CITATION: The Catalyst Capital Group Inc. v. Moyse, 2015 ONSC 4388
COURT FILE NO.: CV-14-507120
DATE: 20150707

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: THE CATALYST CAPITAL GROUP INC., Plaintiff

AND:

BRANDON MOYSE and WEST FACE CAPITAL INC., Defendants

BEFORE: Justice Glustein

COUNSEL: *Rocco DiPucchio* and *Andrew Winton*, for the Plaintiff

Matthew Milne-Smith and *Andrew Carlson*, for the Defendant, West Face Capital Inc.

Robert A. Centa, Kristian Borg-Olivier and *Denise Cooney*, for the Defendant, Brandon Moyse

HEARD: July 2, 2015

ENDORSEMENT

Nature of motion and overview

[1] The plaintiff, The Catalyst Capital Group Inc. ("Catalyst"), brings this motion for:

(i) an order that the defendant, West Face Capital Inc. ("West Face") is prohibited from voting its 35% share interest in WIND Mobile ("WIND") pending a determination of the issues raised in this action (the "Voting Injunction"),

(ii) an order to authorize the Independent Supervising Solicitor ("ISS") to create and review forensic images of the corporate servers of West Face and the electronic devices used by five individuals at West Face, at the expense of Moyse and West Face, to take place before any examination-for-discovery (the "Imaging Order"), and

(iii) an order (the "Contempt Order") that the defendant, Brandon Moyse ("Moyse"), is in contempt of an interim consent order of Firestone J., dated July 16, 2014 (the "Consent Order").

[2] At the hearing, the parties prepared extensive material. West Face filed a four-volume motion record with (i) a lengthy affidavit with 163 exhibits from Anthony Griffin ("Griffin"), a partner at West Face, (ii) an affidavit from Assar El Shanawany ("El Shanawany"), the

Corporate Planning & Control Officer of WIND, and (iii) an affidavit from Harold Burt-Gerrans, a forensic computer expert retained by West Face.

[3] Moyse filed two motion records, including a lengthy affidavit from Moyse and two affidavits from Kevin Lo ("Lo"), a forensic computer expert retained by Moyse.

[4] The defendants also filed a joint motion record with answers to undertakings from cross-examinations, transcripts, and an affidavit from West Face's head of technology.

[5] Catalyst filed three separate motion records, including (i) two extensive affidavits with approximately 40 exhibits from James Riley ("Riley"), the Chief Executive Officer of Catalyst, and (ii) three affidavits from Martin Musters ("Musters"), a computer forensic expert retained by Catalyst.

[6] In total, the parties filed over 3,000 pages of motion material, three factums totalling more than 110 pages, and 66 authorities.

[7] In this endorsement, I address only the key evidence and law which I find are necessary to consider the issues raised by the parties. For the reasons I discuss below, I dismiss the motion for all grounds of relief sought by Catalyst.

The Voting Injunction

a) The failure to provide an undertaking

[8] The Voting Injunction cannot be granted as Catalyst provided no undertaking as to damages.

[9] Rule 40.03 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (the "*Rules*"), provides that:

> On a motion for an interlocutory injunction or mandatory order, the moving party shall, unless the court orders otherwise, undertake to abide by any order concerning damages that the court may make if it ultimately appears that the granting of the order has caused damage to the responding party for which the moving party ought to compensate the responding party.

[10] The failure to provide an undertaking (or request to be relieved) is fatal to an injunction. Such an undertaking in damages "is almost invariably required in commercial cases" (Sharpe J.A., *Injunctions and Specific Performance*, Looseleaf Edition (Toronto: Canada Law Book, 2014), at paras. 2.470 and 2.500).

[11] The court will dismiss a motion for an injunction if the moving party fails to provide an undertaking under Rule 40.03 (*Mandel v. Morguard Corp.*, [2014] OJ No. 1088 (SCJ), at paras. 20-21; *Air Canada Pilots Association v. Air Canada Ace Aviation Holdings Inc.*, [2007] OJ No. 89 (SCJ), at para. 70, affirmed without separate reasons [2008] OJ No. 2567 (CA)).

[12] West Face raised the lack of an undertaking in its factum, as was appropriate since Catalyst failed to provide the undertaking in its evidence before the court on this injunction.

[13] Catalyst knew and understood the need for an undertaking to obtain an injunction.

[14] At the outset of the hearing, I raised directly with Catalyst's counsel the issue of an undertaking with respect to the injunctive relief sought on this motion.

[15] I advised counsel that Catalyst could consider, prior to argument, whether it was necessary to adjourn the hearing to provide the court with an undertaking. I further advised Catalyst's counsel that if he chose to argue the motion on the basis of the existing evidentiary record, the court could not adjourn the hearing in mid-argument to permit further evidence on the issue. Counsel for Catalyst assured the court that he was prepared to argue the motion on the basis of the evidentiary record and would set out in his oral submissions why the requirement for an undertaking had been satisfied.

[16] During his submissions, when asked to address the issue of the undertaking, Catalyst sought to rely on the undertaking it provided to the court to obtain an interim injunction from Justice Lederer by reasons dated November 10, 2014 (the "Interim Injunction"). Justice Lederer had granted interim relief, by which he, *inter alia*, enjoined Moyse from working for West Face until December 21, 2014 and ordered that an independent supervising solicitor (previously defined as the "ISS") be put into place to review the images of Moyse's personal computer and electronic devices that had been conducted pursuant to the Consent Order (Reasons of Lederer J., at para. 83).

[17] In support of the Interim Injunction, Riley swore an affidavit on June 26, 2014 in which he gave an undertaking to the court that Catalyst "will comply with any order regarding damages the Court may make in the future, if it ultimately appears that the injunction requested by the plaintiff ought not to have been granted" (para. 75 of the June 26, 2014 Riley affidavit).

[18] Justice Lederer relied on the evidence from Riley to find that Catalyst had complied with its requirement under Rule 40.03 to provide an undertaking for damages which might arise if the court ultimately found that the injunction requested by Catalyst ought not to have been granted.

[19] Justice Lederer's reasons made it clear that the undertaking related only to the order he made. He stated that Catalyst gave an undertaking (Reasons of Lederer J., at para. 84):

> that it will comply with any order regarding damages the court may make in the future, if it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them. [Emphasis added.]

[20] At the hearing before me, Catalyst submitted that this undertaking "continued" (in effect, could be transferred) to the present Voting Injunction. Catalyst submitted that Riley was not required to provide a separate undertaking for the Voting Injunction since Riley

stated in his affidavit for this motion that "I adopt and re-state the facts set out in those affidavits [filed in support of the Interim Injunction] in this affidavit".

[21] I do not agree that an undertaking for an injunction seeking to prevent employment for a limited time or having documents imaged by an ISS can be "transferred" to an injunction seeking to prevent a 35% shareholder of WIND from exercising voting rights at any time until trial of the action.

[22] First, an undertaking is not a "fact" to be repeated and relied upon in a subsequent affidavit. It is a promise to the court to pay damages arising out of the injunctive relief sought before the court at that time. At no point until this injunction did Catalyst seek an order preventing West Face from exercising its 35% voting interest in WIND.

[23] Second, the damages that could be incurred as a result of the Voting Injunction are exponentially greater than any possible damages that could arise on an order to prevent competition by an analyst (Moyse) who leaves for a competitor. The Interim Injunction, based on the earlier Riley affidavits, protected Catalyst's interests through (i) a review by the ISS of the forensic images of Moyse's computer and electronic devices before discovery, and (ii) orders prohibiting Moyse from competing for six months and using confidential information. Any damage associated with the order sought on the Interim Injunction could pale to the losses West Face could incur as a result of the Voting Injunction if West Face is unable to vote its shares in WIND on all decisions between the present and trial.

[24] Justice Lederer was clear that the undertaking he accepted was based on the relief sought in the specific motion before him, as it was based on the undertaking to pay damages if "it ultimately appears that **this order** ought not to have been granted, and that the granting of **this order** has caused damage to Brandon Moyse and West Face Inc. for which The Capital Catalyst Group Inc. should compensate them" [Emphasis added.] (Reasons of Lederer J., at para. 84).

[25] At the present hearing, Catalyst attempted to rely on the evidence in the current Riley affidavit that it "currently has in excess of $3 billion dollars under management". However, the existence of assets under management is not an undertaking to the court to pay damages for an injunction.

[26] When an undertaking is provided, a responding party has the opportunity to challenge the sufficiency of the undertaking. Regardless of the amount of assets managed or owned by a corporation, the undertaking provided by the moving party depends on its ability to pay the damages which could arise from the injunction. A responding party is entitled to cross-examine to test the sufficiency of the undertaking.

[27] Consequently, there is no undertaking before the court on the present injunction, which is between sophisticated commercial parties with Catalyst seeking a Voting Injunction to enjoin West Face from voting any of its 35% share interest in WIND until trial.

[28] This is not a case of West Face's counsel "laying in the weeds" (as submitted by Catalyst). Catalyst knew the requirements for an injunction, as demonstrated by the earlier injunction sought before Justice Lederer. West Face raised the issue directly in its factum.

Catalyst was advised by the court at the outset that the court was providing it with an opportunity to consider whether it would seek an adjournment to file further evidence, and Catalyst chose not to do so. West Face is not required to create evidence for Catalyst on cross-examination when Catalyst chose not to provide the evidence.

[29] Consequently, Catalyst made a decision to rely on the earlier undertaking with full knowledge that no adjournment mid-hearing could be obtained if the court was not satisfied that there was a proper undertaking.

[30] For these reasons, I dismiss the Voting Injunction on the basis of the failure to provide an undertaking under Rule 40.03.

b) The failure to satisfy the requirements of irreparable harm and balance of convenience

[31] Catalyst's counsel acknowledges that Catalyst has the burden of establishing irreparable harm and that the Voting Injunction cannot be granted if Catalyst does not meet this burden.

[32] The only evidence of harm to Catalyst if the injunction is not granted is Riley's statement in his affidavit that:

> As the largest of the four shareholder groups, West Face can use its voting interest in Wind Mobile to harm Catalyst's long-term interest in Wind Mobile. Catalyst has a claim for a constructive trust over West Face's interest. In order to protect Catalyst's contingent interest in Wind Mobile, Catalyst seeks an order restraining West Face from participating in the operations of Wind Mobile pending the resolution of this action.

[33] The above evidence does not meet the test of harm that "could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the results of the interlocutory application", or "harm which either cannot be quantified in monetary terms or which cannot be cured" (*RJR-MacDonald Inc. v. Canada*, [1994] SCJ No. 17, at paras. 58-59).

[34] Evidence of irreparable harm must be clear and not speculative (*Trapeze Software Inc. v. Bryant*, [2007] OJ No. 276 (SCJ), at para. 52). It is not enough to show that a moving party is "likely" to suffer irreparable harm; one must establish that he or she "would suffer" irreparable harm (*Burkes v. Canada (Revenue Agency)*, [2010] OJ No. 2877 (SCJ), at para. 18, leave to appeal refused, [2010] OJ No. 5019 (Div. Ct.)).

[35] Riley's assertion is speculative. He does not state that West Face "will" use its voting interest in WIND to harm Catalyst's purported interest. Rather, he states only that West Face "can" do so without explaining how such conduct would arise.

[36] Even if Catalyst has a contingent interest in WIND, Riley admitted during cross-examination that (i) "West Face wants to maximize WIND's value in the same way that Catalyst claims to want to do"; and (ii) West Face "would obviously have an incentive to

maximize the value of its investment in [WIND]" in the same manner as Catalyst claims that it would.

[37] Catalyst submits at paragraph 114 of its factum that West Face could provide capital to WIND (or WIND could seek to raise capital) "on terms to which Catalyst, in West Face's shoes, would not agree". However, there is no evidence to that effect. To the contrary, West Face has been a shareholder and an active part of the management of WIND since September 16, 2014, and Catalyst led no evidence that it is worse off today than it was almost nine months ago.

[38] In essence, Catalyst's position on irreparable harm is that West Face, as a 35% shareholder in WIND, might vote their shares in a manner that decreases the value of the company, and as such, harm Catalyst's "contingent" interest based on Catalyst's claim of constructive trust. However, any claim of constructive trust over property raises a speculative concern that the property may be worth less at trial than at the outset of pleadings. In the present case, there is no evidence to suggest any past or future conduct which will cause irreparable harm, and as such, the injunction must fail.

[39] With respect to the balance of convenience, since Catalyst offers no proper evidence of irreparable harm, it cannot establish that the balance of convenience favours granting the injunction.

[40] Further, West Face filed evidence (in the Griffin and El Shanawany affidavits) that West Face is the single largest investor in WIND, designates two of the ten seats on the board of directors, and plays an important role in WIND's governance, strategic and capital funding direction. An inability for West Face, as the largest WIND shareholder, to vote on issues that affect a significant investment is evidence of the type of harm that cannot be cured in monetary terms, as other shareholders would then have the ability to control the future of WIND without any voting from a 35% shareholder.

[41] For the above reasons relating to Catalyst's failure to provide the undertaking, Catalyst's failure to establish irreparable harm, and given my finding that the balance of convenience is against granting an injunction, I dismiss the motion for a Voting Injunction.

[42] Consequently, I do not address whether there is a serious question to be tried.

The Imaging Order

[43] West Face characterizes the Imaging Order as either an *Anton Piller* order or a Rule 30.06 order. For the purposes of this argument, I make no finding as to whether the higher threshold of an *Anton Piller* order should apply because I agree with West Face that even under the lower "Rule 30.06" threshold as considered in cases where a similar imaging order was sought, the motion must fail.

[44] In the present case, Catalyst proposes to have the ISS conduct a review of West Face's corporate servers and the electronic devices of five West Face representatives and then "prepare a report which shall": (i) "identify whether the Images contain or contained Catalyst's confidential and proprietary information ("Confidential Information") and (ii)

provide particulars of who authored or saw any emails which contained or referred to the Confidential Information.

[45] I note that many of the cases relied upon by West Face arise in the context of a request by an adverse party to review the documents sought to be imaged, typically through a forensic expert retained by the moving party. It may be that the discussion in those cases could apply to the Catalyst request for ISS review, since the nature of a review is similarly intrusive, even if not conducted directly by the moving party.

[46] However, it is not necessary to rely on those authorities and I make no finding as to whether the test to permit a moving party to have direct access to the servers of a responding party requires a higher threshold to obtain such relief.

[47] Under Rule 30.06, the principle remains that a party has an obligation under the *Rules* to produce relevant documents, and the court will only order further and better production if there is good reason to believe that the responding party has not complied with its production obligations. I agree that the same approach should apply to a request that a responding party image computer servers and electronic devices.

[48] This approach was followed by Justice Stinson in *Brown v. First Contact Software Consultants Inc.*, [2009] OJ No. 3782 (SCJ) ("*Brown*"). Justice Stinson was not faced with a request by a moving party to review the responding party's server, but only with a request for "an order that would require the responding parties to 'image' the hard drives or their computers, in order to preserve an electronic copy of all visible and invisible data contained on them" (*Brown*, at para. 67). The intrusiveness of such a request would be less than the ISS review proposed by Catalyst.

[49] In *Brown*, Justice Stinson refused to order the plaintiffs (responding parties) to image their hard drives or computers. He held (*Brown*, at para. 67):

> There is no proof, however, that the responding parties are or have been engaged in conduct designed to hide or delete electronic or other information. There is no proper basis for granting this relief, on the material before the court.

[50] Orders for production of computer hard drives will not be made when a party can explain any delay or errors in producing relevant documents (*Baldwin-Jones Insurance Services (2004) Ltd. (c.o.b. Baldwin Janzen Insurance Brokers) v. Janzen*, [2006] BCJ (S.C.) at paras. 34, 36). Further, the number of "hits" of a term does not demonstrate that a party has failed to produce relevant documents (*Mathieson v. Scotia Capital Inc.*, [2008] OJ No. 3500 (Mast.) at par. 9).

[51] As Morgan J. held in *Zenex Enterprises Ltd. v. Pioneer Balloon Canada Ltd.*, [2012] OJ No. 6082 (SCJ) ("*Zenex*"), "it is not sufficient for a moving party to say 'I believe there are more documents' or 'it appears to me that documents are being hidden'" (*Zenex*, at paras. 13-14).

[52] There is no evidence that West Face has failed to comply with its production obligations, let alone intentionally delete materials to thwart the discovery process or evade its discovery obligations.

[53] The evidence relied upon by Catalyst at the hearing to demonstrate an effort to thwart discovery obligations was not convincing. Evidence with respect to Callidus Capital Corporation ("Callidus") was produced by West Face once Catalyst put Callidus in issue by alleging misuse of confidential information. West Face disclosed its investment in Arcan voluntarily.

[54] West Face even offered to turn over its own confidential information created, accessed or modified by Moyse to the ISS, but Catalyst has not accepted this offer.

[55] The error of West Face to recall the March 27, 2014 email arose not in the context of litigation production, but only when West Face received Catalyst's pre-litigation correspondence. The email was immediately produced in the July 7, 2014 responding material, six business days after Catalyst brought its motion for interim relief. West Face's failure to recognize prior to litigation that the March 27, 2014 email had been received and forwarded is not evidence of an intention to hide or delete electronic information.

[56] Further, West Face has produced voluminous records relating to the allegations Catalyst has made, even before discovery, and in particular: (i) filed a four-volume responding motion record attaching 163 exhibits regarding WIND, the AWS-3 auction (since abandoned) and Callidus, (ii) produced a copy of the notebook Moyse used during his three and a half weeks at West Face, redacted only for information about West Face's active investment opportunities, (iii) produced all non-privileged, non-confidential emails sent to or from Moyse's West Face email account or known personal email accounts which were on West Face's servers, and (iv) produced 19 additional exhibits in response to undertakings given and questions taken under advisement at the cross-examination of Griffin on May 8, 2015.

[57] For the above reasons, I find that Catalyst has not met its burden to establish that West Face has engaged in any destruction of evidence or in any conduct "designed to hide or delete electronic or other information". Consequently, I dismiss the motion for an Imaging Order.

Contempt Order

[58] For the reasons that follow, I do not find Moyse to be in contempt of the Consent Order.

[59] I summarize the relevant legal principles below:

(i) The contempt power rests on the power of the court to uphold its dignity and process. It is necessary to maintain the rule of law (*Carey v. Laiken*, 2015 SCC 17 ("*Carey*"), at para. 30);

(ii) There are three elements which must be established beyond a reasonable doubt before a court may make a finding of civil contempt:

(a) The order that was breached must state clearly and unequivocally what should and should not be done;

(b) The party alleged to have breached the order must have had actual knowledge of it; and

(c) The party allegedly in breach must have intentionally done the act that the order prohibits or intentionally failed to do the act that the order compels (*Carey*, at paras. 31-35);

(iii) Any reasonable doubt must be resolved in favour of the person or entity alleged to have breached the order (*Prescott-Russell Services for Children and Adults v. G. (N.)*, 2006 CanLII 81792 (CA), at para. 270);

(iv) The contempt power is discretionary and courts should discourage its routine use to obtain compliance with court orders. The contempt power should be used "cautiously and with great restraint" and as "an enforcement power of last rather than first resort" (*Carey*, at para. 36); and

(v) The court retains a discretion to decline to make a finding of contempt if the alleged contemnor acts in good faith (*Carey*, at para. 37).

[60] I review the relevant evidence against the backdrop of these principles.

[61] The impugned contemptuous acts of Moyse are (i) he deleted his personal browsing history immediately prior to turning his personal computer over to the ISS; and (ii) he allegedly bought and used software to "scrub" files from his personal computer prior to delivering it.

a) The relevant evidence

[62] Moyse's evidence was that when he was ordered to deliver his computer, he was concerned and embarrassed by some of the content on his computer related to adult entertainment sites. Moyse's evidence is that he was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in the lawsuit since he had reasonable explanations for every Catalyst-related document that would be found on the computer and intended to disclose all such documents in his affidavit of documents, as required under the Consent Order.

[63] Moyse's evidence is that he understood and respected his obligations under the Consent Order and was careful in how he maintained his computer following the Consent Order. Moyse's evidence that if Catalyst had sought and obtained an order requiring that he maintain the computer "as is", he would not have used it at all prior to the image being taken.

[64] Moyse's evidence was that he did not have advanced knowledge about computers but was aware that the mere act of deleting one's internet browsing history through the browser program itself does not fully erase the record, and that a forensic review of a computer would likely capture some or all recently-deleted material.

[65] Moyse did some internet searches on how to ensure a complete deletion of his internet browsing history. He came to believe that "cleaning" the computer's registry following the deletion of the internet history would ensure the permanent deletion of the history.

[66] Moyse then purchased the "RegCleanPro" product on July 12, 2014 to delete his internet browser history and four days later purchased the "Advanced System Optimizer" ("ASO") program which contains a suite of programs for personal computer tune-up. One product on the ASO suite is a program called "Secure Delete".

[67] Moyse made no efforts to hide the purchase of these products. The payment receipts and license keys for Moyse's purchases of the two Systweak products were found by the ISS in his electronic personal mail box.

[68] On Sunday, July 20, 2014, the day before Moyse was scheduled to deliver his computer and other devices to counsel, he (i) opened the RegClean Pro and ASO software products on his computer, (ii) looked into how each operated, and (iii) ran the "RegCleanPro" software to clean up the computer registry after he deleted his internet browser history.

b) Deleting personal browsing history

[69] With respect to the first impugned act, there is no evidence to establish, beyond a reasonable doubt, that Moyse deleted relevant information as a result of deleting his personal browsing history and then running a registry cleaner to delete traces of the internet searches.

[70] The Consent Order only requires Moyse to preserve and maintain records "that relate to Catalyst", "relate to their activities since March 27, 2014" or "are relevant to any of the matters raised in this action".

[71] If the words "activities since March 27, 2014" were intended to encompass searching adult entertainment sites or any other non-litigation related activities, then I would agree with Moyse's submissions that the Consent Order would be ambiguous, as reasonable people could have a different understanding of whether non-work-related activities were to be included.

[72] Catalyst does not strenuously submit that "activities" should be read as broadly as including adult entertainment internet searches. I agree with Moyse that deleting adult entertainment files is not caught by the word "activities" in the Consent Order as those activities would still need to be relevant to Moyse's conduct at Catalyst and/or with respect to issues raised in the litigation.

[73] Catalyst's submission as to the purported contempt is that the court should find, on a standard of beyond reasonable doubt, that Moyse's deletion of his personal browsing history resulted in deletion of any references to his searching his "Dropbox" files, and that such searches would have been relevant as evidence that Moyse was taking confidential information with him prior to departing Catalyst.

[74] However, the evidence does not support a finding beyond a reasonable doubt that there were such files on Moyse's personal computer. It is not enough for Catalyst to speculate

that in the course of deleting his personal browsing history, Moyse may have deleted references to searches of Dropbox files.

[75] The Amended Report of the ISS, dated March 13, 2015, states that Digital Evidence International ("DEI"), the forensic computer expert retained by the ISS, searched Moyse's iPad and found over 1,000 "Catalyst" documents in Moyse's iPad Dropbox. The ISS stated:

> DEI was able to generate a list of documents accessible from this device from the 'Dropbox' iOS application. The iPad contained records for some 1,327 total documents which were recorded by the operating system as accessible to the user at some point in time. Of these documents, a total of 1,017 documents were contained in a folder entitled 'Catalyst'. I have attached as **Appendix 'N'** a copy of the list of files contained within the 'Catalyst' folder, from the data supplied by DEI. The data generated also include a record of the last time that each file was recorded to have been accessed by the user, which is contained within that spreadsheet. I note that there are no records of the documents in the Dropbox being reviewed on any date subsequent to April 16, 2014, and therefore no evidence that the Dropbox files were viewed subsequent to Moyse's departure from Catalyst on the iPad device. [Emphasis in original.]

[76] Catalyst seeks to rely on Moyse's evidence that he accessed Dropbox from time to time, and as such, relevant search history from his computer must have been deleted. However, there was no evidence as to whether Moyse accessed Dropbox through his personal computer or his iPad. Moyse's evidence was that he did not know whether he accessed Dropbox through an "app" (which could have been on his iPad) or by internet (which could also have been through his iPad) (see questions 254-260 of his cross-examination transcript).

[77] Further, Moyse was asked by Catalyst counsel that "if I'm correct that your Dropbox, your history of accessing Dropbox, was retained in your browsing history, you would also have been successful in deleting that, right?" Moyse answered that "I access my Dropbox through a variety of other means" (see questions 294-300 of his cross-examination transcript).

[78] Consequently, there is no evidence, on the standard of beyond reasonable doubt, that Moyse deleted Dropbox information from his personal computer when he deleted his personal browsing history and ran the registry cleaner. Given the over 1000 "Catalyst" files on his iPad Dropbox account, and Moyse's explanation that he may have accessed Dropbox files through an "app", I cannot find (on a standard of beyond reasonable doubt) that Moyse deleted his personal browsing history relevant to Dropbox from his personal computer and as such, I cannot find contempt of court for deleting relevant information from his personal computer.

[79] I note that even if I found that it was beyond reasonable doubt that Moyse deleted relevant Dropbox searches from his personal computer, I would exercise my discretion to decline to making a finding of contempt as such conduct would have occurred as a result of Moyse's "good faith" efforts to comply with the Consent Order while deleting embarrassing personal files which were not relevant to the litigation.

c) Use of the Secure Delete program

[80] Catalyst submits that it is beyond reasonable doubt that Moyse ran the Secure Delete program to delete relevant files from his personal computer. I do not agree that the evidence supports such a conclusion.

[81] First, all of the forensic experts agreed that the presence of a Secure Delete folder on Moyse's system is not evidence that he ran the program.

[82] DEI, on behalf of the ISS, indicated that it could not conclude from the presence of a folder whether the program had been used to delete files. Musters, the forensic expert retained by Catalyst, acknowledged on cross-examination that "the Secure Delete program was launched, but it doesn't yet speak to whether or not files or folders were deleted". Lo, the forensic expert retained by Moyse, gave the same opinion, *i.e.*, that the presence of a Secure Delete folder is not evidence that Moyse ran the program.

[83] Second, Lo's evidence was that he had conducted a complete forensic analysis of Moyse's computer and found no evidence that Secure Delete had been used to delete any files or folders from Moyse's computer. Lo's expert opinion evidence was that if the Secure Delete program had been run on the computer, a log would have been found which maintains records of the files deleted (the "Secure Delete Log"), but no such log exists on Moyse's computer.

[84] Catalyst's expert, Musters, initially gave opinion evidence that it was a "relatively simple" matter to "reset" the Secure Delete Log by using a function called Registry Editor to hide any trace of having run the program. Musters did not append as an exhibit to his affidavit the "publicly available information" on which he relied. Musters maintained his position in cross-examination. However, in an answer to an undertaking, Musters sought to "correct an error in his testimony" in that "the [publicly-available] information includes advice on the removal of the entire ASO program".

[85] Consequently, the evidence is that Moyse could not have easily deleted only the Secure Delete Log with publicly-available information. Instead, the conclusion sought by Catalyst, at a level of beyond reasonable doubt, is that Moyse ran Secure Delete to remove files and then (i) obtained information which explained how to remove the ASO software from his computer, (ii) chose not to use that information to remove all traces of that ASO software, (iii) instead removed only the Secure Delete Log files of the ASO (though Musters did not provide any publicly-available information which would simply instruct Moyes how to do so), (iv) but still left the ASO software, receipts, and emails in place to be easily found by a forensic investigator.

[86] I cannot find that the above evidence supports a finding, beyond reasonable doubt, that Moyse breached the Consent Order by scrubbing relevant files with the Secure Delete program. There still remained 833 relevant documents on his computer, as well as the evidence on his computer of the ASO program, the Secure Delete folder, and the purchase receipts. The evidence is at least as consistent with Moyse's evidence that he loaded the ASO

software and investigated the products it offered and what the use would entail, but he did not run the Secure Delete program.

[87] For the above reasons, I dismiss the Contempt Motion.

Order and costs

[88] Consequently, I dismiss Catalyst's motion in its entirety. If counsel cannot agree on costs, I will consider written costs submissions from each party of no more than three pages (not including a costs outline), to be delivered by West Face and Moyse within 14 days of this order, with Catalyst to respond within 14 days from receipt of the Defendants' submissions. The Defendants may provide a reply of no more than two pages to be delivered within 10 days of receipt of Catalyst's costs submissions.

GLUSTEIN J.

Date: 20150707