontario, M5H 2Y2  
Tel: 416-364-9599 Fax: 416-364-2490  
[www.grosman.com](http://www.grosman.com)

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**From:** Andrew Winton [<mailto:awinton@counsel-toronto.com>]  
**Sent:** Monday, February 09, 2015 6:48 PM  
**To:** 'Brendan Van Niejenhuis'; Jeff C. Hopkins; Justin Tetreault  
**Cc:** Rocco DiPucchio  
**Subject:** Conference call request [IWOV-CLIENT.FID45653]

Brendan, Jeff and Justin,

We would like to schedule a conference call for tomorrow to discuss two issues:

The status of Mr. Moyses's review of the draft report and/or intention to object to the inclusion of documents referred to in the draft report;

The possible exclusion of Catalyst Confidential Information from the draft report.

A call on these issues would be much more efficient than communicating via email or letter.

Also, if you all agree, Jim Riley from Catalyst would like to sit in on the call. Mr. Riley may be able to assist with the discussion as to why Catalyst believes confidential information may have been inadvertently excluded from the draft report.

Please let me know if you are available tomorrow and agree that we can speak.

Regards,

Andrew

**Andrew Winton**

Direct: (416) 644-5342

[awinton@counsel-toronto.com](mailto:awinton@counsel-toronto.com)

**Lax O'Sullivan Scott Lisus LLP**  
Suite 2750, 145 King Street West  
Toronto ON M5H 1J8 Canada  
T 416 598 1744 F 416 598 3730  
[counsel-toronto.com](http://counsel-toronto.com)

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**From:** [Andrew Winton](mailto:Andrew.Winton)  
**To:** [Brendan Van Niejenhuis](mailto:Brendan.VanNiejenhuis); [Naomi Greckol-Herlich](mailto:Naomi.Greckol-Herlich)  
**Cc:** [Rocco DiPucchio](mailto:Rocco.DiPucchio); "[Sharon.Hawley@paliareroland.com](mailto:Sharon.Hawley@paliareroland.com)"; "[Kris.Borg-Olivier@paliareroland.com](mailto:Kris.Borg-Olivier@paliareroland.com)"; "[Denise.Cooney@paliareroland.com](mailto:Denise.Cooney@paliareroland.com)"; "[Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com)"  
**Subject:** RE: Moyes v Catalyst [IWOV-CLIENT.FID45653]  
**Date:** Thursday, March 12, 2015 5:01:02 PM  
**Attachments:** [20150212\\_Telcon\\_Minutes.docx](#)

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Brendan,

Please see below. Mr. Moyse's new counsel have agreed that you can respond to the issues raised in our conference call held February 12, as summarized in the attached minutes.

If you could please prepare a supplementary report which responds to these issues at the earliest opportunity, that would be appreciated.

Regards,

Andrew

**Andrew Winton**  
Lax O'Sullivan Scott Lisus LLP

Direct: (416) 644-5342

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**From:** [Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com) [mailto:[Robert.Centa@paliareroland.com](mailto:Robert.Centa@paliareroland.com)]  
**Sent:** March-12-15 3:07 PM  
**To:** Andrew Winton  
**Cc:** [Rocco DiPucchio](mailto:Rocco.DiPucchio); [Sharon.Hawley@paliareroland.com](mailto:Sharon.Hawley@paliareroland.com); [Kris.Borg-Olivier@paliareroland.com](mailto:Kris.Borg-Olivier@paliareroland.com); [Denise.Cooney@paliareroland.com](mailto:Denise.Cooney@paliareroland.com)  
**Subject:** Moyes v Catalyst

Andrew,

Further to our call this morning, we do not object to you contacting the ISS to request the specific information with respect to the Wind and Callidus results you outlined in the February 12, 2015 conference call with the ISS. Any information or answers the ISS provides you in response to these requests will be without prejudice to our position on what, if anything, flows from those answers.

Rob

Robert A. Centa  
Paliare Roland Rosenberg Rothstein LLP  
155 Wellington St. West, 35th Floor  
Toronto, ON M5V 3H1



+1 416.646.4314 (Direct)  
+1 416.646.4301 (Fax)  
+1 416.434.3636 (Mobile)

[Robert.Centa@paliareroiland.com](mailto:Robert.Centa@paliareroiland.com)

CATALYST CAPITAL GROUP INC. and MOYSE *et al.*  
Plaintiff and Defendants

Court File No: CV-14-507120

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**SUPPLEMENTARY REPORT OF THE  
INDEPENDENT SUPERVISING  
SOLICITOR**

Stockwoods LLP  
Barristers  
TD North Tower  
77 King Street West, Suite 4130  
P.O. Box 140, Toronto Dominion Centre  
Toronto, Ontario M5K 1H1

**Brendan Van Nijenhuis** LSUC#: 46752J  
Tel: 416-593-2487  
Fax: 416-593-9345

Independent Supervising Solicitor