Court File No.: CV-16-1159500CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

VIMPELCOM LTD., GLOBALIVE CAPITAL INC., UBS SECURITIES CANADA INC., TENNENBAUM CAPITAL PARTNERS LLC, 64NM HOLDINGS GP LLC, 64NM HOLDINGS LP, LG CAPITAL INVESTORS LLC, SERRUYA PRIVATE EQUITY INC., NOVUS WIRELESS COMMUNICATIONS INC., WEST FACE CAPITAL INC. and MID-BOWLINE GROUP CORP.

Defendants

FACTUM OF THE DEFENDANT/MOVING PARTY
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July 21, 2017

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PART I – OVERVIEW

1. Globalive Capital Inc. ("Globalive") has brought this motion to dismiss the within action as frivolous, vexatious, and an abuse of process of the Court. The key factual issues raised by the plaintiff Catalyst Capital Group Inc. ("Catalyst") in the within action were before the Court in a previous action brought by Catalyst against West Face Capital Inc. ("West Face") and Brandon Moyse (the "Moyse Action") in connection with Catalyst's failed bid for WIND Mobile Corp. ("WIND"). The Moyse Action was dismissed by Justice Newbould in its entirety and, in doing so, Justice Newbould made findings on key factual issues raised by Catalyst in this action. This action is a clear attempt to relitigate matters previously determined by Justice Newbould in the Moyse Action, and is precluded on the basis of *res judicata*, issue estoppel, and cause of action estoppel, and also, more broadly, on the basis of abuse of process.

2. Catalyst was one of many parties that sought to purchase an interest in WIND from VimpelCom Ltd. ("VimpelCom") in 2014. At the time, VimpelCom indirectly owned a minority of the voting shares and a majority of the overall equity in WIND, and Globalive indirectly owned a majority of the voting shares and a minority of the overall equity in WIND. Catalyst entered into exclusive negotiations with VimpelCom in July 2014, but due to Catalyst's unwillingness to accept (or even negotiate) a break fee sought by VimpelCom in connection with the transaction, the exclusivity period expired in August 2014 without a deal having been concluded.

3. On September 16, 2014, a consortium composed of the defendants Globalive, West Face, Tennenbaum Capital Partners LLC ("Tennenbaum"), 64 NM Holdings LP ("64NM", and its parent LG Capital Investors LLC ("LG")), Serruya Private Equity Inc. ("Serruya"), and Novus Wireless Communications ("Novus") (collectively, the "Consortium") purchased WIND. The Consortium sold WIND to Shaw Communications ("Shaw") in January 2016, for $1.6 billion.

4. Shortly after the sale of WIND to the Consortium closed in September 2014, Catalyst amended the Moyse Claim brought against West Face to include a claim that the Consortium based its offer to VimpelCom on Catalyst's confidential information. Catalyst alleged that West Face received this information from Brandon Moyse, who was a junior analyst previously employed by Catalyst. Catalyst claimed that, but for the Consortium's misuse of Catalyst's confidential information, it would have been the successful bidder for VimpelCom's interest in WIND.

5. Justice Newbould heard the trial of the Moyse Action in June 2016. In dismissing the Moyse Action, Justice Newbould found as facts that:

(a) none of West Face, Tennenbaum or LG (the "New Investors") knew that Catalyst was a bidder for WIND or the terms of any bid that Catalyst made;

(b) the terms of the Consortium's offer to VimpelCom for its interest in WIND were not based on any knowledge of Catalyst's strategy or bid;

(c) VimpelCom did not have any discussions with any of the New Investors before the exclusivity agreement between Catalyst and VimpelCom lapsed, and Globalive did not have any discussions with any of the New Investors between August 7, 2014 and the date the exclusivity agreement lapsed;

(d) VimpelCom's strong aversion to any risk of the failure to gain regulatory approval of any proposed sale of its interest in WIND was well-known in the market by April 2014 at the latest;

(e) an unsolicited offer by the New Investors on August 7, 2014 (the "Unsolicited Offer") did not play any part in the position taken by VimpelCom that, in order to execute a share purchase agreement, it required Catalyst to pay a $5 million to $20 million break fee, to mitigate any risk of failure or delay of regulatory approvals necessary for closing;

(f) it was Catalyst's refusal to agree to the break fee VimpelCom requested that caused Catalyst to end negotiations with VimpelCom;

(g) VimpelCom would not agree to any deal that carried any risk of the Canadian Government not approving it; and

(h) despite a detailed provision in the share purchase agreement that Catalyst was prepared to sign which prohibited the pursuit of regulatory concessions that would impede approval of the transaction, Catalyst was not willing to complete an acquisition of WIND without obtaining certain regulatory concessions from the Government of Canada that were not forthcoming and, as a result, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.

6. Four business days before the beginning of the trial of the Moyse Action, Catalyst issued the claim in the within action, which it served the next day. Catalyst has claimed in this action that the

Consortium induced VimpelCom to breach its exclusivity agreement with Catalyst, and that the Consortium used Catalyst's confidential information to structure its offer to VimpelCom for its interest in WIND. Catalyst alleges that, as a result of these breaches, it was unable to purchase VimpelCom's interest in WIND, and thereby gain the profits from the sale to Shaw.

7. Catalyst has refused to accept responsibility for its failure to conclude a transaction with VimpelCom. This action is an improper attempt to re-litigate the matters previously decided by Justice Newbould in the Moyse Action in connection with the sale of VimpelCom's interest in WIND, and is barred by the doctrines of *res judicata*, cause of action estoppel, issue estoppel and collateral attack. Furthermore, the action is an abuse of the process of this Court and, if allowed to proceed, would bring the administration of justice into disrepute.

PART II – FACTS

8. Throughout this factum, Globalive will adopt and rely on many of the submissions made by West Face in its factum dated July 21, 2017 (the "West Face Factum"). This factum will highlight aspects of the facts and law that pertain more particularly to Globalive.

A. Background to WIND

9. Globalive is a diversified investment corporation based in Toronto and incorporated pursuant to the laws of Ontario. Anthony Lacavera is the Chairman of Globalive and the former Chairman and Chief Executive Officer of WIND.[1]

10. Globalive founded WIND in 2008 along with Orascom Telecom Holdings ("Orascom"). WIND was originally structured so that Globalive indirectly held 67% of the voting shares and 34% of the total equity of WIND through a holding company called Globalive Investment Holdings Corp. ("GIHC"). GIHC held all the shares of WIND. Orascom held 100% of the non-voting shares and 32% of the voting shares in GIHC, for 65% of the total equity in WIND. A former Orascom employee held 1% of the voting shares in GIHC in the form of non-participating equity.[2]

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[1] Trial Affidavit of Simon Lockie, sworn June 6, 2016 ("Lockie Trial Affidavit"), para. 1, West Face Motion Record ("MR"), Vol. 15, Tab 52, p. 6048.

[2] Lockie Trial Affidavit, para. 9, MR, Vol. 15, Tab 52, pp. 6052 – 6053.

11. In 2011, the defendant VimpelCom, a corporation based in the Netherlands, incorporated under the laws of Bermuda, and listed on the New York Stock Exchange, acquired the majority shareholder of Orascom. This transaction gave VimpelCom control of Orascom's stake in GIHC.[3]

12. This ownership structure of WIND remained in place until September 2014, when the Consortium purchased VimpelCom's interest in WIND through a corporation called Mid-Bowline Group Corp. (then known as AAL Management Corp., referred to herein as "Mid-Bowline").[4]

13. From WIND's founding in 2008 until early 2015, Globalive's principal executives managed WIND's day-to-day operations.[5]

B. VimpelCom's Sale of its Interest in WIND

14. Globalive adopts and relies on paragraphs 16 to 25 of the West Face Factum, where West Face describes Catalyst's strategy to bid for VimpelCom's interest in WIND.

15. The key points of this history as related to Globalive are set out below.

16. Beginning in or around 2013, VimpelCom sought to divest its interest in WIND. At that point WIND owed VimpelCom over $1.5 billion in principal and interest. WIND also owed approximately $150 million in third party vendor debt, which was to come due on April 30, 2014. VimpelCom was willing to sell its interest in WIND based on an enterprise value of approximately $300 million, of which approximately $150 million would satisfy the vendor finance debt and the remainder would go to VimpelCom and Globalive. Failing such a transaction, VimpelCom had advised it would seek to force WIND into insolvency and recover its debt in that manner.[6]

17. In the spring of 2014, VimpelCom engaged in discussions, through its investment banker UBS Securities Canada Inc. ("UBS"), with numerous potential bidders for its interest in WIND. The potential bidders included some of the defendants in this action, as well as Catalyst.[7]

18. Given its willingness to exit its WIND investment at a relatively low enterprise value, VimpelCom's primary concern in evaluating potential bidders was the ability to close the transaction, including financial wherewithal and no impediment to timely regulatory approvals.

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[3] Lockie Trial Affidavit, para. 14, MR, Vol. 15, Tab 52, p. 6054.
[4] Affidavit of Andrew Carlson, sworn December 7, 2016 ("Carlson Affidavit"), para. 6(g) – (h), MR, Vol. 1, Tab B, p. 32.
[5] Transcript of the Cross-Examination of Simon Lockie, dated June 10, 2016 ("Lockie Cross-Examination"), MR, Vol. 18, Tab 72, pp. 7332 –7333.
[6] Lockie Trial Affidavit, paras. 17 – 19, MR, Vol. 15, Tab 52, pp. 6055 – 6056.
[7] Lockie Trial Affidavit, para. 17, MR, Vol. 15, Tab 52, p. 6055.

19. As evidence of its determination to minimize any risk of regulatory approval, in its standard form of share purchase agreement VimpelCom included a "hell or high water" clause which effectively prohibited any intended purchaser from taking any step (such as requesting regulatory concessions from Industry Canada) that "would be expected to prevent or delay the obtaining of any consent or approval" required to close the transaction.[8]

20. With a view to bidding on VimpelCom's interest in WIND, Catalyst sought assurances from the Government of Canada in the spring of 2014 that if Catalyst purchased WIND the Government would allow WIND to sell its wireless spectrum to one of the incumbent wireless carriers – Rogers, Bell, or TELUS – after five years. Catalyst was of the view that WIND would not be able to secure required financing to remain a viable independent carrier without this concession from the Government.[9] Thus, without this concession, Catalyst would not close a deal for WIND. However, the Government never gave any indication to Catalyst that it would make such a concession and in fact made explicit that no such concession would ever be granted. Furthermore, VimpelCom never indicated it would accept such a contingency as a part of any sale of its interest in WIND.[10]

21. On July 23, 2014, VimpelCom entered into an exclusivity agreement with Catalyst (the "Exclusivity Agreement"), which precluded VimpelCom from dealing or negotiating with any other bidders during its term. The Exclusivity Agreement was subsequently extended by mutual agreement of the parties, and (as described below) the parties allowed it to expire by its own terms on August 18, 2014.[11] Globalive was not a party to the Exclusivity Agreement, and did not receive a copy of the Exclusivity Agreement at any time in 2014.[12]

22. Late on August 6, 2014, Michael Leitner of Tennenabum sent the Unsolicited Offer to VimpelCom on behalf of the New Investors. Mr. Leitner sent a more formal offer and a draft share purchase agreement to VimpelCom on August 7, 2014. Mr. Leitner also informed Globalive of the Unsolicited Offer on that date.[13] There is no evidence that suggests that the Unsolicited Offer was

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[8] Lockie Trial Affidavit, para. 21, MR, Vol. 15, Tab 52, p. 6057.
[9] Trial Affidavit of Newton Glassman, sworn May 27, 2016, paras. 10-11, MR, Vol. 15, Tab 46, p. 5898-5899.
[10] Reasons for Judgment of Justice Newbould in *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, dated August 18, 2016 ("Moyse Decision"), para. 131, MR, Vol. 1, Tab 1, pp. 123 – 124.
[11] Moyse Decision, para. 30, MR, Vol. 1, Tab 1, p. 93.
[12] Transcript of the Examination-in-Chief of Simon Lockie, dated June 10, 2016 ("Lockie Examination-in-Chief"), MR, Vol. 17, Tab 71, p. 7320.
[13] Lockie Trial Affidavit, para. 24, MR, Vol. 15, Tab 52, pp. 6058 – 6059.

put to VimpelCom's supervisory board (similar to a board of directors).[14] Catalyst became aware of the Unsolicited Offer in September or October of 2014, after the Exclusivity Agreement expired.[15]

23. Also on August 7, 2014, Globalive entered into a support agreement with VimpelCom in respect of the sale of its interest in WIND (the "Support Agreement"). Globalive's obligations under the Support Agreement, offered in exchange for Globalive having an economic participation in the proceeds of a resulting transaction, were limited to its agreement: (i) to sell its interest in WIND to a buyer of VimpelCom's choosing, and (ii) alternatively, to support VimpelCom in putting WIND into insolvency in the event the sale did not proceed (since, at the time, VimpelCom considered insolvency to be the next best alternative to a transaction with Catalyst).[16] Globalive, having been asked by VimpelCom to do so, advised the New Investors on August 7, 2014 that it had entered into the Support Agreement.[17]

24. As reflected by its decision to sign the Support Agreement, Globalive believed that the Catalyst transaction was the only realistic alternative to an insolvency process (which Globalive believed would be destructive to WIND's value) and so Globalive both actively assisted VimpelCom in seeking to advance negotiations with Catalyst and also expressed to Catalyst its desire to invest alongside Catalyst in its acquisition of WIND. Until the expiry of the exclusivity period, Globalive continued to believe that Catalyst would acquire WIND.[18]

25. On or about August 11, 2014, the VimpelCom supervisory board met to review and approve the proposed share purchase agreement with Catalyst. At some point following its review, the supervisory board indicated that, in order to proceed with the transaction with Catalyst, it would require Catalyst to agree to a break fee of between $5 million to $20 million to cover any further financing of WIND required as a result of regulatory approval of the sale to Catalyst taking longer than expected. Newton Glassman, the principal of Catalyst, was infuriated by this request, and advised his deal team that the deal was technically dead or in deep trouble. Catalyst told VimpelCom that the request for the break fee was unacceptable, shut down communications, and let the Exclusivity Agreement expire on August 18, 2014.[19]

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[14] Moyse Decision, para. 127, MR, Vol. 1, Tab 1, p. 122.
[15] Carlson Affidavit, para. 9, MR, Vol. 1, Tab B, pp. 33 – 34.
[16] Lockie Trial Affidavit, para. 25, MR, Vol. 15, Tab 52, p. 6059.
[17] Lockie Trial Affidavit, para. 28, MR, Vol. 15, Tab 52, p. 6060.
[18] Lockie Trial Affidavit, para. 26, MR, Vol. 15, Tab 52, p. 6059.
[19] Moyse Decision, paras. 128 – 129, MR, Vol. 1, Tab 1, p. 123.

26. Upon expiry of the Exclusivity Agreement, VimpelCom was seriously considering proceeding with a CCAA process. Shortly after the expiry, the Consortium was formed and made an offer to VimpelCom as an alternative to a CCAA process.[20]

27. The benefit of the offer made by the Consortium to VimpelCom was that in the first step, the Consortium (which included Globalive, the controlling shareholder of WIND), would only acquire VimpelCom's non-controlling interest in WIND. Accordingly, there would be no change of control and therefore no risk that the transaction would not gain regulatory approval, as none was required. With this structure, the Consortium took on all risk of failing to gain regulatory approval in the second step of the transaction, which was a restructuring of the various Consortium members' interests in WIND that did constitute a change of control and hence required regulatory approval. The Consortium's proposed structure, therefore, satisfied VimpelCom's well-known requirement of a clean and timely exit from WIND. This offer was accepted by VimpelCom and resulted in the Consortium acquiring WIND through Mid-Bowline on September 16, 2014.[21]

C. Catalyst Learns of the Facts Underlying This Action

28. Globalive adopts and relies on paragraphs 26 to 34 of the West Face Factum, where West Face describes how in March 2015, James Riley, the Chief Operating Officer at Catalyst, admitted that Catalyst was aware of a potential claim alleging that VimpelCom had breached the Exclusivity Agreement, and that third parties induced that breach. As discussed above, Catalyst had been aware of the Unsolicited Offer since shortly after the Exclusivity Agreement expired.

29. Furthermore, prior to the motion for an injunction in the Moyse Action, returnable March 18, 2015, West Face filed an affidavit sworn by one of its partners, which outlined that:

(a) in June, 2014, West Face was considering a transaction for WIND that included Anthony Lacavera, the principal of Globalive, and that this relationship proved crucial in completing the Consortium's transaction for WIND months later;

(b) West Face did not receive any information from WIND management (i.e., Globalive) as to whether its proposals would be satisfactory to VimpelCom during the period of the Exclusivity Agreement; and

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[20] Lockie Trial Affidavit, paras. 35-36, MR, Vol. 15, Tab 52, pp. 6064 – 6065.
[21] Lockie Trial Affidavit, paras. 35 – 37, MR, Vol. 15, Tab 52, pp. 6064 – 6066.

(c) Globalive, having been asked by VimpelCom to do so, advised the New Investors on August 7, 2014 that it had entered into the Support Agreement and that it would therefore be engaging in no further discussions with the New Investors.[22]

D. The Consortium Sells Mid-Bowline By Way of Plan of Arrangement

30. Globalive adopts and relies on paragraphs 35 to 44 of the West Face Factum, where West Face describes the Consortium's sale of Mid-Bowline to Shaw for $1.6 billion by way of plan of arrangement (the "Plan of Arrangement"). The deal was announced on December 16, 2015. Justice Newbould concluded that the Plan of Arrangement was fair and reasonable on January 24, 2016, but he did not immediately approve the Plan of Arrangement. Rather, he adjourned the hearing to allow an expedited trial of Catalyst's claim for a constructive trust over West Face's shares in Mid-Bowline, arising from the claims in the Moyse Action. Ultimately, Catalyst relinquished its constructive trust claim, and the Plan of Arrangement was approved.

31. In the context of the Plan of Arrangement application, Mid-Bowline filed a significant amount of evidence, including affidavits sworn by Anthony Griffin (of West Face), Hamish Burt (of 64NM/LG), Mr. Leitner (of Tennenbaum) and Simon Lockie (of Globalive). Catalyst did not cross-examine any of Mid-Bowline's affiants.[23]

32. Mr. Lockie's evidence directly addressed the key issues in this action. Specifically, Mr. Lockie, the Chief Legal Officer of Globalive and former Chief Regulatory Officer of WIND, deposed in his affidavit as follows:

(a) "West Face certainly never conveyed any information about Catalyst, its strategies or its intentions, to me or (to my knowledge) anyone else at Globalive. However, I do not believe that West Face could have used purportedly confidential information about Catalyst-required regulatory concessions in order to defeat Catalyst's bid. My understanding of Catalyst's bid was that it was not conditional on regulatory concessions. To the best of my knowledge, information and belief, Catalyst never insisted on any regulatory concessions as a condition of closing, and no such condition was included in any draft of the Share Purchase Agreement between VimpelCom Inc. ("VimpelCom") and Catalyst that I reviewed. On the contrary, I believe that VimpelCom would have refused to consider any bid of WIND that was conditional on regulatory concessions"; and

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[22] Affidavit of Anthony Griffin, sworn March 7, 2015, Tab 1 of West Face's Responding Motion Record (Injunction Motion), paras. 31, 36 – 37, 72, 76 – 78, MR, Vol. 3, Tab 9, pp. 614, 616, 629, 631 – 632.
[23] Carlson Affidavit, paras. 41, 46, MR, Vol. 1, Tab B, pp. 49, 50.

(b) "In summary, to the best of my knowledge, from the time that Catalyst obtained exclusive negotiating rights on July 23, 2014, right up to August 18, 2014, VimpelCom perceived Catalyst to be the only credible bidder. VimpelCom, together with Globalive, made extensive efforts to close a deal with Catalyst. To the best of my knowledge, based on my discussions with Mr. Saratovsky of VimpelCom and my active support of VimpelCom's negotiations pursuant to the Support Agreement, the proposed bid of the New Investors was not taken seriously before August 18, 2014, and did not play a role in VimpelCom's negotiations with Catalyst or assessment of the Catalyst offer. Indeed, VimpelCom extended the period of exclusivity on August 11, five days after the New Investors made an unsolicited proposal to VimpelCom. VimpelCom preferred insolvency to the New Investors' bid until after the exclusivity expired, Globalive joined the Investors, and we convinced VimpelCom to consider the Investors' proposal as an alternative to insolvency with a very short time to close and no regulatory approvals".[24]

33. Catalyst only chose to deliver responding materials in the Plan of Arrangement application shortly before the hearing for the final order was scheduled to begin. These materials consisted of an affidavit indicating Catalyst intended to amend its claim in the Moyse Action. When pressed at the hearing on the nature of these amendments, Catalyst indicated they were in respect of a claim for inducing breach of the Exclusivity Agreement.[25]

34. Justice Newbould approved the Plan of Arrangement on January 26, 2016. Justice Newbould found that Catalyst had known about all the facts relevant to any claim for inducing VimpelCom to breach the Exclusivity Agreement in early 2015. Justice Newbould described the argument Catalyst presented and his findings as follows:

> During argument, it became clear that the basis for this intended claim would be a claim for inducing breach of contract made against the parties that participated in the unsolicited bid to VimpelCom to acquire its interest in WIND during the period that Catalyst and VimpelCom were having exclusive discussions. Those parties apart from West Face were Tennenbaum and 64NM. **This intended claim for tracing would be to trace all of the proceeds paid to all shareholder** [*sic*] **of Mid-Bowline** and not just those paid to West Face. **It would obviously require the addition of the other shareholders of Mid-Bowline.**
>
> [...]
>
> Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was

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[24] Affidavit of Simon Lockie, sworn January 9, 2016 (Plan of Arrangement)("Lockie Plan of Arrangement Affidavit"), paras. 4, 39, MR, Vol. 13, Tab 22, pp. 4679, 4694.

[25] Carlson Affidavit, paras. 47 – 48, MR, Vol. 1, Tab B, p. 51; Reasons for Judgment of Justice Newbould in *Re Mid-Bowline Group Corp.*, 2016 ONSC 669, dated January 26, 2016 ("Plan of Arrangement Decision"), at para. 52, MR, Vol. 1, Tab 2, p. 149

> aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was said by Catalyst about that.
>
> [...]
>
> **The intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith.** Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, which was not true, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner. [emphasis added][26]

E. The Moyse Action and the Potential for Catalyst to Add Claims and Defendants

35. Globalive adopts and relies on paragraphs 26 to 34 of the West Face Factum, which describe how Catalyst amended its statement of claim in the Moyse Action on October 9, 2014 – less than one month after the Consortium closed the deal for VimpelCom's interest in WIND – to include a claim against West Face that alleged that the Consortium based its offer on Catalyst's confidential information. In January, 2015, Catalyst moved to enjoin West Face from exercising any role in WIND management, which motion Justice Glustein dismissed. In the context of that motion, James Riley, a partner in Catalyst, admitted in cross-examination that Catalyst was aware of the facts underlying a potential claim for inducing breach of the Exclusivity Agreement.

36. Globalive also adopts and relies on paragraphs 45 to 53 of the West Face Factum, in which West Face outlines how Catalyst was aware of a potential claim for inducing breach of contract at least by March 2015, and took no steps to amend its claim in the Moyse Action either to add a new cause of action or to add new parties. Globalive adopts West Face's submission that there was nothing in the Plan of Arrangement proceedings that precluded Catalyst from taking either step in the Moyse Action.

37. Specifically relevant to Globalive, in the May 11, 2016 examination for discovery in the Moyse Action of Gabriel De Alba, the Managing Director and a partner of Catalyst, it was put to Mr. De Alba as to whether Catalyst would be adding Globalive as a party in that action. In the examination, and in the related answers to undertakings, counsel for Catalyst indicated that it was not pursuing a claim in

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[26] Plan of Arrangement Decision at paras. 52, 56, 59, MR, Vol. 1, Tab 2, pp. 149 – 151.

that action against Globalive. In the discovery, counsel for West Face asked the following questions and counsel for Catalyst gave the following answers:

> 505 Q. Are you pursuing a claim in this proceeding that [Globalive], any of its subsidiaries or any of its three principals that I will identify – Mr. Scheschuk, Mr. Lacavera or Mr. Lockie – are you pursuing a claim that any of those parties have breached any kind of legal duty or obligation to Catalyst in respect of their discussions with West Face?
>
> MR. DIPUCCHIO: As part of this claim?
>
> MR. MILNE SMITH: Yes.
>
> U/T MR. DI PUCCHIO: Let me consider that question and I'll get back to you on that, okay? I think the answer to that is no, obviously, but let me just consider that, okay?[27]

38. In respect of the undertaking given, namely, "To confirm that Catalyst is not pursuing a claim in this proceeding that [Globalive], any of its subsidiaries or any of its three principals (Brice Scheschuk, Mr. Lacavera or Mr. Lockie) have breached any kind of legal duty or obligation to Catalyst in respect of their discussions with West Face", Catalyst answered "Confirmed".[28] At no time prior to the commencement of this action did counsel for Catalyst suggest that it had been precluded from asserting such a claim.

F. The Trial of the Moyse Action

39. Globalive adopts and relies on paragraphs 56 to 63 of the West Face Factum, in which West Face outlines that Justice Newbould tried the Moyse Action *via* an expedited process on the agreement of the parties. Over 30 witnesses gave evidence in chief by way of affidavit, and were then briefly examined further in chief and cross-examined at trial. Catalyst cross-examined West Face's witnesses about whether VimpelCom, Globalive and/or UBS revealed the state of the VimpelCom/Catalyst negotiations to West Face, whether the Consortium induced VimpelCom to breach the Exclusivity Agreement, and whether VimpelCom breached the Exclusivity Agreement.

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[27] Transcript of the Examination for Discovery of Gabriel De Alba held May 11, 2017 ("De Alba Discovery Transcript"), Q. 505, MR, Vol. 14, Tab 41, p. 5493.

[28] Catalyst's Revised Undertakings, Under Advisements and Refusals Chart of the Examination for Discovery of Gabriel De Alba, held May 11, 2016, dated June 2, 2016 ("Catalyst Undertakings"), at no. 34, MR, Vol. 14, Tab 41, p. 5858.8

40. West Face called Mr. Lockie as a witness at trial. His evidence in chief, by way of affidavit, was substantially similar to the evidence he gave in the context of the Plan of Arrangement. He confirmed this evidence in his oral examination in chief at trial.[29]

41. Catalyst's counsel cross-examined Mr. Lockie at length, including on the following subjects:

(a) Globalive's relationship and communications with the New Investors in respect of the Unsolicited Offer and its efforts to make a bid for an interest in WIND through 2014;[30]

(b) the Support Agreement;[31]

(c) Globalive's involvement with VimpelCom's attempts to sell its interest in WIND, including Globalive's involvement in, and knowledge of, VimpelCom's negotiations with Catalyst;[32] and

(d) Globalive's understanding of the regulatory environment in 2014 and previously.[33]

G. The Moyse Decision

42. Justice Newbould dismissed the Moyse Action in its entirety in Reasons for Judgement released on August 18, 2016.[34]

43. Justice Newbould rejected Catalyst's evidence as unreliable. He found Mr. Glassman was "aggressive, argumentative, refused to make concessions that should have been made and contradicted his own statements made contemporaneously in emails", and viewed him "as more a salesman than an objective witness". Conversely, Justice Newbould accepted the evidence from the New Investors, and found their witnesses were "straightforward ... impressive and did not engage in overstatement". He found that "on all crucial points they were not shaken".[35]

44. With respect to the Unsolicited Offer, Justice Newbould found that none of the New Investors based any of their actions on any Catalyst confidential information, and that all of the information on which the Unsolicited Offer was based was public. His Honour made the following findings about the basis for the Unsolicited Offer and the later offer by the Consortium:

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[29] Lockie Trial Affidavit, MR, Vol. 15, Tab 52; Lockie Examination-in-Chief, MR, Vol. 17, Tab 71, p. 7295.
[30] Transcript of the Cross-Examination of Simon Lockie, dated June 10, 2016 ("Lockie Cross-Examination"), MR, Vol. 18, Tab 72, pp. 7338 – 7339.
[31] Lockie Cross-Examination, MR, Vol. 18, Tab 72, pp. 7341 – 7343.
[32] Lockie Cross-Examination, MR, Vol. 18, Tab 72, pp. 7342 – 7348.
[33] Lockie Cross-Examination, MR, Vol. 18, Tab 72, pp. 7349 – 7354.
[34] Moyse Decision, MR, Vol. 1, Tab 1.
[35] Moyse Decision, paras. 11, 14, MR, Vol. 1, Tab 1, pp. 87 – 90.

(a) "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 Catalyst was a bidder" (para. 89);

(b) "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 marketplace by VimpelCom as early as April, 2014" (para. 96);

(c) "The [New Investors] 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" (para. 104);

(d) "... neither VimpelCom nor Globalive had any discussion with any of the [New Investors] before the exclusivity period with Catalyst expired on August 18, 2014" (para. 105);

(e) "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 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 Government regulatory approval might not occur would make little sense for the size of the investment made" (para. 109);

(f) "[the New Investors] 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" (para. 113);

(g) "I accept [Mr. Leitner's of LG's] 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 Catalyst's regulatory strategies" (para. 114);

(h) "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" (para. 122);

(i) "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 the deal with VimpelCom if it could not obtain the concessions it was looking for from the Government" (para. 124); and

(j) "... 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 interest in WIND or of its later acquisition of its shareholding in WIND..." (para. 125).[36]

45. In any case, Justice Newbould found that Catalyst could not have suffered any damages, as it would have never closed the deal with VimpelCom. This finding is fatal to the new claim advanced by Catalyst. His Honour found there were two reasons Catalyst would never have closed the deal: (i) because Catalyst would not agree to a break fee, and (ii) because Catalyst would never have completed a deal without first securing regulatory concessions from the Government, which were not forthcoming. Specifically, His Honour found:

(a) "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, 2017 [the Unsolicited Offer] 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**" (para. 127);

(b) "Mr. Glassman acknowledged in his evidence that the real reason the deal between Catalyst and VimpelCom fell through **was because of the break fee that VimpelCom requested that Catalyst would not agree to**" (para. 129); and

(c) "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 ... Given that evidence, and VimpelCom's refusal to agree to a deal that

[36] Moyse Decision, paras. 89, 96, 104, 105, 109, 116, 122, 124, 125, MR, Vol. 1, Tab 1, pp. 110, 112 – 113, 115 – 116, 119 – 122.

contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom" (para. 131). [emphasis added][37]

H. Catalyst's Claims in This Action

46. As discussed above, on May 31, 2016, four business days before the trial of the Moyse Action, Catalyst issued the statement of claim in the within action, and served it the next day. In the statement of claim, as most recently amended (the most recent amendment, dated May 30, 2017, will be referred to herein as the "Thrice Amended Statement of Claim"), Catalyst claims against Globalive for misuse of confidential information, conspiracy, inducing breach of contract, and breach of contract. All of these claims are related to the Unsolicited Offer (to which Globalive had no connection) and the Consortium's ultimate purchase of VimpelCom's interest in WIND, which were the subject of express findings made by Justice Newbould in the Moyse Action.[38]

PART III – ISSUES

47. The issues on this motion are:

(a) the action should be dismissed or permanently stayed as against Globalive on the basis of issue estoppel and/or cause of action estoppel because Justice Newbould made a final decision on the same issues in the Moyse Action, and Globalive was a privy to the parties in that action because it was a witness;

(b) in any case, the action should be dismissed or permanently stayed as against Globalive as it is an abuse of process, insofar and a disposition in favour of Catalyst would require the Court to make findings of fact that directly contradict findings made by Justice Newbould in the Moyse Action;

(c) if the action is not dismissed or permanently stayed, the Court should dismiss the breach of contract claim as against Globalive because Catalyst has not pleaded that it was a party to any contract with Globalive; and

(d) if the action is not dismissed or permanently stayed, the Court should strike the jury notice Catalyst served as Catalyst has claimed equitable relief, and the action involves the consideration of a complex commercial transaction that would be inappropriate for a jury.

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[37] Moyse Decision, paras. 127, 129, 131, MR, Vol. 1, Tab 1, pp. 122 – 124.
[38] Amended Amended Amended Statement of Claim, dated May 30, 2017 ("Thrice Amended Statement of Claim").

PART IV – LAW AND ARGUMENT

A. The Nature of the Motion

48. Globalive adopts and relies on paragraphs 69 to 74 of the West Face Factum for the submission that this motion concerns the traditional doctrines of *res judicata*, issue estoppel and cause of action estoppel, as well as the auxiliary doctrine of abuse of process. The three doctrines have the same effect – litigants are "only entitled to one bite at the cherry" – and any claims that could have been made in a proceeding must be made, since re-litigation of the same factual matrix is not permitted.[39]

49. The Court has the jurisdiction to dismiss a claim as an abuse of process (which encompasses all claims that are *res judicata*) pursuant to Rule 21.01(3)(d), which provides:

> 21.01 (3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of process of the court,
>
> and the judge may make an order or grant judgment accordingly.[40]

50. The test on a motion under this rule is whether it is plain and obvious that the claim is an abuse of process.[41] It is plain and obvious in this case that the action is barred by issue estoppel and cause of action estoppel, and that it is an abuse of process. Accordingly, this Court should exercise its discretion to stay or dismiss the action as against Globalive.

B. The Action as against Globalive is Barred by Issue Estoppel

51. Issue estoppel precludes a party from re-litigating the same issues that have been previously decided in another proceeding. The three elements of issue estoppel apply equally to Globalive as they do to West Face in this action in respect of the issues determined in the Moyse Action, namely:

(a) the issues to be determined in this proceeding are the same as in the Moyse Action;

(b) the Moyse Decision is a final judicial decision; and

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[39] *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 at para. 18 ("*Danyluk*"), Moving Defendants' Joint Book of Authorities ("BOA"), Tab 1, p. 19

[40] *Rules of Civil Procedure*, O.Reg. 194, Rule 21.01, Schedule B.

[41] *Gyimah v. Reda*, 2016 ONSC 5550 at para. 22, aff'd 2017 ONCA 317, BOA, Tab 2, p. 42.

(c) Globalive, while not a named party to the Moyse Action, is a privy to a party in the Moyse Action.[42]

Each of these elements are considered in turn below.

1. The Moyse Decision Decided the Same Issues

52. Globalive adopts and relies on paragraphs 75 to 87 of the West Face Factum, where West Face describes Justice Newbould's finding that Catalyst did not suffer any harm even if the Consortium misused Catalyst's confidential information, because Catalyst would not have been successful in any event in closing a deal for VimpelCom's interest in WIND.

53. The Court should not allow Catalyst to obfuscate the issues decided in the Moyse Action by parsing the technical causes of action. As Justice Perell recently held:

> Not to put too fine a point of it, a litigant cannot avoid an issue estoppel by atomizing the legal question before the court to find some unexamined atom.[43]

54. As outlined in the West Face Factum at paragraphs 80 to 83, this case is directly analogous to the British Columbia case of *Foreman v. Niven*. In that case, Foreman had sought to purchase a property in a joint venture with Chambers. Foreman sought financing from Highland, whose principal was Niven. Highland denied the loan, and Chambers purchased the property himself. Foreman sued Chambers for breach of confidence and breach of fiduciary duty. The British Columbia Court of Appeal upheld the lower court's dismissal of the action against Chambers, agreeing that Chambers had not misused any confidential information. In any case, Foreman could not have obtained financing so he could not have suffered any damages in respect of the purchase of the property. Foreman then sued Niven and Highland, who successfully moved to dismiss the action on the basis of issue estoppel, or alternatively abuse of process.[44]

55. In dismissing the action for issue estoppel, the Court did not parse the technical aspects of the causes of action pleaded, or the parties named, in the previous action – rather it looked broadly at what the plaintiff was asking the Court to find in the second action. The Court held:

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[42] *Danyluk, supra*, at para. 25, BOA, Tab 1, p. 21; *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63 at para. 23 ("*Toronto*"), BOA, Tab 3, p. 83.

[43] *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2016 ONSC 3235 at para. 44 ("*Millwrights*"), BOA, Tab 4, 136.

[44] *Foreman v. Niven*, 2009 BCSC 1476 at paras. 2 – 4 ("*Foreman*"), BOA, Tab 5, p. 142 .

> In my view, the ineluctable consequence of these findings is that the Court in the Chambers Actions has thoroughly canvassed the question of the use and misuse of allegedly confidential information. It found that there was no or minimal confidential information. It found that there was no misuse of confidential information. It was Chambers' misuse of allegedly confidential information that gave rise to the alleged loss of opportunity of Foreman. No loss of opportunity was made out. Shifting the focus of the attack to the Niven Group or Highland cannot change this result.[45]

56. Similarly, in this action and in the Moyse Action, Catalyst asked the Court to determine whether the New Investors and the Consortium based their offers to VimpelCom on Catalyst's confidential information. It is notable that Catalyst, because it had no evidence of passing of confidential information, asked the Court to draw an inference in the Moyse Action of misuse of confidential information – the Court was therefore required to consider whether West Face's actions showed *any* evidence of misuse, not just whether they showed evidence of misuse of information obtained *from Moyse*. Justice Newbould found no such evidence and declined to make the requested inference.[46] Justice Newbould held:

> 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.[47]

57. Justice Newbould directly found that he could not infer that the Unsolicited Offer or the Consortium's ultimately successful offer were based on any information of Catalyst's – even if any of the members of the Consortium had received any such information. Justice Newbould found that the $300 million enterprise value on which the offer was made was not confidential, but rather was known in the marketplace no later than April 2014. Furthermore, he clearly held that there was no evidence the structure of the Unsolicited Offer or the Consortium's bid were based on Catalyst's information, even assuming such information was received:

> 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**

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[45] *Foreman*, *supra*, at para. 37, BOA, Tab 5, p. 155.
[46] Moyse Decision, paras. 72 – 73, 81, MR, Vol. 1, Tab 1, pp. 105 – 106, 108.
[47] Moyse Decision, para. 72, MR, Vol. 1, Tab 1, p. 105.

> **transaction 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 Government regulatory approval might not occur would make little sense for the size of the investment made. [emphasis added][48]

58. In the Thrice Amended Statement of Claim in this action, Catalyst has pleaded facts that directly contradict these findings made by Justice Newbould. For example, Catalyst has pleaded that the Unsolicited Offer and the Consortium's offer were structured with knowledge of Catalyst's need for regulatory concessions:

> Together the Conspirators prepared terms of an offer to VimpelCom that were designed to induce VimpelCom to breach the Exclusivity Agreement and to cause VimpelCom to negotiate with Catalyst in bad faith during the terms of the Exclusivity Agreement. The Conspirators used their extensive knowledge of the Exclusivity Agreement to design their offer.
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> **The Conspirators agreed one of the terms they would offer to VimpelCom would be that the closing of their offer would not be conditional on any regulatory approval from IC. The Conspirators included this term in their offer with the knowledge that Catalyst had not offered this term and would not do so**.
>
> [...]
>
> Lacavera had intimate knowledge of Catalyst's confidential negotiations with VimpelCom, which he received in his role as CEO of Wind, including Catalyst's regulatory strategy, its negotiating positions with VimpelCom and the terms of the Exclusivity Agreement ("Catalyst's Confidential Information").
>
> [...]
>
> The Consortium knowingly received and misused Catalyst's Confidential Information to create the Proposal and gain an unfair advantage over Catalyst in its negotiations with VimpelCom. [emphasis added][49]

59. Furthermore, in dismissing the Moyse Action, Justice Newbould found that Catalyst did not suffer any damages because it would never have been able to purchase VimpelCom's interest in WIND; in particular, because (i) Catalyst would not agree to a break fee required by VimpelCom, and (ii) Catalyst would not have closed the transaction without regulatory concessions from the

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[48] Moyse Decision, paras. 96, 109, MR, Vol. 1, Tab 1, pp. 112 – 113, 117.
[49] Thrice Amended Statement of Claim, paras. 76, 77, 96, 101.

Government, which the Court found Catalyst that would not have been able to obtain. In the Moyse Action, the Court conclusively determined the issue of damages, which must also apply to this claim.[50] It will be impossible for Catalyst to succeed in the present action for the same reason, because the causes of action pleaded all require proof of damages and the issue has been conclusively determined in the Moyse Action.[51] Justice Newbould held:

> Mr. Glassman acknowledged in his evidence that the real reason the deal between Catalyst and VimpelCom fell through **was because of the break fee that VimpelCom requested that Catalyst would not agree to ...**
>
> 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 ... **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**. [emphasis added][52]

60. Catalyst's entire Thrice Amended Statement of Claim in this action is premised on the claim that it lost the opportunity to purchase WIND – an opportunity Justice Newbould has already held Catalyst never had. Catalyst has pleaded in this action that:

> As a result of the misconduct of the Conspirators, VimpelCom and UBS breached the Exclusivity Agreement and breached their duty of good faith during its negotiations with Catalyst. **As a result, the Consortium was able to purchase Wind to Catalyst's detriment**.
>
> On or about January 2016, Shaw Communications ("Shaw") acquired Mid-Bowline, the corporation formed after the Consortium's acquisition of VimpelCom's interest in WIND, for $1.6 billion. As a result, the Consortium received a profit of over $1,300,000,000, thereby crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above. [emphasis added][53]

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[50] Moyse Decision, paras. 126 – 131, MR, Vol. 1, Tab 1, pp. 122 – 124.

[51] For inducing breach of contract, see *OBG Ltd. v. Allan*, [2007] U.K.H.L. 21 at paras. 39-44, BOA, Tab 6, pp. 197-199, and *Correia v. Canac Kitchens*, 2008 ONCA 506 at para. 99, BOA, Tab 7, p. 321; for breach of confidence, see *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 1989 CarswellOnt 126 at para. 139 ("*Lac Minerals*"), BOA, Tab 8, p. 394; *Lysko v. Braley* (2006), 79 O.R. (3d) 721, 2006 CarswellOnt 1758 at para. 17 (C.A.), BOA, Tab 9, p. 432; and for conspiracy, see *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, 1983 CarswellBC 812 at paras. 22 – 23, 34, BOA, Tab 10, pp. 481-483, 487, and *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460 at para. 24, BOA, Tab 11, p. 505.

[52] Moyse Decision, paras. 129, 131, MR, Vol. 1, Tab 1, pp. 123 – 124.

[53] Thrice Amended Statement of Claim, paras. 126 – 127.

61. By bringing this action, Catalyst has asked the Court to re-consider the very issues that Justice Newbould decided in the Moyse Action. The parties should not be forced to re-litigate these issues, rather Catalyst should be estopped from raising them in this action.

2. The Moyse Decision is a Final Decision

62. Globalive adopts and relies on paragraphs 88 to 90 of the West Face Factum for the submission that the Moyse Decision is a final judicial decision. Globalive agrees that it is possible, in the alternative, for the Court to provisionally stay this action, pending the outcome of the appeal in the Moyse Action, after which the Court could hear further submissions.

3. Globalive is a Privy in Interest to West Face

63. While Globalive was not named as a party in the Moyse Action, it was a member of the Consortium and its representative, Mr. Lockie, was a witness who gave extensive evidence in the action. Globalive is therefore a privy of West Face. Witnesses in previous proceedings have frequently been found to be privies for the purpose of issue estoppel.[54]

64. This case is analogous to the Court's decision in *Machado v. Pratt & Whitney Canada Inc.* In that case, the plaintiff was dismissed for cause by his employer, Pratt & Whitney. The employer claimed it dismissed him for sexual harassment of three other employees. The plaintiff made a claim with the Employment Standard Branch of the Ministry of Labour, and the referee found that Pratt & Whitney had just cause to dismiss the plaintiff. The employees the plaintiff had harassed were witnesses in the proceeding before the referee. The plaintiff later sued Pratt & Whitney for unjust dismissal and the three employees for conspiracy and defamatory libel. The Court dismissed the action as against the employees on the basis of issue estoppel, finding that they were privies to the proceeding before the referee because they were witnesses in that proceeding, and their evidence was central to Pratt & Whitney's case.[55]

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[54] *Foreman, supra*, at para. 27, BOA, Tab5, p. 152; *Rasanen v. Rosemount Industries Ltd.* (1994), 17 O.R. (3d) 267, 1994 CarswellOnt 960 at para. 47 (C.A.), leave to appeal to S.C.C. dismissed, [1994] S.C.C.A. No. 152 (S.C.C.), BOA, Tab 12, p. 539; *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237, 1994 CarswellOnt 175 at para. 13 (Gen. Div.), BOA, Tab 12, p. 530; *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132, 1995 CarswellOnt 283 at paras. 37 – 38 (Gen. Div.)("*Machado*"), BOA, Tab 14, pp. 574-575; see also *Hurst v. Société Nationale de l'Amiante* (2006), 23 B.L.R. (4th) 214, 2006 CarswellOnt 6099 at para. 105 (Sup. Ct. [Commercial List]), aff'd 2008 ONCA 573, "where the court held that a party that produced documents in an action concerning a transaction to which it was a party (and was not a witness at trial) was not a privy, but could nonetheless benefit from issue estoppel.", BOA, Tab 15, p. 620

[55] *Machado, supra*, at paras. 1 – 11, 38, BOA, Tab 14, pp. 564-566, 574.

65. As discussed above, Mr. Lockie gave evidence in Plan of Arrangement application and in the trial of the Moyse Action, in which he was cross-examined extensively by counsel for Catalyst. Mr. Lockie gave evidence on Globalive's relationship with VimpelCom and the New Investors, Globalive's involvement in supporting VimpelCom's negotiations with Catalyst, the Consortium's bid for VimpelCom's interest in WIND, and the regulatory environment at the time.[56] This evidence was central to the factual matrix in the Moyse Action and, as discussed below, Globalive would need to adduce the same evidence in this action if it is allowed to proceed.

66. Globalive's position in respect of the Moyse Action is strengthened by the fact that, in the Moyse Action, Justice Newbould's findings of fact related to the entire Consortium, not just West Face. The Moyse Decision clearly identifies the "consortium" as the entities that acquired WIND on September 16, 2014.[57] The Moyse Decision necessarily involved factual findings about all of the Consortium members, and the Court had before it evidence from Globalive and all the New Investors. Since Catalyst was asking the Court to draw an inference from West Face's actions that it had confidential information, the Court's findings could not be limited to whether West Face received information from Moyse, but rather the Court needed to consider whether West Face's actions showed any basis to infer West Face possessed confidential information. West Face's actions were, for the most part, actions taken by West Face jointly with the New Investors and, more latterly, the broader Consortium.

67. For example, after considering the evidence of all the parties involved, Justice Newbould made key findings about the actions of the entire "consortium":

> ... neither VimpelCom nor Globalive had any discussion with any of the consortium members before the exclusivity period with Catalyst expired on August 18, 2014.
>
> [...]
>
> 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.[58]

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[56] Lockie Cross-Examination, MR, Vol. 18, Tab 72, pp. 7338 – 7354.
[57] Moyse Decision, para. 3, MR, Vol. 1, Tab 1, p. 86.
[58] Moyse Decision, paras. 105, 122, MR, Vol. 1, Tab 1, pp. 115 – 116, 121.

68. These findings indicate that, based on the evidence before the Court and the manner in which the Court interpreted the evidence, issue estoppel should preclude re-litigation against Globalive.

C. The Action as Against Globalive is Barred by Cause of Action Estoppel

69. Globalive adopts the submissions in paragraphs 93 to 101 of the West Face Factum to the effect that Catalyst's claims in this action could have been made in the Moyse Action and therefore should be barred by cause of action estoppel.

70. Cause of action estoppel bars the litigation of specific causes of action or claims which have been determined in a previous proceeding. In *Doering v. Grandview (Town)*, the Supreme Court of Canada followed *Henderson v. Henderson*, where the Vice Chancellor explained:

> ...where a given matter becomes the subject of litigation in, and or adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except in special circumstances) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.[59]

71. The four requirements to meet for cause of action estoppel to apply are as follows:

(a) there must be a final decision of a court of competent jurisdiction in the prior action;

(b) the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;

(c) the cause of action in the prior action must not be separate and distinct; and

(d) the basis of the cause of action in the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence.[60]

72. As discussed above, the Moyse Decision is final. Furthermore, Globalive is a privy to the parties to the Moyse Action, and so cause of action estoppel should apply to bar Catalyst's claim as against Globalive in the same way it should bar Catalyst's claim against West Face.

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[59] *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621, 1975 CarswellMan 64 at para. 9, BOA, Tab 16, 9. 696.

[60] *Mpampas v. Schwartz Levitsky Feldman Inc.* (2007), 159 A.C.W.S. (3d) 529, 2007 CarswellOnt 5156 at para. 11 (Sup. Ct.), aff'd 2008 ONCA 581, BOA, Tab 17, p. 715.

73. The causes of action pleaded here are not separate or distinct from those in the Moyse Action. Some are exactly the same. They are all based on the same factual matrix, and the evidence will be largely the same as in the Moyse Action. Furthermore, Catalyst had discovered the allegations before the trial of the Moyse Action, since Catalyst issued its statement of claim four business days before the trial began. It is clear that Catalyst could have advanced the causes of action asserted against Globalive in the Moyse Action had it exercised reasonable diligence, but it expressly considered and elected not to do so. This action is just an attempt by Catalyst to advance a "new legal theory in support of a claim based upon essentially the same facts", which is impermissible.[61]

D. In Any Case, the Action as against Globalive is an Abuse of Process

74. Even if the Court finds that Globalive is not entitled to rely strictly upon the doctrines of issue estoppel or cause of action estoppel on the facts of this case, the Court should nonetheless dismiss or permanently stay the action as against Globalive as an abuse of process. The doctrine of abuse of process is similar to the more traditional *res judicata* doctrines of issue estoppel and cause of action estoppel, but is more flexible and is not bound by the traditional doctrines' specific requirements.[62] Justice Perell recently described the doctrine as follows:

> Abuse of process is a doctrine that a court may use to preclude re-litigation. The court has an inherent jurisdiction to prevent the misuse of its process that would be manifestly unfair to a party to the litigation or would in some other way bring the administration of justice into disrepute, and the court can and has used this jurisdiction to preclude re-litigation when the strict requirements of res judicata are not satisfied.
>
> ... The doctrine of abuse of process precludes re-litigation in circumstances where the strict requirements of res judicata are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality, and the integrity of the administration of justice. [references omitted][63]

75. Courts have held that the policy grounds supporting abuse of process are the same as those supporting issue estoppel, being:

> ... there should be an end to litigation, no one should be vexed twice by the same cause, preservation of the courts and litigants' resources, upholding the integrity of

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[61] *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286, 1996 CarswellOnt 3426 at para. 24 (Sup. Ct.), aff'd (1997), 32 O.R. (3d) 651, 1997 CarswellOnt 1279 (C.A.), BOA, Tab 18, p. 734

[62] *Toronto*, *supra*, at para. 37, 42, BOA, Tab 3, pp. 88-89, 90; *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26 at paras. 40 – 42, BOA, Tab 19, pp. 761-762.

[63] *Millwrights*, *supra*, at paras. 37 – 38, BOA, Tab 4, pp. 134-135.

> the legal system in order to avoid inconsistent results, and to protect the principle of finality.[64]

76. The Supreme Court of Canada has held that the doctrine of abuse of process precludes re-litigation of factual findings in order to safeguard the administration of justice:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality.[65]

77. In this case, in order for Catalyst's claim to succeed, the Court would need to make findings of fact that would directly contradict findings of fact made by Justice Newbould in the Moyse Action. Furthermore, this action is an abuse of process in respect of Globalive because Catalyst could have added Globalive as a party to the Moyse Action, and asserted against it the causes of action in the present action, but consciously chose not to do so.

1. The Action Requires the Court to Make Opposing Findings of Fact

78. As the Supreme Court of Canada has held, requiring a court to make findings of fact that directly contradict explicit findings of fact in a previous proceeding would "undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality".[66] While issue estoppel is more focused on the issues decided as between parties, when considering abuse of process, the Court should consider the effect of inconsistent findings of fact on the proper functioning of the justice system broadly.[67]

79. As discussed above, there are two main areas in which the Court would need to make contradictory findings of fact to those made by Justice Newbould in the Moyse Action in order for Catalyst to succeed in this action. First, Justice Newbould found that he could not infer from West

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[64] *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.* (2005), 29 C.C.L.I. (4th) 244, 2005 CarswellOnt 4659 at para. 106, aff'd (2006), 151 A.C.W.S. (3d) 980, 2006 CarswellOnt 5503 (C.A.), BOA, Tab 20, pp. 789-790.
[65] *Toronto*, *supra*, at para. 51, BOA, Tab 3, p. 93.
[66] *Toronto*, *supra*, at para. 51, BOA, Tab 3, p. 93.
[67] *Toronto*, *supra*, at para. 51, BOA, Tab 3, p. 93.

Face and the Consortium's actions that they had received and misused Catalyst's confidential information.[68]

80. Second, Justice Newbould found that Catalyst could not have suffered damages because (i) Catalyst would not agree to a break fee required by VimpelCom, and (ii) Catalyst would not have closed the transaction without regulatory concessions from the Government, which the Court found that Catalyst would not have been able to obtain. In the Moyse Action, the Court conclusively determined the issue of damages, which must also apply to this claim.[69] If Catalyst reasonably could have purchased WIND, given its insistence on regulatory concessions, it was incumbent on it to prove that before Justice Newbould which it manifestly failed to do.[70]

81. The Moyse Decision is under appeal, and that is the only proper forum in which Catalyst should be allowed to challenge the findings of Justice Newbould. As the Supreme Court has stated, there is no benefit to the administration of justice to challenge these findings in a different forum. Rather, the only possible outcomes in this action are confirming the findings – which would be a waste of judicial resources – or arriving at different conclusions, which would bring the administration of justice into disrepute.

2. The Action is Litigation by Installment

82. Catalyst could have added Globalive as a party to the Moyse Action well before the trial of that action, but consciously chose not to do so and opted to "lie in the weeds" for almost two years before finally bringing this proceeding. This is blatant litigation by installment and is an abuse of process.[71]

83. Catalyst was aware of the alleged facts underpinning its claim against Globalive well before the trial in the Moyse Action. As discussed above, Catalyst admitted to knowledge of its allegations of inducing breach of contract as early as October 2014.[72] Catalyst knew the essence of Globalive's evidence in respect of the factual issues in the Moyse Action and this action no later than December

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[68] Moyse Decision, paras. 72 – 73, 81, MR, Vol. 1, Tab 1, pp. 105 – 106, 108.
[69] Moyse Decision, paras. 126 – 131, MR, Vol. 1, Tab 1, pp. 122 – 124.
[70] *Foreman*, *supra*, at para. 42, BOA, Tab 5, p. 157.
[71] *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Margin & Younger* (2001), 53 O.R. (3d) 208, 2001 CarswellOnt 682 at para. 35 (Sup. Ct.), BOA, Tab 21, p. 809; *Martin v. Goldfarb*, 2006 CarswellOnt 4355 at paras. 78 – 81, BOA, Tab 22, pp. 838-839.
[72] Carlson Affidavit, para. 21, MR, Vol. 1, Tab B, pp. 44 – 45.

2015, when Mr. Lockie gave evidence in the Plan of Arrangement.[73] Catalyst was asked whether it would be adding Globalive as a party to the Moyse Action on May 11, 2016.[74] Catalyst issued its claim in this action on May 31, 2016, four business days *before* the trial of the Moyse Action. It is clear that Catalyst knew of all the allegations it could make against Globalive long before the trial of the Moyse Action, had the opportunity to add Globalive as a party to that action and assert therein the claims made against it in this action, but instead consciously chose to try to reserve to itself a second bite at the cherry.

3. It is Not Unfair to Catalyst to Dismiss the Action

84. None of the indicia of unfairness the Supreme Court has identified to be bars to dismissing a claim for abuse of process apply in this case. In *Toronto*, Justice Arbour held the following factors can indicate that it would be unfair to apply issue estoppel or abuse of process:

(a) the stakes in the original proceeding were too minor to generate a full and robust response;

(b) there was an inadequate incentive to defend the original proceeding;

(c) the party has discovered fresh, new evidence that was previously unavailable, which conclusively impeaches the original results; or

(d) the first proceeding was tainted by fraud or dishonesty.[75]

85. The stakes in the Moyse Action were the same as in this action, and were high. In addition to injunctive relief and unspecified general damages, Catalyst claimed a constructive trust over, and an accounting of, all of the profits West Face made in respect of the sale of WIND to Shaw for $1.6 billion. Catalyst also claimed for $300,000 in punitive damages.[76] Justice Newbould ordered Catalyst pay West Face's costs on a substantial indemnity scale of $1,239,965.[77] These stakes were not "too minor to generate a full and robust response".[78]

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[73] Lockie Plan of Arrangement Affidavit, paras. 4, 39, MR, Vol. 13, Tab 22, pp. 4679, 4694.
[74] De Alba Discovery Transcript"), Q. 505, MR, Vol. 14, Tab 41, p. 5492 – 93; Catalyst Undertakings, no. 34, MR, Vol. 14, Tab 41, p. 5858.8
[75] *Toronto*, *supra*, at paras. 52 – 53, BOA, Tab 3, p. 93; *Gonzalez v. Gonzalez*, 2016 BCCA 376 at paras. 32 – 35, BOA, Tab 23, pp. 866-867.
[76] Catalyst's Amended Amended Statement of Claim in the Moyse Action, dated December 16, 2014, at para. 1, MR, Vol. 1, Tab 6, pp. 198 – 200.
[77] Justice Newbould's Costs Endorsement, dated October 7, 2016, para. 14, MR, Vol. 19, Tab 84, p. 8205.
[78] *Toronto*, *supra*, at para. 52, BOA, Tab 3, 93.

86. Catalyst has also not claimed that it discovered any fresh evidence that was unavailable in the Moyse Action, nor has it alleged the Moyse Action was tainted by fraud or dishonesty. All the evidence in respect of Catalyst's potential damages was before the Court in the Moyse Action, as both Mr. Glassman and Mr. De Alba were cross-examined extensively on that issue. Justice Newbould found neither was credible when they claimed that Catalyst would have closed the deal for WIND. Therefore, even to the extent Catalyst may be able to point to any fresh evidence, it could not be determinative in this action, given that all of the evidence with respect to Catalyst's damages was in its possession and could, or should, have been led in the Moyse Action.[79]

E. In the Alternative, the Breach of Contract Claim Should be Struck

87. Catalyst does not plead sufficient facts to sustain its claim of breach of contract as against Globalive, and consequently the claim should be struck. This Court has held the following are the requirements for pleading breach of contract:

> A claim for breach of contract must contain sufficient particulars to identify the nature of the contract, the parties to the contract and the facts supporting privity of contract between the plaintiff and defendant, the relevant terms of the contract, which term or terms was breached, and the damages that flow from that breach. It must also clearly plead who breached the term, and how it was breached.[80]

88. Catalyst has not pleaded any of these elements as against Globalive. The Thrice Amended Statement of Claim does not allege that Globalive owed Catalyst any contractual duties or that Globalive and Catalyst were parties to any contract as between them. Catalyst admits that Globalive was not a party to the Exclusivity Agreement. There is no mention of privity of contract between Globalive and Catalyst in the Thrice Amended Statement of Claim. Catalyst admits in the Thrice Amended Statement of Claim that Globalive is not a party to the Exclusivity Agreement.[81] Globalive is also not a party to the Confidentiality Agreement, referred to in the Thrice Amended Statement of Claim.[82]

89. Should the Court strike Catalyst's breach of contract claim as against Globalive, the Court should not grant Catalyst leave to amend this claim. Catalyst has never pleaded any of the requisite

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[79] *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3 at paras. 73 – 79, BOA, Tab 24, pp. 893-895.
[80] *McCarthy Corp. PLC v. KPMG LLP* (2007), 154 A.C.W.S. (3d) 340, 2007 CarswellOnt 35 at para. 26 (Sup. Ct. [Commercial List]), BOA, Tab 25, p. 915.
[81] Thrice Amended Statement of Claim, para. 47.
[82] Globalive Request to Inspect Documents, dated December 23, 2016, and Catalyst's responses thereto, Globalive Motion Record, Tabs 4 – 6, pp. 77 – 91.

elements of a breach of contract claim against Globalive, nor has Catalyst ever been able to point to a relevant contract between it and Globalive. This is despite the fact that Catalyst has had the opportunity to cross-examine a Globalive witness twice. Accordingly, the Court should exercise its discretion to deny leave to amend.[83]

F. The Jury Notice Should be Struck

90. The Jury notice should be struck because Catalyst has claimed for equitable relief, and because this action is too complex to be tried by a jury. The Court has jurisdiction to strike a jury notice pursuant to Rule 47.02, which provides:

> 47.02 (1) A motion may be made to the court to strike out a jury notice on the ground that,
>
> (a) a statute requires a trial without a jury; or
>
> (b) the jury notice was not delivered in accordance with the rule 47.01.[84]

91. The *Courts of Justice Act* provides that the issues of fact and the assessment of damages in an action "shall be tried without a jury" in respect of any claim for equitable relief.[85]

92. Catalyst claims against Globalive for, *inter alia*, misuse of confidential information. This is a claim based in equity,[86] and so the issues of fact and the assessment of damages related to that claim cannot be determined by a jury pursuant to the *Courts of Justice Act*.

93. The other claims are based on the same factual matrix as the equitable claim for breach of confidence, and are so interwoven with the factual matrix of the equitable claim that the Court also should not put those claims before a jury. The legal and equitable claims will necessarily rely on the same witnesses, and the evidence in relation to the legal claims is inextricable from the evidence in relation to the equitable claims. Notably, Catalyst claims the same damages in respect of both the misuse of confidential claim (the equitable claim) and the breach of contract and inducing breach of contract claims (common law claims). While, as discussed above, the issue of damages has already been decided in the Moyse Action, if it is to be decided again in this action, the assessment of

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[83] *Gravelle v. Ontario*, 2012 ONSC 5154 at paras. 32, 125 – 126, BOA, Tab 26, pp. 940, 962-963.
[84] *Rules of Civil Procedure*, O.Reg. 194, Rule 47.02, Schedule B.
[85] *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 108(2)(xi), Schedule B.
[86] *Lac Minerals*, *supra*, at para. 41, BOA, Tab 8, p. 364-365.

whether Catalyst would have been able to purchase VimpelCom's interest in WIND would involve the same evidence in respect of the legal and equitable claims.[87]

PART V – ORDER REQUESTED

94. For the foregoing reasons, Globalive requests that the Court:

(a) order that the within action is dismissed or permanently stayed as against Globalive;

(b) in the alternative to dismissing or permanently staying the action, order that the breach of contract claims are struck as against Globalive;

(c) in the alternative to dismissing or permanently staying the action, strike the jury notice served by Catalyst in the within action; and

(d) order that Catalyst pay Globalive's costs of this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

July 21, 2017

FOR James D.G. Douglas/Caitlin Sainsbury/
Graham Splawski

Lawyers for the defendant/moving party,
Globalive Capital Inc.

[87] *Calvin Forest Products Ltd. v. Tembec Inc.* (2004), 73 O.R. (3d) 114, 2004 CarswellOnt 5607 at paras. 17 – 18 (Sup. Ct.), BOA, Tab 27, pp. 985-986.

Schedule "A" – Authorities Cited

1. *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460
2. *Gyimah v. Reda*, 2016 ONSC 5550, aff'd 2017 ONCA 316
3. *Toronto (City) v. Canadian Union of Public Employees (C.U.P.E.), Local 79*, 2003 SCC 63
4. *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*, 2016 ONSC 3235
5. *Foreman v. Niven*, 2009 BCSC 1476
6. *OBG Ltd. v. Allan*, [2007] U.K.H.L. 21
7. *Correia v. Canac Kitchens*, 2008 ONCA 506
8. *LAC Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 1989 CarswellOnt 126
9. *Lysko v. Braley* (2006), 79 O.R. (3d) 721, 2006 CarswellOnt 1758 (C.A.)
10. *Canada Cement Lafarge Ltd. v. B.C. Lightweight Aggregate*, [1983] 1 S.C.R. 452, 1983 CarswellBC 812
11. *Agribrands Purina Canada Inc. v. Kasamekas*, 2011 ONCA 460
12. *Rasanen v. Rosemount Industries Ltd.* (1994), 17 O.R. (3d) 267, 1994 CarswellOnt 960 at para. 47 (C.A.), leave to appeal to S.C.C. dismissed, [1994] S.C.C.A. No. 152 (S.C.C.)
13. *Dableh v. Ontario Hydro* (1994), 58 C.P.R. (3d) 237, 1994 CarswellOnt 175 (Gen. Div.)
14. *Machado v. Pratt & Whitney Canada Inc.* (1995), 12 C.C.E.L. (2d) 132, 1995 CarswellOnt 283 (Gen. Div.)
15. *Hurst v. Société Nationale de l'Amiante* (2006), 23 B.L.R. (4th) 214, 2006 CarswellOnt 6099 (Sup. Ct. [Commercial List]), aff'd 2008 ONCA 573
16. *Doering v. Grandview (Town)* (1975), [1976] 2 S.C.R. 621, 1975 CarswellMan 64
17. *Mpampas v. Schwartz Levitsky Feldman Inc.* (2007), 159 A.C.W.S. (3d) 529, 2007 CarswellOnt 5156 (Sup. Ct.), aff'd 2008 ONCA 581
18. *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286, 1996 CarswellOnt 3426 (Sup. Ct.) aff'd (1997), 32 O.R. (3d) 651, 1997 CarswellOnt 1279 (C.A.)

19. *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26

20. *Free Trade Medical Network Inc. v. RBC Travel Insurance Co.* (2005), 29 C.C.L.I. (4th) 244, 2005 CarswellOnt 4659, aff'd (2006), 151 A.C.W.S. (3d) 980, 2006 CarswellOnt 5503 (C.A.)

21. *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Margin & Younger* (2001), 53 O.R. (3d) 208, 2001 CarswellOnt 682

22. *Martin v. Goldfarb*, 2006 CarswellOnt 4355

23. *Gonzalez v. Gonzalez*, 2016 BCCA 376

24. *Korea Data Systems Co. v. Chiang*, 2009 ONCA 3

25. *McCarthy Corp. PLC v. KPMG LLP* (2007), 154 A.C.W.S. (3d) 340, 2007 CarswellOnt. 35 (Sup. Ct. [Commercial List])

26. *Gravelle v. Ontario*, 2012 ONSC 5154

27. *Calvin Forest Products Ltd. v. Tembec Inc.* (2004), 73 O.R. (3d) 114, 2004 CarswellOnt 5607 (Sup. Ct.)

Schedule "B" – Legislation Cited

1. ***Rules of Civil Procedure*, O.Reg. 194**

Rule 21.01

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

[...]

Action Frivolous, Vexatious or Abuse of Process

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court,

and the judge may make an order or grant judgment accordingly.

Rule 47.02

(1) A motion may be made to the court to strike out a jury notice on the ground that,

(a) a statute requires a trial without a jury; or

(b) the jury notice was not delivered in accordance with rule 47.01.

2. ***Courts of Justice Act*, R.S.O. 1990, c. C.43**

Section 108

Trials without jury

(2) The issues of fact and the assessment of damages in an action shall be tried without a jury in respect of a claim for any of the following kinds of relief:

[...]

11. Other equitable relief.

Court File No.: CV-16-1159500CL

THE CATALYST CAPITAL GROUP INC. - and - **VIMPELCOM LTD., et al**

Plaintiff Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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