CITATION: Catalyst Capital Group Inc. v. Moyse, 2016 ONSC 5271
COURT FILE NO.: CV-16-11272-00CL
DATE: 20160818

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:	)	
	)	
THE CATALYST CAPITAL GROUP INC.	)	Rocco DiPucchio, Andrew Winton and Bradley Vermeersch, for the Plaintiff
Plaintiff	)	
	)	Robert A. Centa, Kris Borg-Olivier and Denise M. Cooney, for the Defendant Brandon Moyse
– and –	)	
BRANDON MOYSE and WEST FACE CAPITAL INC.	)	
	)	Kent E. Thomson, Matthew Mile-Smith and Andrew Carlson, for the Defendant West Face Capital Inc.
Defendants	)	
	)	
	)	**HEARD:** June 6, 7, 8, 9, 10 and 13, 2016

NEWBOULD J.

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REASONS FOR JUDGMENT

Nature of action

[1] The Catalyst Capital Group Inc. (“Catalyst”) brings this action against West Face Capital Inc. (“West Face”) for an alleged misuse of confidential Catalyst information regarding WIND Mobile Inc. (“WIND”) that Catalyst claims was obtained by West Face from the defendant Brandon Moyse who had previously worked for Catalyst before joining West Face. Catalyst claims that West Face used that confidential Catalyst information to successfully acquire an interest in WIND.

[2] Both Catalyst and West Face are Toronto-based investment management firms and have been competitors on potential deals. They were competitors in the chase for WIND.

[3] West Face was part of a consortium that acquired WIND. Before it did so, Catalyst was a bidder for WIND and had an exclusive right for a period of time to negotiate a purchase. When Catalyst failed to conclude a purchase of WIND, West Face and its consortium partners acquired an indirect interest in WIND on September 16, 2014 based on an enterprise value of WIND of $300 million.

[4] Mr. Moyse was an analyst at Catalyst for a little under two years. He left Catalyst in May 2014 and worked at West Face for three and a half weeks from June 23 to July 16, 2014. It is alleged that at some time between March 14, 2014 when Mr. Moyse first spoke to West Face and July 16, 2014 when he stopped working at West Face he gave West Face confidential information regarding Catalyst's strategy to acquire WIND that was used by West Face to structure its bid for WIND.

[5] The consortium in which West Face was a member later sold West Face to Shaw Communications for approximately $1.6 billion. Catalyst claims an accounting of the profits made by West Face

[6] Catalyst also claims against Mr. Moyse for an alleged spoliation of documents and claims against West Face for that spoliation on a theory of vicarious liability.

[7] Catalyst acknowledges that it has no direct evidence that Mr. Moyse provided confidential information to West Face regarding WIND. It says that an inference should be drawn from all of the evidence that Mr. Moyse did so. It is therefore necessary to deal with the evidence in some detail.[1]

[8] For the reasons that follow, the action is dismissed in its entirety.

Assessment of the evidence

[9] In making credibility and reliability assessments, I find helpful the statement of O'Halloran J.A. in *R. v. Pressley* (1948), 94 CCC 29 (B.C.C.A.) at p. 34:

> The Judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[10] In this case, the evidence in chief for all witnesses was given by way of affidavits, and all witnesses were cross-examined at the trial. There is great benefit in proceeding this way. What it can lead to in some cases however, as to some extent in this case, is the repetition of evidence by more than one witness. This occurred, for example, in Messrs. Glassman and De Alba of Catalyst both stating in their affidavits that Mr. Moyse "led the preparation" of a PowerPoint presentation that Catalyst used in making a presentation to Industry Canada in Ottawa. This

[1] Unless stated otherwise, statements of fact in these reasons are findings of fact.

evidence was given to support the assertion of the deep knowledge that Mr. Moyse possessed of the strategic position being taken by Catalyst with the Government and thus with the negotiating strategy that Catalyst was taking with VimpelCom Ltd. regarding the acquisition of WIND. As I will discuss, this evidence was an overstatement of what occurred.

[11] Dealing first with the evidence of the witnesses for the plaintiff, I must say that I had considerable difficulty accepting as reliable much of the evidence of Mr. Newton Glassman. He was aggressive, argumentative, refused to make concessions that should have been made and contradicted his own statements made contemporaneously in emails. I viewed him more as a salesman than an objective witness. I will deal with only a few examples:

(a) It was put to Mr. Glassman on cross-examination that Catalyst's request to sell a fourth wireless carrier without restrictions after five years was crucial. His response was "I don't know what you mean by crucial. Very, very important." Yet his affidavit sworn shortly before the trial on May 27, 2016 said precisely what had been put to him: "Catalyst's request to sell the fourth wireless carrier without restriction after five years was crucial…". When this was pointed out to him, he stated "Crucial in the context of, yes, in my use of the word crucial, yes. As I said, I don't know what you mean by crucial."

(b) The presentation made to the Government of Canada on March 27, 2014 by Mr. Glassman stated that Catalyst was in advanced discussions with VimpelCom to gain control of WIND. Mr. Glassman refused to agree that this statement was misleading, when it surely was. Catalyst had by then had no access to the WIND data room, had not yet retained its financial advisor Morgan Stanley, had not yet retained a technical expert and had not exchanged any draft agreement with VimpelCom. Mr. Glassman would go no further than to say that you can have advanced discussions on an informal basis.

(c) A central point Mr. Glassman asserted in his evidence was that he had picked up from his discussions with Government officials that the Government would eventually grant the concessions wanted by Catalyst to the regulatory environment that would permit spectrum to be sold by new entrants such as WIND to one of the three incumbents Bell, Rogers or Telus. His position is that this belief would be of importance to a competing bidder and that it was told to West Face by Mr. Moyse. Mr. Glassman referred to the Governments "unofficial position" and "softening body language".

(d) Yet from the start Government officials had made clear that no such concessions would be given. Mr. Glassman's own email of May 7, 2014 stated that he had been told by Catalyst's public relations consultant Mr. Bruce Drysdale, who had extensive experience in working with the Government, that the Government would not give in writing the right to sell spectrum in five years and that this took his preferred option to set up a fourth retail carrier in Canada off the table. Catalyst's lawyers Faskens advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed. Mr. Glassman's response was that he had more experience in this than the writer did, which was clearly not the case. On July 25, 2014 Mr. Drysdale said that Industry Canada reached out to him and said that seeking concessions was a dead end. Mr. Glassman's response was that he had more experience in this than Mr. Drysdale did, which was clearly not the case, and he went so far as to say that no one in Canada had the experience except him. On August 3, 2014 Mr. Drysdale told Mr. Glassman that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Glassman's response was that the email confirmed to him that the Government was trying desperately to set the table for future discussion about regulatory concessions. When pressed further on the email, Mr. Glassman said "with the greatest of respect, there is a big difference between people's words and people's

> actions. We were depending on people's actions. And that is a very telling development." There was no evidence of any Government action that could lead one to expect the Government would relent and grant concessions. Nor is there a single contemporaneous document evidencing Mr. Glassman's view of a softening of the Government's position or that eventually the Government would grant concessions.

[12] Mr. Gabriel De Alba also overstated matters and refused to concede points that he should have. He also engaged in argument rather than answering questions. I have already referred to his statement that Mr. Moyse led the preparation of the PowerPoint presentation to the Government. His evidence was given, like Mr. Glassman's, to attempt to show how important Mr. Moyse was to the Catalyst WIND team and to show a deep understanding held by Mr. Moyse of the Catalyst WIND position. An example was a *pro-forma* of a combined WIND and Mobilicity done by Mr. Moyse under Mr. Michaud's supervision. It was a simple exercise based on public information or information already known to Catalyst and required no knowledge of Catalyst's WIND strategy. Mr. De Alba refused to acknowledge this and referred to things that could be implied from the fact of doing the work. He blew up by far what Mr. Moyse had done. In response to the fact that Mr. Glassman did not ask Mr. Moyse for a copy of the second presentation to be made to the Government, but rather asked other Catalyst persons and advisors involved, Mr. De Alba suggested it was because Mr. Glassman might not want to have overwhelmed Mr. Moyse with more pressure, which he said was the way Mr. Glassman treated analysts. This made no sense as Mr. Glassman made clear in his evidence that he put pressure on everyone, including his partners, to achieve his ends.

[13] Mr. Riley's evidence was given in a straightforward manner. It is clear, however, that prior affidavits of his were mistaken and speculative in some measure.

[14] I viewed the West Face witnesses as being straightforward. They were impressive and did not engage in overstatement. They were not any more argumentative than most intelligent witnesses although Mr. Griffin had a tendency from time to time to stray from the question. On

all crucial points they were not shaken. I viewed the evidence of Mr. Leitner of Tennenbaum and Mr. Burt of 64NM Holdings in the same light. They are independent of West Face. The fact that their evidence was consistent with the evidence of the West Face witnesses supported the reliability of the West Face witnesses. A major argument of Catalyst was that a number of emails amongst West Face personnel and Messrs. Leitner and Burt referred to Catalyst as the bidder with VimpelCom for WIND, an indication that they had been told that Catalyst was the bidder, and that an email referred to their bid to VimpelCom being superior to any other offer, an indication that they had been told of the terms of the Catalyst offer to VimpelCom. That was a serious allegation. In the end I accepted their evidence that they thought for various reasons that the other bidder was Catalyst without knowing it and that they had not been told of the Catalyst bid terms. Of course, even if they had been told of these things, it does not mean that they were told that by Mr. Moyse, which is the central claim in this action.

[15] Criticism is made by Catalyst of the truthfulness of the evidence of Mr. Moyse. He admittedly wiped his BlackBerry before giving it back to Catalyst. He deleted during the hiring process with West Face an email sent to West Face that included confidential Catalyst information not involving WIND. He wiped his internet browsing history from his personal computer before turning it over to his counsel to permit an image to be taken of his hard drive to look for any communications by him of confidential Catalyst information to West Face. He acknowledged at trial his error in doing these things, but it raised a question of why he had done those things and whether his explanations were to cover up improper activity in providing confidential Catalyst information regarding WIND to West Face. I have therefore given a critical eye to all of Mr. Moyse's evidence. On the crucial point of the case I have accepted his evidence that he did not communicate anything about Catalyst's dealings regarding WIND to West Face.

[16] Mr. Moyse made some errors in his initial affidavit sworn in July 2014 in response to the Catalyst motion for an injunction. Catalyst contends that the affidavit was purposely drawn to mislead the Court and is an indication that Mr. Moyse is a witness who should not be believed. I have given consideration to the Catalyst arguments but have concluded that Mr. Moyse did not intend to mislead the Court.

Brief history of WIND

[17] WIND is a Canadian wireless telecommunications provider that was originally formed in 2008 pursuant to a joint venture between two parties: (1) AAL Corp. (now Globalive), which was the holding company of Anthony Lacavera; and (2) Orascom Telecom Holding S.A.E., a large Egyptian multi-national telecommunications company. AAL and Orascom held their interests in WIND indirectly through a corporation called Globalive Investment Holdings Corp. ("GIHC").

[18] Due to regulatory restrictions on foreign ownership of Canadian telecommunications operators that existed at the time, AAL held a majority (66.68%) of the voting interests in GIHC (compared to 32.02% for Orascom), even though Orascom held a majority (65.08%) of the total equity interests (as compared to 34.25% for AAL). In 2008, WIND paid $442 million for the rights to use a portion of wireless spectrum for a wireless telecommunications service in an auction held by Industry Canada. The spectrum WIND acquired licenses to use at that time was known as AWS-1 (AWS stands for "advanced wireless services").

[19] WIND's AWS-1 wireless spectrum was acquired in a "set aside" auction from which incumbent wireless carriers were excluded, and was subject to a restriction on transfer to incumbents for at least five years. In addition to this restriction, WIND's AWS-1 spectrum was at all times subject to numerous restrictions on transfer: (i) the Minister of Industry's unilateral discretion whether to permit transfer pursuant to the terms of license; (ii) *Competition Act* approval; (iii) *Investment Canada Act* approval; and (iv) CRTC approval.

[20] The CRTC initially blocked WIND's launch on the basis that Orascom's involvement breached Canadian ownership requirements, and it took Federal Cabinet intervention to overrule the CRTC in this regard. In December 2009, WIND commenced operations, providing mobile data and voice services in the Greater Toronto and Hamilton Area in Ontario, and in Calgary, Alberta. WIND later expanded into Ottawa and parts of southern Ontario, as well as Edmonton, Alberta, and Vancouver, Abbotsford, and Whistler, British Columbia.

[21] In 2011, VimpelCom Ltd. acquired the majority shareholder of Orascom, giving VimpelCom a controlling interest in Orascom and, indirectly, Orascom's investment in WIND. VimpelCom is a publicly-traded international telecommunications and technology business with more than 200 million customers. While it has been formally headquartered in the Netherlands since 2010, its principal shareholder is controlled by Russian interests.

[22] Notwithstanding 2012 legislative amendments that loosened certain restrictions on foreign control of smaller telecommunications service providers like WIND, foreign ownership of the wireless industry in Canada remained heavily regulated. In 2012 VimpelCom and Globalive signed an agreement under which VimpelCom would acquire all of Globalive's interest in WIND. However, VimpelCom was unable to obtain regulatory approval notwithstanding the looser regulatory restrictions. This became known in the press.

[23] VimpelCom became frustrated by the regulatory hurdles it faced in Canada, and this frustration drove its decision to divest its ownership of WIND.

[24] In early 2013, following VimpelCom's inability to obtain regulatory approval to buy out Globalive, VimpelCom engaged UBS Securities to assist VimpelCom in its efforts to find a purchaser for its debt and equity interests in WIND, or for WIND in its entirety. Various parties expressed an interest in doing so.

[25] Both Catalyst and West Face had a longstanding interest in the Canadian telecommunications industry. As early as 2009, Globalive separately approached Catalyst and West Face about the possibility of being a source of Canadian capital for WIND, and discussed WIND's capital structure and Globalive's role in it. Both Catalyst and West Face were therefore at all relevant times familiar with WIND's ownership structure.

[26] Verizon was a bidder but chose in late 2013 not to pursue it. At this point, VimpelCom had grown increasingly frustrated with its inability to either acquire voting control of WIND or to conclude a transaction to allow it to exit the investment. In addition to its voting and non-voting shares, VimpelCom held (both directly and through Orascom) over $1.5 billion in debt

owed by WIND, which WIND had no way of re-paying. WIND was also subject to approximately $150 million in third party vendor debt that was coming due on April 30, 2014. WIND's tenuous financial position at the time created a real risk that its creditors would call its debt, put WIND into insolvency, and allow its creditors to recover the proceeds from the sale of WIND's assets.

[27] It became known in the marketplace that VimpelCom was willing to sell its interest in WIND based on an enterprise value of approximately $300 million, of which $150 million would satisfy the vendor finance debt and the remainder would go to VimpelCom and Globalive.

[28] On November 4, 2013, Mr. Lacavera, the Chairman and CEO of WIND called West Face and advised them that VimpelCom was interested in selling its debt and equity interest in WIND and in arranging for the repayment of WIND's third party debt. West Face delivered an expression of interest to VimpelCom and AAL on November 8. Shortly after, on December 7, West Face entered into a confidentiality agreement with VimpelCom and Orascom and thus gained access to the WIND data room.

[29] Catalyst began negotiating a potential investment in WIND with VimpelCom and UBS in late 2013. On January 2, 2014, Catalyst sent a letter of intent to VimpelCom that set out proposed terms of a WIND transaction. On March 22, 2014, Catalyst executed a confidentiality agreement with VimpelCom and Orascom.

[30] Both West Face and Catalyst had negotiations with VimpelCom and its advisor UBS through the first half of 2014. On July 23, 2014 VimpelCom granted Catalyst an exclusive negotiating period to conclude a binding agreement for the acquisition of WIND. This period of exclusivity was extended several times to August 18, 2014 when VimpelCom refused to extend it further after Catalyst would not agree to a break fee of $5 to $20 million if regulatory approval was not granted within 60 days.

[31] On August 7, 2014 Tennenbaum on behalf of itself and West Face and 64NM Holdings (the vehicle set up by LG Capital LLC for the WIND acquisition) sent a proposal to VimpelCom

for the acquisition of VimpelCom's interest in WIND. On August 25, 2014, West Face's counsel delivered to VimpelCom's counsel an executed conditional financing commitment letter on behalf of a consortium of investors, including West Face, Tennenbaum Capital Partners LLC, 64NM Holdings LP, Globalive and two other investors. Ultimately a definitive purchase agreement was signed for the acquisition of VimpelCom's interest in WIND and the transaction closed on September 16, 2014.

Brandon Moyse's role at Catalyst

[32] Mr. Moyse is currently 28 years old, and at the time of the events giving rise to this action, he was 26 years old. He lives in Toronto with his fiancée. He earned his Bachelor of Arts degree in Mathematics from the University of Pennsylvania.

[33] Prior to working for Catalyst, Mr. Moyse was employed at Credit Suisse in New York and RBC Capital Markets in Toronto as a junior banker on their respective debt capital markets desks.

[34] Mr. Moyse commenced work as an analyst at Catalyst on November 1, 2012. He resigned on May 24, 2014, and pursuant to the terms of his employment agreement, his employment ended on June 22, 2014.

[35] Analysts are the lowest level of investment professionals at Catalyst. The investment professionals employed at Catalyst, and the hierarchy amongst them during the relevant period, was as follows: (i) partners: Mr. Glassman, Mr. De Alba, and Mr. Riley; (ii) vice-president: Zach Michaud; (iii) associate: Andrew Yeh, through early March 2014; and (iv) analysts: Mr. Moyse and Lorne Creighton.

[36] As an analyst, Mr. Moyse performed financial and qualitative research both on Catalyst's potential investment opportunities, and on portfolio companies already owned by Catalyst. During his last six months at Catalyst, Mr. Moyse spent the majority of his time working on two Catalyst portfolio companies. His responsibilities on these portfolio companies required him to

spend a significant amount of time outside the office, and he spent approximately half his time travelling throughout the United States.

[37] There is a difference in the evidence given on behalf of Catalyst and given by Mr. Moyse as to the importance of the role of a young analyst such as Mr. Moyse at Catalyst. It may not be of crucial importance, as what Mr. Moyse did that is relied on by Catalyst is fairly clear. He worked on a PowerPoint presentation made by Catalyst to the federal Government that is heavily relied on by Catalyst. However, for reasons that will be explained, I much prefer the evidence of Mr. Moyse that his role was of far less importance or central to Catalyst's dealings regarding the potential WIND transaction than as articulated by Mr. Glassman and Mr. De Alba, two of the three original partners of Catalyst along with Jim Riley who later became a partner when he joined Catalyst.

[38] Mr. De Alba's evidence was that Catalyst uses a very flat, entrepreneurial staffing model and that investments are reviewed by a "deal team", which typically consists of a partner, a vice-president and an analyst. His evidence was that analysts at Catalyst participate in every part of a deal and are intimately aware of Catalyst's strategies and negotiations. Mr. Glassman went so far as to say that no deal would be approved by him without the entire deal team agreeing with it. I take that with a large grain of salt. Mr. Glassman and Mr. De Alba were the founders of Catalyst with a great deal of experience in the investment world and in the telecommunications industry. It makes little sense that they would not agree to a deal if a junior analyst such as Mr. Moyse did not agree. The evidence of Mr. Riley, who later joined Catalyst as a partner in 2011, is more telling and accords with common sense. His evidence was that a decision on an investment would be made by the three partners of Catalyst but that the ultimate says would be by Mr. Glassman, the chief investment officer of Catalyst. Mr. Glassman described Mr. Moyse as the most junior member of the team and I do not accept his assertion that he would have effectively ceded control of an investment decision to a junior person such as Mr. Moyse.

[39] In the case of the WIND project, it would not have been necessary for Mr. Moyse to be intimately involved in all of the strategic decisions and I do not think he was. Although Mr.

Glassman testified that Mr. Moyse would have been involved in all discussions regarding strategy, and asserted that Mr. Moyse had the most knowledge of the WIND file, he admitted on cross-examination that Mr. De Alba, the chief negotiator on the WIND initiative, had more knowledge than Mr. Moyse on the WIND file. That is hardly surprising.

[40] In late February or early March 2014, Mr. Moyse was assigned to Catalyst's "core" telecommunications deal team, as a result of the departure of an associate named Mr. Yeh from Catalyst. Before that, he knew that Catalyst had an investment in Mobilicity and was interested in building a fourth wireless carrier in Canada, potentially involving WIND and that Catalyst planned to bid for wireless spectrum in a forthcoming Canadian spectrum auction (which it later decided not to do)

[41] On March 7 and 8, 2014, after he was assigned to the core telecommunications team, Mr. Moyse prepared a *pro-forma* statement that showed a combined WIND and Mobilicity entity. This was done under Mr. Michaud's supervision. Mr. Moyse collected data which was either publicly available or known to Catalyst, and then performed basic arithmetic to yield the final product. Mr. Michaud identified the specific data inputs he wanted to assess for the combined entity (i.e. network value, spectrum value, subscribers). No knowledge of Catalyst's plans or strategy was required for Mr. Moyse to complete this assignment. Mr. De Alba has blown out of all proportion what this assignment involved.

[42] Mr. Moyse's next contribution to Catalyst's telecommunications file while on the team occurred on March 26, 2014 in the afternoon and late into the night, when Catalyst prepared a PowerPoint slide deck for a presentation to be made to Industry Canada the following day. The PowerPoint was intended to be a framework for discussion with Government personnel. The PowerPoint outlined the existing regulatory environment and a number of options available to the Government, and the concessions that Catalyst believed would be required. Generally, the presentation set out three strategic options for the creation of a fourth national wireless carrier, being Option 1: a carrier focused on the retail market; Option 2: a carrier focused on the wholesale market; and Option 3: a litigation option.

[43] Both Mr. Glassman's and Mr. De Alba's evidence was that Mr. Moyse "led the preparation" of the PowerPoint presentation that Catalyst used in Ottawa. This evidence was given to support the assertion of the deep knowledge that Mr. Moyse possessed of the strategic position being taken by Catalyst with the Government and thus with the negotiating strategy that Catalyst was taking with VimpelCom regarding the acquisition of WIND. Their evidence was an overstatement of what occurred.

[44] Mr. Moyse's evidence was that his role was largely administrative. He said that Mr. De Alba, Mr. Riley, and Mr. Michaud generated the content and analysis which was contained in this presentation and gave him handwritten mock-ups of the slides which he then transposed into PowerPoint format. He testified that he was not involved in any discussions or debates involving these three persons to determine the content of the presentation. They did not ask for his input into the content of the slides and he did not provide any. Because the slides were required for a meeting in Ottawa the next day, the workplace was frantic. Mr. Moyse's contributions involved layout, data input and the creation of two tables based on publicly available information, one of which was the *pro-forma* which Mr. Moyse had prepared in March.

[45] I accept Mr. Moyse's evidence. Mr. Glassman admitted on cross-examination that it was he and the partners of Catalyst, and not Mr. Moyse, who were the architects of the Catalyst strategy in dealing with the Government of Canada. Mr. Glassman said in his affidavit that he, Mr. De Alba and Mr. Riley gave Mr. Moyse notes to use in the preparation of the PowerPoint presentation, although on cross-examination he waffled on the point but acknowledged that he may have given Mr. Moyse notes and that he knew for a fact that Mr. De Alba did. He also said that for sure he would have participated in discussions and provided direction to Mr. Moyse. Mr. Riley in one affidavit said that Mr. Moyse "helped create" the PowerPoint presentation, which is much closer to the truth.

[46] Nor do I accept Mr. Glassman's undocumented and unspecified assertion that Mr. Moyse was privy to all of Catalyst's deal priorities, internal conclusions, formal and informal discussions with Catalyst's advisors, and any advances Catalyst had made with the regulators on

these issues leading up to the March 27, 2014 meeting with the Government of Canada. Great store by Catalyst witnesses is put on what were described as Monday morning meetings that were said to be required meetings at which it is said that full discussion of all aspects of the proposed WIND opportunity was regularly held. I have difficulty with this evidence. Mr. Glassman described them as Monday morning meetings in his affidavit but in evidence at trial said they were over lunch. He testified there was a schedule of what was to be discussed and that their proprietary software produced a package for everyone to take a copy of at the beginning of the meeting. Yet no notes of any kind have been produced by Catalyst regarding these Monday meetings and Mr. Glassman said he had no idea why they had not been. Mr. De Alba testified that only a one-page agenda was prepared for the meetings and that no written materials were generally prepared. He also testified that it would not be the general practice for any presentation regarding WIND to be prepared for the meetings. In answer to undertakings, Catalyst stated that Catalyst's investment team has reviewed all notebooks and notes and could not locate any existing notebooks or notes concerning WIND.

[47] Mr. Moyse's evidence was that as an analyst, he had no direct input into Catalyst's investment decisions or strategy, but was instead assigned specific research projects by the partners, and vice-president. He said that given the junior nature of his position, he had very little knowledge of Catalyst's potential investments and its strategy for those investments. He regularly attended Catalyst's Monday meetings with the Catalyst investment team and other related individuals, including members of Catalyst's finance and accounting teams. The bulk of those meetings were spent discussing domestic and international economic issues. At most, but not all, Monday meetings, there would be discussion of Catalyst's portfolio companies, and less often, discussion of deals which Catalyst was actively pursuing. Mr. Moyse also said that while these meetings did at times feature some discussion of Catalyst's investment strategies, it was clear that these were premised on higher-level partners-only discussions that were taking place, to which he was not privy. Catalyst's partners would frequently discuss conversations or correspondence in front of the analysts without providing any context to him. They would also frequently gather after the meetings to discuss matters behind closed doors. Mr. Moyse testified

that he could not recall specific discussions at a Monday meeting in which Catalyst's strategy with the Government or VimpelCom was discussed.

[48] Mr. Moyse's evidence makes sense and neither Mr. Glassman nor Mr. De Alba gave evidence of any specific Monday meeting in which they informed Catalyst's WIND deal team in general, or Mr. Moyse in particular, of Catalyst's confidential regulatory strategy. Nor could they identify any particular meeting attended by Mr. Moyse in which any specific piece of information was allegedly discussed. I cannot find that Mr. Moyse was aware from meetings he attended at Catalyst of the negotiating strategy of Catalyst with the Government of Canada or with VimpelCom.[2]

[49] The PowerPoint presentation to the Government stated that for options 1 and 2, Catalyst required the ability to transfer or license spectrum to incumbents (Telus, Rogers and Bell) and to exit the investment with no restrictions in five years. I take from the evidence that Mr. Moyse was aware when he prepared the PowerPoint presentation on May 26, 2014 of the concessions Catalyst would be looking for from the Government of Canada. How much knowledge or understanding he had other than what was stated in the presentation is very questionable and it is debatable how much Mr. Moyse continued to retain in his memory afterwards. The presentation, along with a second presentation prepared on May 12, 2014 and notes or drafts relating to them

[2] Catalyst contends that in his earlier affidavit of July 7, 2014, filed for the pending injunction motion that did not proceed, Mr. Moyse understated at paragraph 11 his role at Catalyst regarding WIND and that this is an indication that Mr. Moyse has something to hide about the extent of his knowledge of WIND. I do not accept that contention. In the affidavit Mr. Moyse stated that he had typed notes of Mr. De Alba, Mr. Riley and Mr. Michaud into a PowerPoint presentation in the Mobilicity file. In his evidence he said that was his recollection at the time and that he was wrong as it was in the WIND file that the PowerPoint presentation was made. There was no PowerPoint in the Mobilicity file. Mr. Moyse was obviously mistaken and I do not accept that Mr. Moyse intentionally misled the Court. There was also a mistake in paragraph 56 of the affidavit in which Mr. Moyse said he was not privy to any internal discussions about the strategy behind Catalyst's potential acquisition of WIND. He was privy to the extent he participated in the preparation of the PowerPoint, and Mr. Moyse readily acknowledged at trial he was partly wrong but said that he didn't remember at the time the details of the PowerPoints given how frantic the pace of work was, and in terms of structuring, was still not sure he really knew anything about that. I do not accept that Mr. Moyse intended to mislead the Court.

were later destroyed by Catalyst, said by Mr. Glassman to have been at the request of Government personnel.[3]

[50] On May 6, 2014, Mr. Moyse found out that Catalyst would be actively pursuing a transaction involving WIND. After that, Catalyst's internal team of which he was a member focused on preparing the investment memorandum which would set out Catalyst's investment thesis, and which at the time of his departure from Catalyst did not contain any regulatory strategy, and reviewing the external advisors' work. He was also actively involved in Catalyst's early due diligence commencing on May 7, 2014. Although Mr. Glassman and Mr. De Alba asserted that Mr. Moyse was kept intimately apprised of Catalyst's strategy during this period, the documentary evidence does not support that evidence. The assertions are also contradicted by the admission of Mr. Glassman on cross-examination that Mr. De Alba, the chief negotiator on the WIND initiative, had more knowledge than Mr. Moyse on the WIND file.

[51] Another PowerPoint presentation to the Government of Canada was prepared on May 12, 2014. The Catalyst evidence was that Mr. Moyse again "led" its preparation. Mr. Glassman testified that one reason Mr. Moyse prepared the PowerPoint was that of people at Catalyst, he had the most knowledge of the file. I do not accept that. The evidence of Mr. Moyse, which I accept, was that his role was largely administrative. He was instructed to re-create a modified version of the March slide deck. Messrs. De Alba, Michaud and Riley then marked up a hard copy of the March 24 presentation and provided him their comments and changes, which he inputted into a new PowerPoint file. Given the hurried manner in which it was created, and his

[3] The evidence of Catalyst witnesses as to why the presentations and notes and drafts of them were destroyed differed from witness to witness and made little sense. Mr. Glassman testified in chief that someone from Industry Canada asked Catalyst not to keep work product that they, i.e. the Government thought might be politically sensitive. So the drafts were destroyed. He said the Government had no problem with Catalyst keeping the final version that was presented to the Government but that if the work product had issues that were not eventually discussed with the Government, Industry Canada did not want it potentially coming back to cause them problems. He went so far as to say that it was his experience that this happened often and frequently, especially if the meetings are on sensitive issues to the Government, but on cross-examination he said this presentation was the first he had ever made to the Government. Why the Government would be concerned with drafts of a presentation made to it that were never seen by the Government is puzzling indeed. Mr. Riley's evidence prior to the trial was that all copies of the presentation were destroyed and this was confirmed by way of an answer to undertakings. At trial he testified that he gave directions that all copies be destroyed because of the sensitivity of information in it. He did not say it was at the direction of the Government that he ordered their destruction.

largely administrative role, Mr. Moyse put little thought or analysis into the PowerPoint, and whatever work he did, he was instructed to do by one of Messrs. De Alba, Michaud or Riley.

[52] Mr. Moyse left for Southeast Asia on a vacation on May 16, 2014. He resigned by email from Catalyst on May 24, 2014, the second last day of his vacation. He told Mr. De Alba when they met in person on May 26, 2014 that he was going to work at West Face. Mr. Moyse was sent home by Mr. Riley on May 26, 2014, and he did no further Catalyst work after this date. Catalyst contacted its IT provider to revoke Mr. Moyse's access to Catalyst's servers.

Mr. Moyse's hiring by West Face

[53] In 2012, West Face had commenced a recruitment drive for a number of analyst positions and Mr. Moyse submitted an application to Mr. Dea, a partner at West Face. On September 25, 2012, Mr. Moyse emailed Mr. Dea to tell him that he had been offered a position at Catalyst. Mr. Dea congratulated Mr. Moyse at that time, but told him that Catalyst had a reputation in the marketplace as a difficult place to work.

[54] By late 2013, Mr. Moyse seriously started thinking about leaving Catalyst because he was not getting the learning opportunities he had set out to achieve when he joined the firm, and because he found the work environment to be oppressive, and lacking in common decency or respect for the individuals working there. This is not surprising evidence given the evidence of Mr. Glassman as to how he treated everyone at Catalyst, including his partners, with pressure on Catalyst people being his *modus operendi*. Mr. Moyse was concerned about how much time was taken at Catalyst with portfolio companies and his lack of responsibility.

[55] On March 14, 2014, Mr. Moyse emailed Mr. Dea looking for a job in response to a West Face press release announcing the launch of its Alternative Credit Fund. West Face was looking to hire someone because it had just launched the Alternative Credit Fund, and West Face had a critical need for someone who had particular experience in all terms of credit to assist West Face in reviewing opportunities for this new fund.

[56] Mr. Moyse met with Mr. Dea over a cup of coffee at a coffee shop on March 26, 2014. The conversation was general. They discussed the financial industry generally and Mr. Moyse told Mr. Dea of his goal of working in a role where his focus was on pursuing new investments rather than monitoring existing portfolio investments. Mr. Dea asked Mr. Moyse run-of-the-mill interview questions to get a sense of what kind of experience he had gained at Catalyst and at his other previous employers, RBC and Credit Suisse. The conversation was generic in nature and there was no discussion of specific things Mr. Moyse had worked on at Catalyst.

[57] During that conversation, Mr. Dea asked Mr. Moyse to provide him with his resume, a deal sheet, and some writing samples to demonstrate his written communication skills. Mr. Dea and Mr. Moyse both testified that Mr. Dea explicitly instructed Mr. Moyse to redact any confidential information as necessary. Early the next morning at 1:47 a.m., at a time that Mr. Moyse had to be tired, Mr. Moyse sent to Mr. Dea an email which attached four investment memoranda he had prepared while at Catalyst involving four corporate opportunities. Three of the memoranda were marked as confidential. None involved the telecommunications industry. Mr. Moyse admitted in his evidence that it was an error in judgment to send these memoranda even though they were based on public information. He realized this shortly after he sent them and deleted the email from his computer. He acknowledged in his evidence that it was a mistake to have deleted the email. I do not take the fact that he sent the memoranda and quickly deleted it as indicating a cavalier attitude about confidentiality

[58] Mr. Moyse had further interviews with West Face. On April 15, 2014, he met with Peter Fraser, Tony Griffin, and Yu-Jia Zhu for a series of short interviews. On April 28, 2014, he met with Greg Boland for a brief interview. On May 16, 2014 he received an oral offer from Mr. Dea and a written signed employment agreement on May 26, 2014. As Mr. Moyse had previously advised that he was subject to a 30-day notice period under his employment agreement with Catalyst, his employment with West Face was scheduled to begin on June 23, 2014.

[59] Catalyst is quite critical of Mr. Moyse in sending the memoranda and of West Face in how it dealt with them, and invites inferences to be drawn from what it says is the cavalier way

in which West Face treated confidential information. In general, I agree with West Face that this issue is a red herring with little or no substance regarding the alleged obtaining and misuse by West Face of confidential Catalyst information. The memoranda had nothing to do with WIND or the confidential Catalyst information alleged to have been obtained and used by West Face.

[60] Moreover, West Face treated seriously the issue of the confidentiality of the memoranda sent by Mr. Moyse to Mr. Dea. Mr. Griffin raised concerns with Mr. Dea about the memoranda that Mr. Moyse had sent to Mr. Dea and wondered if it exhibited a character flaw. Mr. Dea's view was that Mr. Moyse had received very strong endorsements from people who had worked in the past with him and he thought that Mr. Moyse was a suitable candidate. Mr. Dea spoke to Mr. Alex Singh, West Face's general counsel, and asked him to speak to Mr. Moyse and impress upon him the obligation to keep in confidence any confidential information of West Face and of his previous employers. Mr. Singh spoke with Mr. Moyse around May 22, 2014. Mr. Singh impressed upon him that West Face takes matters of confidentiality very seriously and that he was not to disclose any information belonging to Catalyst. Around the same time Mr. Dea spoke to Mr. Moyse about the same thing and stressed that West Face took matters of confidentiality very seriously. Mr. Griffin decided to support hiring Mr. Moyse because he thought that there was no malicious intent on the part of Mr. Moyse in sending the memoranda and that it was an honest mistake of a young man.

[61] On May 24, 2014 while on his vacation, Mr. Moyse gave notice to Catalyst that he was leaving Catalyst and on May 26, 2014, his first day back in the office, he told Catalyst that he was joining West Face. On that day he was sent home by Mr. Riley and completely cut off from Catalyst.

[62] On May 30, 2014 counsel for Catalyst wrote to Mr. Boland, the CEO of West Face, and gave notice of a six month non-compete provision in Mr. Moyse's employment agreement with Catalyst and a confidentiality provision. The letter expressed concern that Mr. Moyse had or would be providing confidential Catalyst information to West Face. On June 3, 2014 employment counsel to West Face replied to counsel for Catalyst and took the position that the

non-compete provision was unenforceable. The letter also stated that West Face had impressed on Mr. Moyse that he was not to divulge any confidential information he had obtained while employed at Catalyst.

[63] During conversations between counsel on June 18, 2014, counsel to Catalyst informed counsel to West Face that Catalyst was particularly concerned about a specific transaction for which Catalyst and West Face had each submitted bids and identified this as a "telecom file".[4] As a result, West Face immediately established a confidentiality wall with respect to the WIND investment it was working on, which was the only telecom investment that West Face was working on at the time.

[64] On June 19, 2014, the day after learning of Catalyst's concerns about a "telecom deal" and four days before Mr. Moyse began work at West Face, the Chief Compliance Officer at West Face erected a confidentiality wall with respect to WIND and Mr. Moyse. The confidentiality wall was disclosed to counsel for Catalyst the same day.

[65] Pursuant to the confidentiality wall Mr. Moyse was forbidden from communicating with anyone at West Face about the ongoing WIND negotiations, and vice-versa, and West Face's IT group restricted access to all WIND-related documents so that Mr. Moyse could not access them. Notification of the confidentiality wall and its terms was circulated to all relevant personnel at West Face including its four partners. The chief compliance officer telephoned Mr. Moyse to discuss the terms of restrictions he would be under. In the call, Mr. Moyse was told that he was not to talk about WIND with anyone at West Face, to ask anyone at West Face about WIND, to disclose to anyone at West Face any information about WIND or to attempt to access any of West Face's files regarding WIND. Mr. Moyse indicated that he would comply. West Face's head of technology confirmed that Mr. Moyse was excluded from the computer directory containing WIND related documents. Once Mr. Moyse began working at West Face, the West Face WIND deal team only met in private, behind closed doors, and away from the trading floor area where Mr. Moyse was seated.

[4] The fact that West Face was in negotiations with VimpelCom for WIND was not public and was confidential to West Face. How Catalyst knew that was unexplained.

[66] Mr. Moyse began working at West Face on Monday, June 23, 2014. Three and a half weeks later, on July 16, 2014, after Catalyst had brought a motion for interim relief prohibiting him from being employed at West Face for the balance of his non-compete agreement, the parties agreed to an interim consent order, pursuant to which Mr. Moyse was put on indefinite leave. Ultimately, Mr. Moyse remained on leave due to these proceedings, never returned to work at West Face, and never performed any more work for West Face before he and West Face mutually terminated his employment in August 2015.

[67] During his period of active employment at West Face, Mr. Moyse was the most junior member of West Face's investment team other than a summer intern. He was not informed of the positions held by West Face funds, was not a member of West Face's investment committee, and did not participate in senior management meetings or have the authority to make investment decisions. Much of Mr. Moyse's three and a half week period at West Face was spent in orientation and training in order to acclimatize him to the West Face working environment. Mr. Moyse's substantive work was limited to performing some preliminary analyses on several potential investments that had nothing to do with WIND.

Test for breach of confidence

[68] The elements of an action for breach of confidence are: (1) that the information conveyed was confidential; (2) that it was communicated in confidence; and (3) that it was misused by the party to whom it was communicated. See *Lac Minerals Ltd. v. International Corona Resources Ltd*., [1989] 2 S.C.R. 574 at para. 129.

[69] Under the third element, misuse is any use of the information which is not authorized by the party who originally communicated it: see *Lac* at para. 139. Under this third branch, it is also necessary that the defendant's misuse of the information caused detriment to the plaintiff. See *Lac* at para. 161; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.) at para. 17 and *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74 (C.A.) at para. 48.

[70] Equity will pursue confidential information that comes into the hands of a third party who receives it with knowledge that it was communicated in breach of confidence. In *Cadbury Schweppes Inc. v FBI Foods Ltd*. [1999] 1 S.C.R. 142, the Supreme Court of Canada confirmed the principle by which third party recipients of confidential information may be held liable. In that case Justice Binnie stated:

> **19** Equity, as a court of conscience, directs itself to the behaviour of the person who has come into possession of information that is in fact confidential, and was accepted on that basis, either expressly or by implication. Equity will pursue the information into the hands of a third party who receives it with the knowledge that it was communicated in breach of confidence (or afterwards acquires notice of that fact even if innocent at the time of acquisition) and impose its remedies.

[71] Thus, if West Face received confidential information of Catalyst from Mr. Moyse and used it in its acquisition of its interest in WIND to the detriment of Catalyst, relief would be available to Catalyst.

Was Catalyst information conveyed by Mr. Moyse to West Face?

[72] The first hurdle faced by Catalyst is to establish on a balance of probabilities that West Face received any information from Mr. Moyse regarding Catalyst's involvement with WIND. Catalyst acknowledges that it cannot point to any direct evidence to demonstrate that Moyse transferred Catalyst’s confidential information concerning WIND to West Face. It contends that the Court must look to the overall course of conduct of West Face to determine if it can be inferred that the transfer of confidential Catalyst information occurred.

[73] Catalyst relies on a passage from *Gurry on Breach of Confidence*: *The Protection of Confidential Information*, 2d ed. (Oxford: Oxford University Press, 2012), at §15.02 which states that an inference of misuse may be drawn from an altered course of conduct on the part of the confidant which is explicable only by reference to the unauthorized use of confidential information. If that were the test, Catalyst’s claim would woefully fail as there are explanations for West Face’s conduct other than the use of confidential Catalyst information.

[74] I accept the statement in Catalyst's written submissions as to when inferences may be drawn:

> The general rule with respect to inference drawing is that the inference must be reasonably and logically drawn from a fact or group of facts established by evidence. The first step in the inference-drawing process is that the primary facts which provide the basis for the inference must be established by the evidence. Inferences can be drawn on the basis of reasonable probability.

[75] It is necessary, however, to be careful not to engage in speculation. In *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.), Doherty J.A. stated at p. 530:

> 52. A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation. As Chipman J.A. put it in *R. v. White* (1994), 89 C.C.C. (3d) 336 at p. 351, 28 C.R. (4th) 160 (Nfld. C.A.):
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> > These cases establish that there is a distinction between conjecture and speculation on the one hand and rational conclusions from the whole of the evidence on the other. The failure to observe the distinction involves an error on a question of law.

Allegation of breach of confidence

[76] Catalyst contends that a number of things were confidential to it and that the confidential information was conveyed to West Face by Mr. Moyse. Catalyst contends that the information in its presentations to the Government contained key confidential information, including (i) that Catalyst was in advanced discussions with VimpelCom to gain control of WIND[5], (ii) that to

[5] This statement made to the Government was clearly misleading. Catalyst had not by the time of the presentation on March 27, 2014 had any access to the VimpelCom and WIND data room, which first took place in May 2014. It had not yet retained Morgan Stanley as its financial advisor and did not do so before May 6, 2014 when it approached Morgan Stanley to request that it advise it on the acquisition of WIND, and had not yet retained a technical expert in the areas of operating a wireless network as late as May 16, 2014. Catalyst had had no negotiations with VimpelCom having just signed a confidentiality agreement on March 21, 2014. The first draft of an agreement to purchase WIND by Catalyst was dated May 9, 2014 and sent by UBS, the financial advisor to Globealive to Morgan Stanley. I do not accept Mr. Glassman's evidence that it was possible to have advanced discussions on an informal basis. He did not know what Mr. De Alba had discussed with VimpelCom. The presentation to the Government

build a fourth wireless carrier, which was the Government of Canada's stated goal, would require concessions from the Government including an unrestricted ability to sell the business to an incumbent (Rogers, Bell or Telus) in five years, and (iii) that if the Government did not agree to such concessions, litigation would likely follow against the Government (by someone other than Catalyst) caused by the Government's retroactive change to the 2008 spectrum licenses which would likely be successful and force the Government to give concessions. That retroactive change precluded new entrants from indefinitely selling its spectrum to an incumbent carrier. The earlier licences had permitted such a sale after five years.

[77] Mr. Glassman's evidence was that while he was told by Industry Canada that the Government of Canada would not give any such concessions, he believed that it was just posturing and that he sensed that the Government was softening its view on concessions. He claimed that his knowledge of the softening of the Government's position on concessions was confidential to Catalyst and that Mr. Moyse was told of that. He asserted that knowledge of his analysis of the weakness of the Government's position, based on his knowledge of a U.S. case involving the *F.C.C v. NextWave*, would prove invaluable to any other potential bidder since it in essence would massively mitigate, if not entirely eliminate, their financial risk in bidding for WIND.

[78] Catalyst contends that it would never acquire WIND without the Government's agreement that the business could be sold after five years to an incumbent. Mr. Glassman's view was that an independent fourth wireless carrier would not be viable or be able to survive without Government concessions permitting its spectrum to be sold to an incumbent and would be able only to compete in the short term with the incumbents on price and would be quickly squeezed out by the incumbents.

[79] Catalyst claims that Mr. Moyse knew that Catalyst would not bid for WIND without the agreement being conditional on regulatory approval that provided concessions permitting WIND

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stated that the purchase price for WIND was $500 million, which was far less than the price of $300 million that VimpelCom through UBS made known to Catalyst when it began its negotiations in May, 2014.

to sell its spectrum to an incumbent and that this information was provided to West Face. It claims that West Face and the consortium members used this information in making their acquisition of VimpelCom's interest in WIND without a condition requiring Government regulatory approval that would require concessions, which gave the consortium a leg up on Catalyst as it knew that VimpelCom did not want a conditional deal dependent on Government concessions and that Catalyst would not and could never make such a deal with VimpelCom.

[80] Catalyst also claims that the fact that it was bidding on WIND and the amount bid was confidential. West Face and the consortium bid the same price as Catalyst, being an enterprise value of $300 million.

[81] Catalyst has made an elaborate argument that changes made in the strategy of West Face to acquire WIND that led to an offer without any condition requiring Government concessions can reasonably be explained by West Face having obtained the confidential Catalyst information from Mr. Moyse and that an inference should be made that there was a transfer of such confidential information by Mr. Moyse to West Face. For the reasons that follow I reject this argument.

[82] There is direct evidence that Mr. Moyse did not impart any information about Catalyst's initiative with WIND to anyone at West Face. Mr. Moyse himself testified that he never imparted any information about WIND that he had learned at Catalyst. The West Face witnesses who testified, being Mr. Dea who was instrumental in hiring Mr. Moyse, Mr. Griffin who had primary responsibility for the WIND transaction while Mr. Moyse was actively employed at West Face, Ms. Kapoor who was the chief compliance officer and Mr. Zhu who was the vice-president at West Face all denied any communications or discussions with Mr. Moyse about WIND. Their evidence was not shaken and there are no documents in existence that indicate otherwise.[6] I accept their evidence.

[6] I reject the assertion made by Catalyst on the last day before the trial that in the interview of Mr. Moyse by Mr. Zhu, the vice-president of West Face, on April 15, 2014 they discussed WIND. The notes made by Mr. Zhu of the brief interview with Mr. Moyse list a number of things under a heading of Catalyst, including “live deals”. Mr.

[83] I have considered the evidence of Mr. Moyse carefully, particularly as he made some mistakes in providing confidential documents to West Face during his interview process and then deleted the email from his computer shortly afterwards when he realized it was a mistake to have done so. What he did later that has given rise to the spoliation allegation against him was done out of a personal concern not involving WIND or Catalyst and while it was a mistake which he acknowledges, I do not draw an inference of a general inclination to destroy relevant evidence or that his evidence should be disregarded. I viewed his evidence as being honestly given.

[84] There is no reason not to accept the evidence of the other West Face witnesses who testified that Mr. Moyse never discussed WIND with them. The fact that West Face took pains to impress upon Mr. Moyse before he started at West Face that his obligations of confidentiality to Catalyst were to be respected and that it set up a confidentiality wall once it was made aware of Catalyst's concerns regarding a telecom file that Catalyst said both firms were working on is contrary to the notion that West Face was interested in acquiring information regarding Catalyst's involvement in WIND.

[85] The evidence of Mr. Moyse and the West Face witnesses is also consistent with the evidence of the other members of the consortium who acquired their interests in WIND. Mr. Leitner of Tennenbaum, a most impressive witness and the senior partner leading Tennenbaum’s technology/media/telecom business, testified that neither West Face nor Mr. Moyse nor anyone else ever communicated to Tennenbaum anything about Catalyst's involvement with WIND or Catalyst's regulatory strategy, that no such information was discussed among the investors and that until he read Mr. Glassman's affidavit he did not have any understanding of what that regulatory strategy of Catalyst was. Mr. Leitner also testified that no one at Tennenbaum knew the details of any offer made by Catalyst to VimpelCom during the period of exclusivity of

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Zhu’s evidence is that he had no discussion with Mr. Moyse about WIND and that the reference to “live deals” was that Mr. Moyse said he had been working on live deals at Catalyst. He said he did not ask Mr. Moyse what the deals were and Mr. Moyse did not say what they were. Mr. Zhu was a straightforward witness and I accept his evidence. It would be sheer speculation to read into the words “live deals” a reference to any particular deal or to WIND.

Catalyst to negotiate with VimpelCom. Mr. Leitner's evidence was not shaken at all and I accept it.

[86] The evidence of Hamish Burt, a member of 64NM, and also an impressive witness, was to the same effect as that of Mr. Leitner. His evidence was not shaken and I accept it as well.

[87] This evidence of Messrs. Leitner and Burt is confirmatory of the evidence given by Mr. Moyse and the West Face witnesses. The strategy of the winning bid for WIND by the consortium was not the sole work of West Face and required input from all the consortium members who were making sizeable investments. In fact, the evidence makes clear that the idea for the structure of the ultimately successful bid for VimpelCom's interest in WIND was that of Mr. Guffey of LG Capital, a man who had a very long history of successful involvement in the telecommunications business. If West Face was acting on confidential Catalyst information in the formulation of the final bid to VimpelCom, the reason for having a bid unconditional on Governmental concessions would have obviously been discussed with the partners. The fact that there was no discussion about any Catalyst information is a strong indication that West Face did not have any such information.

[88] There were reasons for West Face to make its bid that it did with the consortium other than acting on confidential Catalyst information obtained from Mr. Moyse.

[89] Regarding West Face's view that Catalyst was a bidder for WIND, there was sufficient information in the marketplace for West Face to put two and two together to believe or presume that Catalyst was a bidder. There is no direct evidence that West Face or its consortium members knew that Catalyst was a bidder. Their evidence, which I accept, is that they thought from what they knew that Catalyst was a bidder but they never knew for sure. It was for that reason that in some emails they referred to Catalyst as being the bidder.

[90] Mr. Griffin of West Face had seen press discussion in 2013 of an interest of Catalyst in Mobilicity and WIND and of combining them and Mr. De Alba acknowledged that by 2013 at the latest, there was public discussion of Catalyst's interest in merging Mobilicity and WIND.

Mr. Griffin's evidence was that he assumed through a process of elimination that it was probable that Catalyst was the party but that he did not know for sure. I accept that evidence. Mr. Griffin's e-mail of June 4, 2014 to Mr. Lacavera makes clear that at that point Mr. Griffin was by no means certain that Catalyst was a real bidder for WIND. On June 18, 2014 after Mr. Moyse told Catalyst that he was leaving Catalyst and joining West Face, counsel to Catalyst informed counsel to West Face that Catalyst was particularly concerned about a specific transaction for which Catalyst and West Face had each submitted bids and identified this as a "telecom file". In the context of what was occurring in the marketplace at the time and the known desire of VimpelCom to quickly sell its interest in WIND, this was a very strong indication to West Face from Catalyst itself through its counsel that Catalyst had made a bid for WIND. On June 23, 2014 in response to a proposal from West Face to acquire WIND and draft agreements submitted to UBS, Mr. Turgeon of UBS responded negatively about the drafts and referred to the process as being competitive and said that others were further advanced on their due diligence and had less mark-up on the drafts of UBS. This was a clear indication from UBS that someone else was a bidder for WIND. On July 23, 2014 Mr. Friesel of Oak Hill Capital which was interested in WIND at that time emailed Tennenbaum, LG Capital and West Face and said that Mr. Herbst of UBS, the financial advisors to VimpelCom, had called him to say that VimpelCom had entered into a period of exclusivity at the reserve price. There is no evidence other than the email as to what UBS told Mr. Herbst that he was passing on, but it is obvious that there was a lot of market chatter at the time, none of which can be laid at the feet of Mr. Moyse who could not have known what Catalyst was doing at the time.

[91] Mr. Leitner’s evidence was that when he learned that VimpelCom had granted an exclusivity negotiating period to a party, he was fairly confident that the other party was Catalyst, given that Catalyst had been actively seeking financing in the market. He testified that Tennenbaum is a debt provider and that in that capacity had been told that there was a party looking for financing for an upstart wireless carrier in Canada and he presumed that to be Catalyst as it could not be West Face. Mr. Leitner was very knowledgeable of the wireless industry in North America and it would not have been a stretch for him to think that Catalyst was a bidder at the time for WIND. In an email of July 21, 2014 Mr. Leitner told Mr. Boland of West

Face and said that he "heard Catalyst is seeking exclusivity this week". His evidence was that he was assuming without actual knowledge that Catalyst was a bidder and seeking exclusivity. I accept his evidence that he did not know for certain that Catalyst was a bidder. However, even if someone had told Mr. Leitner that week that Catalyst was seeking exclusivity, it would not have been information he got from West Face (or from Mr. Moyse through West Face) as he would have had no reason to email West Face to tell them what he had heard. The week in question was long after Mr. Moyse had left Catalyst on May 26, 2014 and Mr. Moyse was in no position to know in July what Catalyst was doing with VimpelCom.

[92] Mr. Burt of 64NM testified that he had no definitive knowledge that Catalyst was a bidder for WIND but assumed it was in the process. They were aware that Catalyst was a potential bidder because it had been out in the market seeking financing with respect to the acquisition of WIND. He was not really challenged on this evidence and I accept it. He was one of two persons at LG Capital, the other being Mr. Guffey, who worked closely on this transaction and it would be highly improbable that Mr. Guffey would have had knowledge that Catalyst was a bidder for WIND or on what terms without discussing this with Mr. Burt.

[93] I would not infer that Mr. Moyse told West Face that Catalyst was a bidder for WIND. I accept that the persons at West Face involved in the deal believed Catalyst was a bidder without actually knowing that.

[94] Regarding the offer made by the consortium to acquire WIND based on an enterprise value of $300 million, this price was made known to the market place by VimpelCom as early as April, 2014. At that time, West Face was attempting to acquire WIND on its own without consortium partners. On April 21, 2014 Mr. Griffin, the lead partner on the WIND file for West Face, told Mr. Boland, the President and CEO of West Face, that he had had a discussion with Mr. Lacavera a few days before in which he was told that VimpelCom were sellers of their interest in WIND at a "$300 million EV". On May 4, 2014, West Face sent VimpelCom and the other shareholders of WIND a proposal to address VimpelCom's required deal terms that included a purchase of 100% of WIND's equity, based on the $300 million enterprise value that

had been communicated by Mr. Lacavera of Globalive and by VimpelCom's financial advisor UBS Securities. On June 10, 2014 UBS again told West Face that the objective for VimpelCom was a clean exit at a $300 million enterprise value. On July 23, 2014 Mr. Friesel of Oak Hill, who at the time was interested in WIND, advised West Face, Tennenbaum and LG Capital that UBS had called to say that VimpelCom had entered into exclusivity at the reserve price of $150 million, which amount when added to the debt of $150 million resulted in an enterprise value of $300 million. It was also reported in the press on July 31, 2014 that VimpelCom had put a $300 million price tag on WIND.

[95] I would not infer that Mr. Moyse told West Face that Catalyst was going to or had made a bid for WIND for $300 million.

[96] There was reason why the structure of the agreement made by the consortium that succeeded in the acquisition of WIND did not contain a clause requiring Government concessions to permit spectrum acquired by WIND to be sold to an incumbent. Neither West Face nor the other consortium members held the view of Mr. Glassman that WIND would need such concessions in order to survive. No such condition was put in the West Face proposal of May 4, 2014 made to Globalive and the other shareholders of WIND to acquire WIND. It was conditional only on regulatory approval, i.e. Industry Canada and Competition Bureau approval.

[97] Mr. Griffin's evidence is that West Face knew that any transaction involving a change of control of WIND and a transfer of its spectrum licenses would require regulatory approval, but West Face did not see the need for any concessions in terms of future transferability of spectrum. He said that based on West Face's due diligence efforts and analysis of WIND and the regulatory environment, West Face was confident Industry Canada would approve any sale to West Face. West Face concluded that the regulatory considerations were manageable and ultimately not a material risk to West Face's investment thesis. Mr. Griffin's evidence was that all that West Face wanted from Industry Canada was more certainty regarding when, how, and at what cost WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network. Mr. Griffin

testified that West Face did not believe that WIND or purchasers of WIND would need the ability to sell spectrum after five years. In his words, WIND was a business "that could stand on its own two feet with the right ownership structure and the right oversight from management. We knew this was a business that would turn into a solid business and a credit that arm's length parties would be willing to underwrite".

[98] I accept Mr. Griffin's evidence on this. It is supported by the presentation made by West Face to Industry Canada on May 21, 2014, which was much different from the presentation made by Catalyst to Industry Canada. The presentation made by West Face to Industry Canada made clear that it was prepared to take business risks in its acquisition of WIND, but that it needed clarity and certainty regarding WIND's spectrum availability enabling its evolution to LTE. West Face did not ask Industry Canada for any concessions regarding roaming costs, tower sharing, or spectrum swapping, and did not ask for the ability to exit the investment with no restrictions in five years as Catalyst had.[7]

[99] A further proposal by West Face to VimpelCom and the other shareholders of WIND made on June 3, 2014 provided for $160 million in bridge financing to fund the repayment of WIND's existing third party vendor debt and the entering into a share purchase agreement for 100% of WIND for deferred contingent consideration of $100 million, payable to VimpelCom upon West Face obtaining sufficient spectrum within 12 months to support WIND's LTE rollout strategy. The response of UBS on behalf of VimpelCom was that VimpelCom wanted a clean

[7] Catalyst refers to an investment memo sent by West Face to investors on the credit part of the successful bid for VimpelCom's interest in WIND. That memorandum contained information as to collateral coverage for the investment. Under scenario 1 it said "In the event that Wind fails and there are no other buyer options, the Government cannot logically continue to block a sale to an incumbent. In this scenario, valuation range is $500 to $800 million.". I do not take this as being different from the investment strategy of West Face and I accept Mr. Griffin's evidence that it was not but rather was an assertion or thesis of a position if the investment was an abject failure. I also accept Mr. Griffin's evidence that West Face would never have based its acquisition strategy on the litigation that Mr. Glassman believed some unnamed party other than Catalyst would have pursued against the Federal Government over the regulatory restrictions that limited transferability of the 2008 spectrum licenses. Moreover, the assertion referred to in the West Face investment memo was not something that would in any event be confidential to Mr. Glassman or Catalyst. There was much discussion in the marketplace on this issue, particularly as Mobilicity had twice been turned down by the Government on an attempt to sell its business to Telus. I do not accept the argument that the thought was Mr. Glassman's alone and that it must have come from Mr. Moyse to West Face. The idea was not so unique to draw that inference.

exit at a $300 million enterprise value and that VimpelCom was not prepared to have any portion of the proceeds contingent on a future event such as the acquisition of spectrum.

[100] The issue of the ability of WIND to acquire new spectrum to enable it to upgrade to a LTE or fourth generation network was resolved on July 7, 2014 when Industry Canada announced that a large, 30 MHz block of AWS-3 spectrum (of 50 MHz total) would be set aside and made available exclusively for new entrants like WIND. This ensured that WIND would have access to additional spectrum without having to bid against the incumbents Rogers, Telus and Bell. This announcement provided West Face with sufficient certainty regarding the ability to acquire the additional spectrum WIND needed to roll-out LTE.

[101] Tennenbaum was one of the consortium members that acquired WIND. It had known of WIND and its business since 2012 when it had acquired approximately US$25 million in WIND's third party vendor debt. This came due on April 30, 2014 and was unpaid at that time, thus going into default. VimpelCom then reached out to Tennenbaum and there were discussions about a sale of WIND. Mr. Leitner knew that VimpelCom's priority was speed and certainty of closing, as VimpelCom had grown suspicious and mistrustful of the Canadian Government, and minimizing regulatory risk was paramount to it.

[102] Tennenbaum signed a non-disclosure agreement and gained access to the WIND data room in early May, 2014. It reached out for partners and together with Blackstone and Oak Hill Capital, two U.S. equity firms, submitted an initial indication of interest to VimpelCom on or around May 30, 2014. Mr. Leitner testified that in discussions with the Canadian Government regarding WIND, they understood that an issue would be the acquisition of WIND by three foreign entities. Mr. Leitner testified that the only regulatory issue Tennenbaum discussed with the Canadian Government was the issue of WIND acquiring new spectrum and this was resolved by the July 7, 2014 announcement of an auction of spectrum available only to new entrants.

[103] Tennenbaum then reached out to West Face as a potential debt financing party as Tennenbaum's $300 million proposal to VimpelCom had included the refinancing of the $150

million vendor debt. Tennenbaum had worked with West Face before and knew that West Face was a Canadian entity knowledgeable of the telecom sector in Canada and well known. In early June 2014, Tennenbaum had discussions with West Face but at that stage West Face was not interested in going in with Tennenbaum. In July 2014, Oak Hill Capital and Blackstone lost interest and so Tennenbaum again approached West Face. LG Capital, a U.S. firm, had earlier been in discussions with Tennenbaum and became a member of the consortium.

[104] On August 7, 2014 a proposal to VimpelCom was made by Tennenbaum on behalf of the consortium consisting of Tennenbaum, LG Capital and West Face. The proposal was not to acquire WIND but rather to acquire VimpelCom's minority equity and debt interest in WIND at VimpelCom's price. Globalive's majority equity in WIND would be left in place and the consortium would simply step into the shoes of VimpelCom. This had the advantage of having no change of control of WIND and avoiding the need for regulatory approval of a change of control. It would permit a quick exit for VimpelCom which the parties understood was of paramount importance to VimpelCom. The parties knew from UBS that VimpelCom had entered into a period of exclusivity with a party, which was believed by them to be Catalyst, and the proposal was unsolicited and sent to VimpelCom without any substantive communications with VimpelCom since the exclusivity period had commenced on July 23, 2014.

[105] The only condition to the proposal was that Globalive's consent was required. However the day the proposal was sent in, Mr. Lacavera of Globalive informed Tennenbaum that Globalive had earlier that day signed a support agreement with VimpelCom and was therefore unable to continue any discussions or consider any proposals relating to WIND. As a result, neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.

[106] The intent of the proposal was that the acquisition of VimpelCom's interest in WIND was the first step of a two-step process. The second step would later be taken effectively to reorganize the entities that funded step one to become direct owners of WIND which would

require regulatory approval as it would then have amounted to a change of control of WIND. Mr. Leitner's evidence was that this two-step process was proposed to him by Mr. Guffey of LG Capital and it was then discussed with the other members of the group[8].

[107] Regarding the risks of the second step, Mr. Leitner's evidence was that their whole thesis was never predicated on regulatory concessions and Tennenbaum never needed regulatory concessions. The business model was based upon the value that Tennenbaum believed it could be achieved with WIND. This evidence is consistent with the evidence of Mr. Griffin of West Face that I have accepted. As it turned out, this thesis turned out to be correct. WIND performed very well after its acquisition by the consortium and went from losing money at the EBITDA line to making a substantial amount of money at the EBITDA line. Mr. Leitner testified that he never had any contact with Mr. Moyse, that West Face did not convey to Tennenbaum any information regarding Catalyst that it had obtained from Mr. Moyse or anything about Catalyst's strategies or negotiations and that he knew nothing of the details of Catalyst's regulatory strategy nor of the details of its offer or negotiations with VimpelCom.

[108] In his affidavit, Mr. Leitner stated that the "advantage" of their August 7, 2014 proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. It was put to him on cross-examination that he was referring to an advantage of the proposal over the Catalyst offer that was being dealt with by VimpelCom and that Tennenbaum and the consortium knew from Mr. Moyse that Catalyst could not waive regulatory approval. Mr. Leitner denied this and said the advantage referred to was an advantage over the earlier proposal made by Tennenbaum with Oak Hill Capital and Blackrock that was for control of WIND that would require Governmental approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted a deal with no risk of Governmental rejection and it was an advantage to VimpelCom to have an offer without such a

[8] Catalyst is critical of West Face for not calling Mr. Guffey as a witness and asks for an adverse inference to be drawn. I see no basis for any adverse inference. Mr. Guffey was not at all in the control of West Face and it was open to Catalyst to call Mr. Guffey as a witness. See *Parris v. Laidley*, 2012 ONCA 755 at para. 2. Moreover, the evidence of Mr. Guffey would have been cumulative to evidence of others, and no adverse inference should be drawn. See *R. v. Jolivet*, 2000 SCC 29 at paras 24 and 28 and *R. v. Lapensee*, 2009 ONCA 646 at paras. 43, 49 and 52.

condition. In any event, there is no evidence to support an inference that whatever the advantage was, Mr. Leitner obtained his information from Mr. Moyse.

[109] Of course, the issue of requiring regulatory approval is not the same as requiring concessions from the Government permitting the transfer of spectrum to an incumbent after five years. There is no evidence at all that West Face thought there was any serious issue about obtaining Government regulatory approval to the transaction. There was no need for such a condition in the August 7, 2014 proposal to VimpelCom because no regulatory approval was required for that transaction. The transaction was structured that way because of the clear message from UBS that VimpelCom wanted a clean exit without regulatory issues getting in the way. It was not structured that way because of some knowledge allegedly obtained from Mr. Moyse that Catalyst had such a condition in its offer to VimpelCom. Moreover, Catalyst's argument that the proposal did not contain such a condition because it knew that Catalyst had such a condition and knew that Catalyst could not waive it makes little sense. If West Face had thought that regulatory approval was a concern, it would make no sense to ignore it just because Catalyst had such a condition, assuming it knew of that condition in the Catalyst bid. To do so to have a leg up on Catalyst and then acquire WIND with a concern that in the second step the Governmental regulatory approval might not occur would make little sense for the size of the investment made.

[110] Tennenbaum and LG Capital were in a little different position as they were U.S. firms. However Mr. Leitner's evidence was that even when their initial group of just U.S. firms was investigating the acquisition, they discussed this with Investment Canada.[9] That situation changed of course when West Face became involved. Tennenbaum was expected to obtain a little under 30% of WIND after the second step. Mr. Leitner testified that they thought there was no serious risk that regulatory approval would not be granted. He also said that once the group acquired the shareholder loans of WIND from VimpelCom, they would have a path if necessary to full ownership of WIND through a CCAA proceeding. This fall-back position was based on a

[9] Mr. Leitner and Mr. Burt used the expression of "socializing" the idea with Investment Canada. I took that word to mean more than a discussion over wine and canapés.

belief that ownership of the outstanding debt of WIND that was in default would end up in their obtaining equity ownership of WIND in an insolvency proceeding under the CCAA. Mr. Griffin shared this view.

[111] In an email of August 1, 2014 to the consortium, Mr. Leitner said that he had heard that VimpelCom was taking the Catalyst share purchase agreement to its board that week-end. It would appear from the evidence that this information likely came to him from an advisor to Tennenbaum who may have obtained it from UBS. The email also referred to "feedback on price levels". He denied that it was feedback on the price that Catalyst had offered to VimpelCom. What the price levels referred to is unclear, but even if it was a reference to the price Catalyst had bid, there is no evidence that any such evidence came from West Face. The fact that the email was from Mr. Leitner to the consortium including West Face would indicate it came from some other source. It must be remembered that by this time Mr. Moyse was long gone from Catalyst and had no knowledge of the terms of any bid that had been made by Catalyst to VimpelCom.[10]

[112] There is an email of August 6, 2014 from Mr. Leitner to VimpelCom and copied to West Face and LG Capital in which Mr. Leitner sent the outlines of the proposal made the next day to VimpelCom. His email referred to a "Superior Proposal" and said that "Our proposal will be superior to any other offer as our proposal will not require regulatory approval…". It further said that with the benefits of an immediate sign and close "our proposal will be economically superior to any other proposal by significantly reducing the accruing interest on the Company's Vendor Loans …".

[113] Catalyst lays great store on this email and contends that it could only have been written by Mr. Leitner with knowledge of the terms of the Catalyst offer to VimpelCom. Unfortunately this email was not put to Mr. Leitner on his cross-examination and it would be unfair to him to

[10] While Mr. Moyse was on vacation, and at the time that he decided to leave Catalyst, an email from Catalyst's lawyers enclosing a clean and blacklined copy of an early draft agreement of a Catalyst/VimpelCom share purchase agreement was sent to a number of Catalyst people including Mr. Moyse. Mr. Moyse's evidence is that he did not read the draft. I accept his evidence. Reading a 122 page agreement while on vacation with his girlfriend at a time he had decided to leave Catalyst would be an unusual thing to do.

draw conclusions as to his knowledge and where it came from. Mr. Burt of 64NM testified that they assumed, but did not know, that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. Given that evidence, and the lack of cross-examination of Mr. Leitner on the email, I would not find that the statement of Mr. Leitner regarding the consortium’s proposal being superior because it did not require regulatory approval was based on any knowledge by him of the Catalyst bid or that it came from Mr. Moyse. The same can be said for the balance of the email.

[114] I accept the evidence of Mr. Leitner that the proposal made by him to VimpelCom on behalf of the consortium on August 7, 2014 and the ultimate deal made with VimpelCom was not based on anything that Catalyst was doing but rather was based on what Tennenbaum had concluded from its own due diligence and understanding of WIND and its prospects and of the lack of regulatory risk to what it was proposing. I accept his evidence that the lack of a need for regulatory concessions, and the lack of a need for a condition in the offer to VimpelCom of Government regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies.

[115] The email of August 6, 2014 written by Mr. Leitner was put to Mr. Griffin on cross-examination. He testified that he and West Face had no role in drafting the email. He stated that the proposal was unique and not West Face's idea and agreed that the proposal was certainly superior to any proposal that West Face had submitted previously on its own behalf because of the structure that permitted VimpelCom a clean exit without the worry of a requirement for regulatory approval. He denied that West Face's view was based at all on information regarding Catalyst's offer to VimpelCom. I cannot find from the language in the email that West Face knew the terms of the offer from Catalyst to VimpelCom.

[116] The evidence of Mr. Burt is to the same effect as Mr. Leitner. Mr. Burt worked with Mr. Guffey at LG Capital and was a member of the investment vehicle 64NM used to acquire the interest in WIND held by VimpelCom. He worked alongside Mr. Guffey on this acquisition. Their view was that there would be no issue with their participation in the consortium because

they had discussed the idea previously with the Government. Their view was that with the set-aside AWS3 spectrum auction, WIND could be a viable stand-alone business. Mr. Burt's evidence was that LG Capital had no knowledge of the details of Catalyst's offer or negotiations with VimpelCom. They assumed, but did not know that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. I make the same findings regarding 64NM as I do with respect to Mr. Leitner.

[117] The inference which Catalyst asks to be drawn that West Face acquired from Mr. Moyse confidential Catalyst information about its interest and strategy to acquire WIND and about its regulatory strategy and that West Face passed that information on to Tennenbaum and LG Capital/64NM would amount to several witnesses purposely giving false testimony. I cannot make any such finding. To the contrary, I find that Mr. Moyse never communicated to anyone at West Face, either in the interview process or later, anything about Catalyst’s dealings with WIND or of Catalyst's regulatory or telecommunications industry strategy regarding its interest in WIND and that Tennenbaum and that LG Capital/64NM were never advised of any such information by West Face or Mr. Moyse.

[118] On that basis, the action against West Face for breach of confidence must fail.

Did West Face make use of any Catalyst confidential information?

[119] In light of the finding that no Catalyst confidential information was given by Mr. Moyse to West Face or passed on to the consortium members, it is not necessary to deal with this issue in any detail. I will deal with it briefly.

[120] Assuming, without deciding, that some of the information said to have been passed on by Mr. Moyse to West Face was confidential[11], I would not find that West Face made use of it.

[11] Mr. Glassman's evidence was that the industry generally held the view that Government regulations would have to change for a transaction such as the acquisition of WIND to work and that another bidder such as West Face would either assume or know that Catalyst was putting such a proposition to the Government. If this central point to the

[121] The price of the bid by West Face and the consortium with an enterprise value of $300 million was based on what VimpelCom and its advisor UBS had made clear to West Face and others as to the amount that VimpelCom required. Even if Mr. Moyse had known and told West Face of the intention of Catalyst to bid at an enterprise value of $300 million, West Face made no use of such information.

[122] The basic strategy of Catalyst was based on its belief that WIND could not survive without Government concessions that would allow WIND to sell its spectrum to an incumbent by the end of five years. Even had West Face or its consortium members been told of this strategy by Mr. Moyse or anyone else, it played no part in the reasoning of West Face to bid as it did by itself and later with the consortium. West Face did not hold the same view regarding the need for concessions and held the view that so long as WIND would be able to acquire additional spectrum to upgrade its network from a 3G (third generation) wireless network to an LTE ("long term evolution" or fourth generation) network, which was made clear by the Industry Canada announcement on July 4, 2014, WIND would be a viable business. The other consortium members held the same view.[12]

[123] For the same reason, even if Mr. Moyse disclosed to West Face the views of Mr. Glassman that the potential litigation by some other party against the Government would force the Government to grant concessions and that the Government was therefore softening its

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argument of Catalyst in this case was something that Catalyst believes a bidder such as West Face would assume, Catalyst is in no position to say that the information of what it was putting to the Government was confidential.

[12] An email from Mr. Boland of West Face to consortium members of August 26, 2014 summarized a meeting with Mr. Lacavera of Globealive in which Mr. Lacavera expressed concern "that we [the consortium] may over reach (by asking for roaming, spectrum transfer to incumbent etc). Catalyst argues that this makes it plain that the consortium intended to push the Government for concessions despite agreeing to step into the shoes of VimpelCom in the first step. I do not accept that argument. The email said nothing about the intentions of West Face or the other members of the consortium. The offer by West Face, Tennenbaum and 64NM that had been made to VimpelCom on August 7th contained no such condition and the consortium did not seek any concessions from the Government before that deal closed. Nor is there any evidence that West Face or the other consortium members ever sought concessions from the Government before the second step of the acquisition of WIND took place.

position on concessions, that disclosure played no part in the decision of West Face to make the bids that it did.

[124] I accept the evidence of Mr. Griffin that West Face would never have based its strategy on the litigation that Mr. Glassman believed some unnamed party other than Catalyst would have pursued against the Federal Government over the regulatory restrictions that limited transferability of the 2008 spectrum licenses. His evidence was that based on its own discussions with Industry Canada, including during the May 21 meeting with Industry Canada, West Face believed that the Government was going to continue to maintain the existing restrictions on transfers of spectrum to incumbents. West Face never understood the Government's policy stance to be a bluff. Nor did Globalive, who told West Face on April 21, 2014 of its view that the Government would not change its policy. In spite of what Mr. Glassman asserted was his view of the potential litigation against the Government and the softening of the Government's position on concessions, the actions of Catalyst in its bid for WIND did not reflect a view that the Government's knowledge of the threat of litigation and the Government's body language demonstrating that it was softening its position regarding concessions would massively mitigate, if not entirely eliminate, the financial risk in bidding. Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government.[13]

[125] In summary, if Mr. Moyse provided to West Face any confidential Catalyst information, I find that such information was not used by West Face in its acquisition from VimpelCom of its

[13] I have considerable doubt of the plausibility of any theory that the Government would change its position on granting concessions based on Mr. Glassman's statements to Industry Canada or anyone else in Government. Mr. Glassman was the chief architect of Catalyst's regulatory strategy. The *NextWave* case that Mr. Glassman put so much store on does not appear to be of much if any relevance to the issue. While Mr. Glassman obtained a law degree, he never practised law. He admitted he is no specialist in communication law or the law concerning the management of wireless spectrum in Canada. It is difficult to accept that based on his analysis the Government would soften its position. The Government never said that it would. Mr. Drysdale, the Government relations expert retained by Catalyst made clear to Catalyst that the Government had said it would not grant concessions to Catalyst and that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Acker of Faskens, Catalyst's lawyers, an experienced communications lawyer advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed.

interest in WIND or of its later acquisition of its shareholding in WIND. For this reason too, the action for breach of confidence against West Face must fail.

Did Catalyst suffer any detriment or compensable damage?

[126] Even if a case of misuse of confidential Catalyst information were made out, I cannot find that it caused Catalyst any detriment or damage.

[127] Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.

[128] On August 11, 2014 the Chairman of the Board of VimpelCom advised Mr. De Alba that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman was furious and told his people on August 11, 2014 as well as Mr. Levin of Faskens who was advising Catalyst that VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated "I am fed up. I do not want to hear a single more excuse from them". On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin advised that VimpelCom was "out to lunch and I think we should tell them". Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."

[129] Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that

VimpelCom and the consortium, including West Face, concluded a deal. Mr. Glassman acknowledged in his evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.

[130] For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.

[131] There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.[14]

[14] Several drafts of an agreement between Catalyst and VimpelCom were exchanged. VimpelCom continuously refused to agree to a condition that would make closing the deal conditional on the Government granting concessions on transferring spectrum to an incumbent. In the last draft that Mr. Saratovsky of VimpelCom and Mr. De Alba agreed was substantially settled, it provided in section 6(d) that before closing Catalyst could not (i) develop, evaluate or analyze any studies, analyses, reports or plans relating to the sale of the Business, or any of its assets, by the Purchaser to an Incumbent; or (ii) discuss with any Governmental Authority the sale or transfer of the Business, or any of its assets, by the Purchaser to an Incumbent. In light of that, I have difficulty with the position of Mr. Glassman that he would not close without Government concessions regarding spectrum, unless he intended to breach the terms of the agreement. Section 6(e) did permit Catalyst after closing to pursue regulatory concessions from Industry Canada that WIND had been seeking. Mr. De Alba's said on cross-examination that he did not think WIND had been seeking concessions to permit the sale of spectrum to an incumbent and agreed that if Catalyst had signed that agreement, it would not have been able before closing to seek concessions from the Government about

Spoliation

[132] Around June 17, 2014, Mr. Moyse wiped all contents from his BlackBerry before returning it to Catalyst. He said he did so to remove personal information from the device. He said he understood that all information belonging to Catalyst would still exist on Catalyst's server.

[133] On July 16, 2014, an interim order was made in the proceedings brought by Catalyst to enjoin Mr. Moyse from working at West Face. The order, consented to by Mr. Moyse, contained a provision that the parties would preserve their records relating to Catalyst and/or related to their activities since March 27, 2014 and/or related to or was relevant to any of the matters raised in the Catalyst action. The order provided that Mr. Moyse was to turn over his personal computer to his legal counsel for the taking of a forensic image of the data stored on it, to be conducted by a professional firm as agreed by the parties, and that he deliver a sworn affidavit of documents setting out all documents in his power, possession or control that related to his employment with Catalyst. Prior to delivering his personal computer to his lawyer, Mr. Moyse deleted his internet browsing history. He said he did this because he was concerned that his internet browsing history would show that he had accessed adult entertainment websites and could become part of the public record. He says he did not think there was anything improper in doing so.

[134] Catalyst says that Mr. Moyse engaged in spoliation of documents and that an inference should be drawn that the destroyed evidence would have been damaging to the defence of Mr. Moyse, and by extension West Face. It says the spoliation should detract from the reliability and credibility of Mr. Moyse.

[135] Spoliation is an evidentiary rule that gives rise to a rebuttable presumption that destroyed evidence would be unfavourable to the party that destroyed it. Catalyst argues that spoliation in

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selling spectrum to an incumbent.. Mr. De Alba asserted that section 6(e) would permit Catalyst to seek concessions on the sale of spectrum if Catalyst were to operate a wholesale business with WIND and not a retail business. I do not understand what would give Catalyst that right but in any event it is clear that Catalyst was interested in acquiring WIND to operate a retail operation.

this case should be recognized as an independent tort. In argument Catalyst contended that damages could be assessed against Mr. Moyse and that an award covering the costs of the case would be appropriate. Catalyst also contended that West Face would be liable for the same amount on a theory of vicarious liability.

[136] The parties agree that a finding of spoliation requires four elements to be established on a balance of probabilities, namely:

(1) the missing evidence must be relevant;

(2) the missing evidence must have been destroyed intentionally;

(3) at the time of destruction, litigation must have been ongoing or contemplated; and

(4) it must be reasonable to infer that the evidence was destroyed in order to affect the outcome of the litigation.

[137] The drawing of an inference was described in *Spasic Estate v. Imperial Tobacco Ltd.* (2000), 49 O.R. (3d) 699 (C.A.), leave to appeal refused, [2000] S.C.C.A. No. 547, at para. 10 as:

> The spoliation inference represents a factual inference or a legal presumption that because a litigant destroyed a particular piece of evidence, that evidence would have been damaging to the litigant.

[138] Thus there must be evidence of a particular piece of evidence that was destroyed.

[139] Courts in Canada have permitted a pleading of a tort of spoliation to stand to proceed to trial on the basis articulated in *Hunt v. Carey* Canada Inc., [1990] 2 S.C.R. 959 that it was not plain and obvious that such an action could never succeed. See *Spasic*, *supra* and *McDougall v. Black & Decker Canada Inc.* (2008), 97 Alta. L.R. (4th) 199 (C.A.). I was referred to no case in which spoliation was recognized as a tort and I do not believe the tort of spoliation has been recognized in Canada. Catalyst contends that the tort should be recognized in this case.

[140] I will deal with the various claims of spoliation made by Catalyst. The first has to do with Mr. Moyse deleting his browsing history from his personal computer.

[141] Mr. Moyse's evidence is as follows. He understood that pursuant to the order of July 16, 2014, a forensic image would be created of his computer's hard drive for the purpose of determining what, if any, documents he had in his possession that related to Catalyst or to the issues raised in Catalyst's lawsuit. He was not concerned that his devices would be reviewed to identify relevant documents that related to Catalyst or to the issues raised in Catalyst's lawsuit as he had good, reasonable explanations for every Catalyst-related document that would be found and intended to disclose all such documents in his affidavit of documents, as required under the order. He was troubled that Catalyst would have access to his personal internet browsing history, and in particular that he had accessed adult entertainment websites. He was concerned that it might become part of the public record in this litigation.

[142] Mr. Moyse therefore decided that prior to delivering his computer to his counsel, he would attempt to delete his internet browsing history from his computer. He did not believe that there was anything improper about his doing so as the order did not require him to maintain his computer "as is" for the five days before he was to deliver the computer or to preserve clearly irrelevant files. The focus of the order was to maintain and preserve documents relevant to this action. If the order had required him to maintain the computer "as is", he would not have used it at all prior to the image being taken. He felt that by deleting his browsing history he was deleting personal information not relevant to the litigation.

[143] He 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. He did some internet searches on how to ensure a complete deletion of his internet browsing history, and many websites said that cleaning the registry following the deletion of the internet history would accomplish this. He purchased two software products from a company called Systweak. The first was software named RegCleanPro which he purchased online on Saturday, July 12, 2014, for the purpose of deleting his internet browser history. On Sunday July 20, 2014 the day before he was to deliver his computer to his lawyers, he ran RegCleanPro software to clean up the computer registry after he had deleted his internet browser history.

[144] I accept Mr. Moyse's evidence as to why he deleted his internet browsing history. There is no evidence to contradict his statements as to why he deleted his internet browsing history. He was a young man at the time who had a very close relationship with his girlfriend who is now his fiancée. He did not want his internet searching to become part of the public record. In deleting this history, he did not intend to breach the order of July 16, 2014 or to destroy any evidence relevant to this litigation. This lack of intention to destroy relevant evidence precludes any finding of spoliation resulting from the deletion of his internet browsing history.

[145] In closing argument, it was conceded on behalf of Catalyst that there is no evidence that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face. Catalyst contends however that by wiping his browsing history, Mr. Moyse may have wiped evidence that he looked at Catalyst documents in his Dropbox account after deciding he was leaving Catalyst. Catalyst says that if those documents that he may have looked at in his Dropbox account included Catalyst documents involving WIND, it would be evidence that might suggest he wanted them to discuss with West Face.

[146] There are difficulties with this contention. There is no evidence that Mr. Moyse ever transferred confidential Catalyst documents regarding WIND to his Dropbox account. Mr. Musters, the computer expert retained by Catalyst created a forensic image of Mr. Moyse's computer on June 21, 2014. The only time Mr. Moyse used his Dropbox account on his computer was on February 10, 2014 before Mr. Moyse was on the WIND team at Catalyst and long before he decided to leave Catalyst and go to West Face. There is no evidence what documents were in his Dropbox account that he accessed on that day. Moreover the timing does not lead to any cogent inference that documents accessed that day consisted of confidential Catalyst documents regarding WIND that Mr. Moyse wanted to discuss with West Face. To make such a finding would amount to speculation rather than reasonably making an inference.

[147] Catalyst has not established that Mr. Moyse looked at any documents in his Dropbox account dealing with Catalyst's WIND initiative or that he did so in order to discuss them with

West Face. Nor has Catalyst established that any evidence that might be relevant to this litigation was destroyed by the wiping of Mr. Moyse's internet browsing history.

[148] On July 16, 2014, the day on which the interim order was made requiring his personal computer to be turned over to his counsel, Mr. Moyse purchased online from Systweak a second software product named Advanced System Optimizer ("ASO") advertised as an all in one PC tune-up suite containing many different programs, one of which was a program called Secure Delete.

[149] On July 20, 2014, at 8:09 p.m., a folder called Secure Delete was created on Mr. Moyse's computer. Catalyst contends that although the forensic evidence does not conclusively establish that Moyse ran the Secure Delete program, the undisputed circumstances in which it was purchased, downloaded, and launched the night before his computer was scheduled to be forensically imaged lead to the logical and reasonable inference that Mr. Moyse ran it to delete relevant inculpatory evidence.

[150] This contention is somewhat contrary to the concession made in closing argument that Catalyst is not contending that Mr. Moyse destroyed documents that no longer exist either at Catalyst or West Face. In any event, I cannot find that Mr. Moyse ran the Secure Delete program in order to destroy documents or that any documents were destroyed.

[151] Mr. Moyse denies that he ever ran the Secure Delete program to delete any documents. His evidence is that he bought the ASO software because his computer was running slowly. On July 20, 2014, he opened both the RegCleanPro and the ASO software to see what they could do and he investigated what products the ASO offered and what the use of those products would entail. He did this by clicking on the various parts of the program. He said he was certain that he did not run the Secure Delete product or any other to delete any Catalyst documents or anything else from his computer that could have been relevant to this litigation and that since his computer was returned to him after the image was taken from it, he has used ASO a number of times to clean up his computer and optimize its functioning.

[152] An Independent Supervising Solicitor (“ISS”) was appointed to review the forensic images taken from Mr. Moyse's computer. The ISS’s forensic expert reached the conclusion that it could not determine whether the Secure Delete function had been used to delete an individual file or files and that it accordingly could not express any conclusion on that possibility other than to note that it exists.

[153] Although not the case from the start, the forensic experts retained by Catalyst and Mr. Moyse now agree on most of the forensic evidence. Mr. Musters, the expert for Catalyst, at first stated in his affidavit that a Secure Delete folder is not created merely by downloading the ASO software but is only created when a user runs the Secure Delete feature to delete a file or folder from the computer. He concluded from the existence of the Secure Delete folder on Mr. Moyse's computer that Mr. Moyse had deleted one or more files on his computer. The evidence of Mr. Lo, the computer expert for Mr. Moyse, was that the presence of a Secure Delete folder on Mr. Moyse’s system is not evidence that he ran the Secure Delete program, or used it to delete any files.

[154] At trial Mr. Musters acknowledged that he was wrong and that the presence of a Secure Delete folder does not mean that the function was used to delete a file. Both experts agreed that a Secure Delete folder, such as the one found on Mr. Moyse’s computer, is created as soon as a user clicks Secure Delete on the ASO menu, but before the product is used for any purpose. The Secure Delete folder is created even if a user does not delete a single file.

[155] Although acknowledging his error in concluding that Mr. Moyse deleted a file merely from the presence of the Secure Delete folder on his computer, Mr. Musters did not change his opinion that Mr. Moyse most likely did use the Secure Delete function to delete files from his computer to prevent them being recovered by a forensic analysis. His reasoning however is something that falls outside of a forensic analysis and his expertise. What Mr. Musters was doing was engaging in an exercise of a judge or jury in considering possibilities unrelated to a forensic analysis. He said:

> My conclusion is based on a number of factors. The program was purchased and paid for. The Secure Delete feature is a function of a program called the advanced system optimizer, and when you load -- when you launch advanced system optimizer, you get a home screen, and the Secure Delete feature is not on the home screen. There are about five options, if you will, on the left-hand side, one of them is security and privacy. If you then go to the security and privacy, it gives you, I believe, three options, one of them being Secure Delete. Underneath the Secure Delete it says this is how you permanently erase a file, its contents, never to be recovered, and then you launch -- then you click on that Secure Delete feature to launch that function. That's when the folder gets created. I draw my conclusion in 13 on the fact that the program was bought, paid, installed, it wasn't easy to get to that function, and it was done on the night before the ISS was to examine the computer.

[156] In a prior affidavit after learning of his error, Mr. Musters expressed the opinion that Mr. Moyse likely used the Secure Delete program to delete files and relied on several factors, based much on the same reasoning as he expressed at trial. One was that Mr. Moyse had exhibited a pattern of conduct that was consistent with taking confidential information from his previous employer. He admitted on cross-examination that he did not know if the documents he was referring to were confidential. Another was that the running of the Secure Delete program the night before Mr. Moyse was to deliver his computer to a forensic expert was too coincidental to be an innocent "mistake". Mr. Moyse never said that what he did with the ASO software, including clicking on the Secure Delete portion of it, was a mistake.

[157] I am troubled by the assertions of Mr. Musters. They are really outside of his expertise and indicate somewhat of a less than neutral observation of an expert. They are argument and speculation.

[158] It would not be entirely surprising that Mr. Moyse purchased the ASO software for other than a nefarious purpose. He saw it while searching the internet for a product that would help him prevent disclosure of the fact that he had accessed adult websites on the internet. The AOS software was sold by the same company that sold the RegCleanPro that he used. He used the RegCleanPro software on the night before he was to turn over his computer to his counsel for the reasons he has stated. To then look at the ASO software, including looking at the Secure Delete program on it, at the same time without using it to delete files is not something that can be

concluded is too coincidental, as stated by Mr. Musters. Mr. Moyse's evidence that he has used the ASO software to optimize or clean up his computer since it has been returned to him was not challenged.

[159] Mr. Musters has also speculated that Mr. Moyse took steps by using the Registry Editor on his computer to remove evidence that he had used the Secure Delete program to delete files. Mr. Lo, the expert called by Mr. Moyse, testified that he found no evidence that Secure Delete had been used to delete any files or folders from Mr. Moyse's computer. Mr. Lo explained that if the program had been run on the computer, a Secure Delete Log which maintains records of the files deleted would have been found, but no such log exists on Mr. Moyse's computer. Mr. Musters agreed that using Secure Delete to delete files would result in the creation of a Secure Delete Log but he speculated that Mr. Moyse took steps by using the Registry Editor on his computer to remove evidence that he had used the Secure Delete program to delete files.

[160] Both experts agreed that it would be theoretically possible for a user to use the computer's Registry Editor to delete a Secure Delete Log. They differed on how easily that could be done. Mr. Musters said it could be done very easily. His explanation suffered somewhat by a hiccup in the information he said was available to the public which turned out to be information on how to remove the entire ASO program and not just the removal of the remnant files. Mr. Lo testified that it would be complicated and risky for a lay user to use a Registry Editor to hide the use of the Secure Delete program and said there was no evidence he found on Mr. Moyse's computer that he had done so.

[161] I have considerable doubt that Mr. Moyse had the expertise needed to hide the use of the Secure Delete program on his computer. He left on his computer the ASO software and the Secure Delete folder, along with emails and the receipts recording his purchase of the software, to be easily found by a forensic investigator. Mr. Musters asserted at one place in his evidence that Mr. Moyse's understanding that cleaning the registry of his computer to erase his browsing history made no sense, which is somewhat inconsistent with a view that Mr. Moyse knew enough about a registry to remove evidence of his use of the Secure Delete program.

[162] It is not necessary to come to a final conclusion on how easily one could hide the use of the Secure Delete program. Whether or not it would have been easy or difficult to use the registry to remove evidence that the Secure Delete program had been used to delete files, it would be sheer speculation unsupported by any forensic evidence to find that Mr. Moyse did erase any prior use of the Secure Delete program. Mr. Musters in his April 30, 2015 affidavit said as much by saying it was impossible to determine whether the absence of wiping history in the Secure Delete system summary means that Mr. Moyse did not use the software to permanently delete files or folders or whether he used the software and then removed the evidence of his having done so by deleting the Secure Delete files from his registry. His conclusion that Mr. Moyse likely used the Secure Delete program to permanently delete files from his computer was not based on forensic evidence but on speculation outside of his field as a forensic computer analyst.

[163] Without cogent evidence that Mr. Moyse managed to remove from his computer the evidence that he had used the Secure Delete function, there is no cogent evidence that he used the Secure Delete program in the first place to delete any documents from his computer. I find that Catalyst has not established that Mr. Moyse used the Secure Delete program to delete to delete any relevant evidence.

[164] Regarding the wiping of his BlackBerry before returning it to Catalyst, Mr. Moyse's evidence is that his BlackBerry contained photographs and text messages of a personal and private nature, and he thought it was completely reasonable to take steps to ensure that they would not be accessible to the next user of the company issued BlackBerry. The only email address associated with the BlackBerry was his Catalyst email address, and Catalyst had full access to those emails on its server. Catalyst admits it would have had all emails that were sent through this account on his BlackBerry. Mr. Moyse's evidence is that he did not believe that he used his BlackBerry to communicate with West Face, although it turned out later that he had used it once or twice to receive telephone calls. Mr. Moyse admits it was a mistake to have wiped his BlackBerry.

[165] I accept that Mr. Moyse had no intent to destroy relevant evidence on his BlackBerry, and there is no evidence that any relevant evidence was destroyed. The call logs of his calls with West Face are in evidence.

[166] In summary, I find that Catalyst has not established that Mr. Moyse intentionally destroyed evidence in order to affect the outcome of this litigation. There is no basis to find that or infer a presumption that Mr. Moyse destroyed evidence that would be unfavourable to him.

[167] So far as the argument that West Face has liability for any spoliation of Mr. Moyse, I see no basis whatsoever for such a conclusion. Whatever Mr. Moyse did, he did it after he was on leave of absence from West Face and did it for his own concerns, not out of any concern to protect West Face in this litigation.

[168] I need not consider whether an independent tort of spoliation exists in Ontario.

Conclusion

[169] The action is dismissed in its entirety. The defendants are entitled to their costs. If not agreed, written submissions along with proper cost outlines may be made within 15 days and reply submissions may be made in writing within a further 15 days.

Newbould J.

Released: August 18, 2016

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COURT FILE NO.: CV-16-11272-00CL
DATE: 20160818

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

BETWEEN:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

– and –

BRANDON MOYSE and
WEST FACE CAPITAL INC.

Defendants

REASONS FOR JUDGMENT

Newbould J.

Released: August 18, 2016