Court File No.: CV-16-1159500CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

B E T W E E N :

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, NOVUS WIRELESS COMMUNICATIONS INC.

July 21, 2017

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Court File No.: CV-16-1159500CL

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FACTUM OF THE DEFENDANT/MOVING PARTY,
NOVUS WIRELESS COMMUNICATIONS INC.

PART I - INTRODUCTION

1. Catalyst Capital Group Inc. ("**Catalyst**"), the unsuccessful litigant in a prior proceeding, brings this abusive action to recover that to which it is not entitled.

2. In 2014, Catalyst sought to acquire VimpelCom Ltd.'s ("**VimpelCom**") interest in WIND. After enjoying a period of exclusive negotiations, Catalyst failed to conclude the transaction.

3. Thereafter, on August 25, 2014, a consortium of investors including Novus Wireless Communications Inc. ("**Novus**"), West Face Capital Inc. ("**West Face**"), Globalive Capital Inc. ("**Globalive**"), Tennenbaum Capital Partners LLC ("**Tennenbaum**"), LG Capital Investors LLC ("**LG**") and Serruya Private Equity Inc. ("**Serruya**") (collectively, the "**Consortium**") were granted exclusive rights to negotiate

the purchase of WIND. Those negotiations were successful, and on September 16, 2014, VimpelCom and members of the Consortium announced that they had reached an agreement and closed a transaction whereby the Consortium acquired all of VimpelCom's debt and equity interests in WIND through an acquisition vehicle, Mid-Bowline Group Corp. ("**Mid-Bowline**").

4. Catalyst, unable to accept defeat, brought an action against West Face and a junior analyst, Brandon Moyse, who had previously worked for Catalyst before joining West Face (the "**Moyse Action**"). Catalyst alleged that West Face used confidential information belonging to Catalyst to successfully acquire WIND. This was said to have caused Catalyst's efforts in that regard to fail.

5. Catalyst was entirely unsuccessful in the Moyse Action. Justice Newbould found that Catalyst had not suffered any harm, and that its efforts to acquire WIND were destined to fail as a result of its negotiating position and its need to secure regulatory concessions which were not forthcoming.

6. Now, in a transparent effort to pursue a new theory where its previous one failed, Catalyst alleges in this action that the true cause of its losses was a broad conspiracy amongst the Consortium to induce VimpelCom to breach the exclusivity agreement it entered with Catalyst. Importantly, Catalyst does so while at the same time pursuing an appeal of the Moyse Action.

7. Catalyst's pursuit of this claim is an abuse of process and ought to be dismissed or permanently stayed on that basis. Catalyst is engaging in litigation by installment, seeking to relitigate its alleged loss arising from the Consortium's acquisition of WIND, this time under the guise of a re-constituted theory. Catalyst knew of the facts which

underscore its claims against Novus by as early as August or September, 2014 and no later than March, 2015. It put the factual circumstances of the WIND transaction before this Court in the Moyse Action and had an obligation to assert all causes of action and name all defendants at that time.

8. Instead, Catalyst opted to "lie in the weeds", as found by Justice Newbould after Catalyst attempted to prevent court approval of a Plan of Arrangement by which Mid-Bowline was to sell WIND to Shaw Communications Inc. in January, 2016 (the "**Plan of Arrangement Proceeding**"). In spite of Justice Newbould's warning that Catalyst's conduct was "troubling" and "not acting in good faith", Catalyst continued on its course of seeing how the Moyse Action unfolded without asserting the claims it advised Justice Newbould it intended to advance. Instead, it issued this claim a week before the trial in the Moyse Action as a hedge against an adverse result in that action. This action would no doubt have never been commenced or pursued had Catalyst been successful in the Moyse Action.

9. Catalyst elected not to pursue all of its claims in the Moyse Action. It was warned in the Plan of Arrangement Proceeding as to the impropriety of "lying in the weeds". Its strategy was unsuccessful, and this Court made findings of fact that are fatal to Catalyst's claims in this second action. Catalyst must now face the consequences of attempting a strategy of litigation by installment.

10. Accordingly, the claims in this action, as against Novus, ought to be dismissed or permanently stayed on the ground that they are an abuse of process.

PART II - THE FACTS

11. Novus adopts the relevant history as outlined in paragraphs 10 to 67 of West Face's Factum.

A. Catalyst Aware of the Facts Which Underscore its Claim No Later Than March, 2015

12. After Catalyst opposed court approval of the Plan of Arrangement immediately prior to its hearing, Justice Newbould admonished Catalyst for its tactic of "lying in the weeds" and "waiting and seeing how things are going in the litigation process before springing a new theory at the last moment." He found that Catalyst knew of the facts which underscore its claim of inducing breach of contract – the very claim which it seeks to advance in this action – by no later than March, 2015:

> This 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.
>
> The evidence on the record is that VimpelCom told the parties who made the unsolicited bid that it could not deal with it while under an exclusivity arrangement with Catalyst and it did not do so. The proposed claim of Catalyst looks weak on the strength of the record before me and Catalyst has done nothing to adduce evidence to support the intended claim.[1]

13. The record reflects not only that Catalyst knew of the facts upon which it now seeks to advance this claim by March, 2015, but that Catalyst considered and believed

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[1] *Mid-Bowline Group Corp., Re*, 2016 ONSC 669 (CanLII) at paras 59-60 ("***Re Mid-Bowline***").

that it had a claim for inducing breach of contract, and elected not to pursue that claim in the Moyse Action:

(a) On ***March 13, 2015***, in response to an injunction brought by Catalyst, West Face served a responding motion record which included an affidavit sworn by West Face partner, Anthony Griffin. Mr. Griffin's evidence was that members of the Consortium worked together in July and August, 2014 to prepare an offer to purchase WIND that would be acceptable to VimpelCom; that representatives of Globalive had communications with various members of the Consortium before Globalive entered into a Support Agreement with VimpelCom on August 7, 2014; and, that certain members of the Consortium (West Face, Tennenbaum and LG Capital) made an unsolicited offer for the purchase of WIND from VimpelCom on August 7, 2014.[2] Despite this evidence and the ongoing proceedings arising from the Consortium's acquisition of WIND, Catalyst did not seek to amend its claim so as to assert allegations for inducing breach of the exclusivity agreement.

(b) On ***May 13, 2015***, in a cross-examination on an affidavit sworn in support of Catalyst's injunction motion, James Riley, Catalyst's Chief Operating Officer, admitted that while Catalyst believed VimpelCom had breached its exclusivity agreement, it had not issued a demand letter, made allegations or pleaded this cause of action at the time. Mr. Riley also

[2] Affidavit of Andrew Carlson sworn December 7, 2016 ("**Carlson Affidavit**") at para. 18, Motion Record of the Defendant/Moving Party, West Face Capital Inc. ("**West Face MR**"), Vol. 1, Tab B; Exhibit "9" to the Carlson Affidavit, Excerpts of the Affidavit of Anthony Griffin sworn March 7, 2015 at paras 5-12, 71-73 and 75-80, West Face MR, Vol. 3.

explicitly referred to *Lumley v. Gye*, the leading case on inducing breach of contract.[3]

(c) On ***January 8, 2016***, Mid-Bowline served its Application Record in the Plan of Arrangement Proceeding. The Application Record contained affidavits from West Face, Tennenbaum, LG Capital and Globalive describing the manner in which the Consortium acquired WIND.[4] Catalyst, again, did not assert any new claims.

(d) By Reasons dated ***January 26, 2016***, as described at paragraph 12 above, Justice Newbould rejected Catalyst's request and found as a fact that Catalyst knew of the relevant facts as of no later than March, 2015 and had acted in bad faith by failing to raise the issues until the hearing of the Plan of Arrangement Proceeding.[5] Despite Justice Newbould's warning, Catalyst, again, elected not to amend its claim in the Moyse Action to assert its claims for inducing breach of contract.

(e) On ***February 2, 2016***, in a telephone call between counsel to each of West Face and Catalyst, West Face advised Catalyst that if it intended to assert a claim for inducing breach of contract, it ought to do so promptly

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[3] Carlson Affidavit at para. 21, West Face MR, Vol. 1, Tab B; Exhibit "11" to the Carlson Affidavit, Excerpt of the Transcript of the Cross-Examination of James Riley dated May 13, 2015, qq. 510-514, West Face MR, Vol. 8.

[4] Carlson Affidavit at paras 41-43, West Face MR, Vol. 1,Tab B.

[5] *Re Mid-Bowline*, *supra* note 1 at para. 59.

by amending its Claim in the Moyse Action. Counsel to Catalyst said that he would "think about that".[6]

(f) On ***February 8, 2016,*** in a further telephone call between counsel, Catalyst advised West Face that while he would probably be amending the claim in the Moyse Action, he had chosen not to include claims for inducing breach of contract.[7]

(g) On May 11, 2016, Gabriel De Alba, Catalyst's chief negotiator, admitted on examination for discovery in the Moyse Action that he had been informed by VimpelCom's counsel in ***August or September, 2014*** that certain members of the Consortium had submitted an offer to VimpelCom for the purchase of WIND during Catalyst's exclusivity period.[8]

14. Catalyst has, accordingly, known of the facts upon which it advances this claim since as early as August or September, 2014 (and no later than March, 2015 as found by Justice Newbould). It believed it had a claim and gave consideration to pursuing that claim. It simply elected not to do so, preferring to first try a different litigation strategy. This alone justifies a dismissal of this action as an abuse of process.

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[6] Carlson Affidavit at para. 59, West Face MR, Vol. 1, Tab B; Exhibit "30" to the Carlson Affidavit, Copy of Handwritten Notes of Telephone Call dated February 2, 2016, West Face MR, Vol. 14, Tab 30; Exhibit "31" to the Carlson Affidavit, Transcription of Notes of Telephone Call dated February 2, 2016, West Face, MR, Vol. 14, Tab 31; Transcript of Cross-Examination of Andrew Carlson dated June 28, 2017, qq. 124-128.

[7] Carlson Affidavit at para. 69, West Face MR, Vol. 1, Tab B; Exhibit "34" to the Carlson Affidavit, Copy of Handwritten Notes of Telephone Call dated February 8, 2016 (incorrectly dated "February 7, 2016"), West Face MR, Vol. 14, Tab 34; Exhibit "35" to the Carlson Affidavit, Transcription of Notes of Telephone Call dated February 8, 2016, West Face MR, Vol. 14, Tab 35.

[8] Carlson Affidavit at para. 9, West Face MR, Vol. 1, Tab B; Exhibit "5" to the Carlson Affidavit, Trial Transcript of Cross-Examination of Gabriel De Alba, June 6, 2016, pp. 238:18-243:17, West Face MR, Vol. 1, Tab 5.

B. Justice Newbould's Findings in the Moyse Action are Determinative in this Action

15. In addition, Justice Newbould ultimately dismissed the Moyse Action in its entirety by written reasons dated August 18, 2016. In so doing, Justice Newbould made several findings of fact that are entirely dispositive of Catalyst's claims against Novus in this action.

16. Justice Newbould found that Catalyst did not suffer any damages as a result of the alleged misuse of confidential information, and that Catalyst was the author of its own failure to complete the transaction to acquire WIND. Specifically, Justice Newbould found as follows:

> [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.**
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> ...
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> [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.**
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> [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.**[9]

17. These findings were made on the basis of a full and complete record over seven extended sitting days of trial. These findings were fundamental or necessarily incidental to Justice Newbould's dismissal of the Moyse Action, and are fatal to Catalyst's claim against Novus in this action.

PART III - ISSUES AND THE LAW

18. The issue on this motion is whether Catalyst's action against Novus is an abuse of process. It is, and ought to be dismissed or permanently stayed on that basis.

19. A claim for abuse of process engages the inherent jurisdiction of the court. It is discretionary and not subject to the more rigid common law test for issue estoppel. As the Supreme Court of Canada stated in *Toronto (City) v. C.U.P.E., Local 79*:

> The attraction of the doctrine of abuse of process is that it is unencumbered by the specific requirements of res judicata while offering the discretion to prevent relitigation, essentially for the purpose of preserving the integrity of the court's process.[10]

20. There are no specific criteria or circumstances that must be satisfied in order for a court to apply the doctrine of abuse of process:

> [A] plea of issue estoppel is not available. However, to permit the statement of claim to proceed would be an abuse of process and that is the principle applicable. In considering this doctrine, it seems to me prudent to avoid hard and fast institutionalized rules such as those which attach to the plea of issue estoppel. By encouraging the determination of each case

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[9] *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 (CanLII) at paras 127-131 (“***Catalyst/Moyse***”).
[10] *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77 at para. 42 (“***Toronto***”).

> on its own facts against the general principle of the plea of abuse, serious prejudice to either party as well as to the proper administration of justice can best be avoided.[11]

21. In the present case, the doctrine of abuse of process ought to prohibit Catalyst from advancing its claim against Novus for two primary reasons:

(a) ***First***, Catalyst is engaging in relitigation by having tactically decided not to pursue Novus in an earlier proceeding arising from precisely the same circumstances; and

(b) ***Second***, success of Catalyst's claim against Novus requires this Court to make inconsistent findings with those of Justice Newbould in the Moyse Action, which offends the integrity of the adjudicative process.

22. That the outcome of the Moyse Action is under appeal is irrelevant in this case. Catalyst's claim against Novus is an abuse of process in any event and Catalyst ought to be prohibited from pursuing it on that basis.

A. Catalyst's Claim Against Novus is an Abuse of Process by Relitigation

23. One of the essential aspects of the doctrine of abuse of process is to prevent relitigation which undermines the integrity of the judicial system. In *Toronto (City) v. C.U.P.E., Local 79*, Arbour J. affirmed that "[o]ne circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to relitigate a claim which the court has already determined." She explained the doctrine as follows:

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[11] *Solomon v. Smith*, 1987 CarswellMan 233, [1987] M.J. No. 502 (C.A.) at para. 46.

> In the context that interests us here, the doctrine of abuse of process engages "the inherent power of the court to prevent the misuse of its procedure, in a way that would ... bring the administration of justice into disrepute"... Canadian courts have applied the doctrine of abuse of process to preclude relitigation in circumstances where the strict requirements of issue estoppel **(typically the privity/mutuality requirements)** 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.[12]

24. Invoking the doctrine of abuse of process by relitigation does not require a defendant to have been a party to the earlier proceeding which the plaintiff is seeking to relitigate.[13] This was recognized by Finlayson J.A. (Weiler J.A. concurring) in *Canam Enterprises Inc. v. Coles*, where he stated:

> Abuse of process is a discretionary principle that is not limited by any set number of categories. It is an intangible principle that is used to bar proceedings that are inconsistent with the objectives of public policy. **The doctrine can be relied upon by persons who were not parties to the previous litigation but who claim that if they were going to be sued they should have been sued in the previous litigation**.[14]

25. The decision in *Canam* was subsequently reversed, with the Supreme Court accepting Goudge J.A.'s conclusion that the abuse of process doctrine was inapplicable to the facts of that case. Goudge J.A. held that it was not an abuse of process for the appellant to sue the respondents after an earlier action involving different parties had been dismissed, noting that the appellant could not have brought the respondents into the original action since it was not itself a party thereto. However, neither the Supreme Court, nor Goudge J.A., took issue with the principle expressed above by Finlayson J.A. This was later recognized in *Currie v. Halton (Region) Police Services Board*, where

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[12] *Toronto, supra* note 10 at para. 37 [emphasis added].
[13] *Orlandello v. Nova Scotia (A.G.)*, 2005 NSCA 98 (CanLII) at para. 38; *Ontario v. Ontario Public Service Employees Union (O.P.S.E.U.)*, 2003 SCC 64 (CanLII) at paras 9-12.
[14] *Canam Enterprises Inc. v. Coles*, [2000] OJ No 4607 (C.A.) at para. 31, rev'd on other grounds 2002 SCC 63 (CanLII).

Armstrong J.A., in referring to *Canam*, stated that "[i]t is obvious that Finlayson and Goudge JJ.A. were *ad idem* in respect to the nature of the doctrine of abuse of process."[15]

26. That the policies which underlie the doctrine of abuse of process are offended when parties that should have been added in the first proceeding were not and are named in a subsequent action has been confirmed by a number of courts since *Canam*.[16]

27. In *Nowak v. Burhoe*, the plaintiff brought an action against Guardian Insurance Company of Canada ("**Guardian**"), Robert Burhoe, and Rhodes & Williams Limited ("**Rhodes & Williams**") seeking damages in negligence and breach of contract. In a previous action, Mr. Nowak was found to be liable to Guardian pursuant to an indemnity agreement. Nowak did not, in the course of the first action, commence proceedings against Mr. Burhoe and Rhodes & Williams by way of counterclaim or third party proceedings. In her decision in the first action, Justice Swinton found that there was no evidence of misapprehension by Mr. Burhoe and that, in any event, it did not cause any loss.

28. The defendants in the second action brought a motion seeking to strike the Statement of Claim or otherwise dismiss the action as being an abuse of process. Justice Jarvis granted the relief sought and concluded as follows:

> [9] ...**A person who was not a party to earlier proceedings is entitled to the protection of cause of action estoppel where, as here, the present issues were or could have been dealt with in the previous proceeding**.

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[15] *Currie v. Halton (Region) Police Services Board*, [2003] O.J. No. 4516 (C.A.) at para. 16.
[16] *Gravelle v. Ontario*, 2012 ONSC 5149 (CanLII) at para. 189 ("***Gravelle***"); *Erschbamer v. Wallster*, 2013 BCCA 76 (CanLII) at para. 30.

> [10] **The role played by Burhoe in the matter giving rise to the present action was very much before Madam Justice Swinton as I have earlier set out and was the subject of a specific finding.** The present action is an obvious attempt by Nowak to recast the very issues previously decided. The mere fact that Burhoe and Rhodes & Williams were not parties before Madam Justice Swinton does not mean that Mr. Nowak is not bound by her previous findings. [citations omitted]
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> ...
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> [15] **As I have said, in this case the plaintiff seeks to relitigate matters that could have or should have been litigated in the previous action.** In the motion for judgment before Madam Justice Swinton, he was obligated to put his best foot forward on the motion for judgment. If he failed to do so that cannot give rise to a right to take further proceedings in hopes of achieving an inconsistent verdict and at great cost to all involved including the judicial system.[17]

29. Similarly, in *Gravelle v. Ontario*, the plaintiff claimed to have been damaged by wrongful criminal charges and commenced an action against the Crown, the Ontario Provincial Police, the Hamilton Police Services Board, and various officers. The action was resolved by way of a consent dismissal; however, prior to its dismissal, Mr. Gravelle commenced a second action in which he named certain of the same defendants as in the first action, along with two additional officers of the Ontario Provincial Police.

30. The defendants to the second action brought a motion seeking its dismissal. The plaintiff argued that *res judicata* and issue estoppel did not apply because the second action was commenced prior to the dismissal of the first, and because the first action did not name two officers as defendants. Justice Quigley, however, struck the statement of claim and concluded that, in the alternative, the action would have been dismissed as an abuse of process. The officers named in the second action were not pursued in the first action even though their alleged conduct formed part of the foundation of the plaintiff's claim in the first action, and the policies which underlie the doctrine of abuse of process

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[17] *Nowak v. Burhoe*, [2002] O.J. No. 2729 (S.C.J.) at paras 9-10, 15.

are offended when parties that should have been added in the first proceeding were not, and are named in a subsequent action.[18]

31. As in those cases, Catalyst brought an action against Brandon Moyse and one member of the Consortium, West Face, alleging that misuse of confidential information belonging to Catalyst caused its failure to acquire WIND. The foundation of that action – being the circumstances pursuant to which the Consortium acquired WIND, the failed negotiation as between Catalyst and VimpelCom, and the damages allegedly suffered by Catalyst – is precisely the same factual foundation as in the present action.

32. Catalyst could have amended its claim in the Moyse Action to pursue the allegations it now pursues against Novus (and other members of the Consortium); however, it did not.

33. Instead, as described by Justice Newbould, Catalyst has pursued a course of "[lying] in the weeds" and "waiting and seeing how things are going in the litigation process before springing a new theory."[19] Its tactic of litigation by installment is an abuse of this Court's process, and Catalyst must now face the consequences of the litigation strategy it elected to pursue.

B. Catalyst's Claim Against Novus is an Abuse of Process Which Seeks Inconsistent Findings

34. The Supreme Court has unequivocally stated that the primary focus of the abuse of process doctrine is the integrity of the adjudicative functions of the courts.[20] The

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[18] *Gravelle, supra* note 16 at para. 189.
[19] *Re Mid-Bowline, supra* note 1 at para. 59.
[20] *Toronto, supra* note 10 at para. 43.

reputation of the Court requires that "the scandal of conflicting decisions be avoided."[21] Avoiding inconsistent results is, in fact, one of the policy grounds which underlies the doctrine.[22]

35. In this case, Catalyst's claim against Novus asks this Court to make findings of fact which directly contradict findings made by Justice Newbould in the Moyse Action. Catalyst alleges that as a result of receiving and misusing Catalyst's confidential information and conspiring to induce VimpelCom to breach its exclusivity agreement with Catalyst, Novus (and the Consortium) caused Catalyst's failure to conclude a transaction by which it would have acquired WIND.

36. These allegations cannot succeed in the face of Justice Newbould's findings in the Moyse Action. This Court has already concluded that Catalyst did not suffer any detriment by any misuse of its confidential information;[23] that Catalyst's refusal to agree to a break fee requested by VimpelCom caused its negotiations with VimpelCom to fail;[24] and, because Catalyst required regulatory concessions which were not forthcoming, there was no chance it could have successfully concluded a deal with VimpelCom.[25]

37. This Court's findings in the Moyse Action are a complete answer to the questions of causation and damages raised by Catalyst's allegations. That Novus was not party to the Moyse Action does not save Catalyst from the consequences of those judicial findings:

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[21] *Duhamel v. R.*,1984 CarswellAlta 174, [1984] S.C.J. No. 58 at para. 15.
[22] *Toronto*, *supra* note 10 at para. 38.
[23] *Catalyst/Moyse*, *supra* note 9 at para. 127.
[24] *Catalyst/Moyse*, *supra* note 9 at para. 130.
[25] *Catalyst/Moyse*, *supra* note 9 at para. 131.

> Even if it is not *res judicata*, I can see no good reason why I should, sitting as a judge of this division of the Federal Court, be invited to make a finding which would directly contradict a finding previously made by another judge of coordinate jurisdiction upon the identical facts.[26]

38. Above and beyond presenting a mere risk of inconsistent findings, Catalyst's allegations, to be sustained, demand them. Accordingly, Catalyst's action against Novus abuses this Court's process by seeking inconsistent judicial findings, and on that basis it ought to be dismissed.

C. The Outcome of the Appeal in the Moyse Action is Irrelevant

39. That the decision of Justice Newbould in the Moyse Action is under appeal is irrelevant to the viability of Catalyst's claim against Novus. There are, in brief, three possible outcomes of the appeal in the Moyse Action:

(a) ***First,*** should Catalyst's appeal be unsuccessful, the decision and factual findings of Justice Newbould will stand. Justice Newbould's findings that Catalyst failed to acquire WIND because it refused to meet VimpelCom's demands for protections from regulatory risk, and that it would not have completed the acquisition without regulatory concessions from the Government of Canada which were not forthcoming, are fatal. Catalyst cannot successfully advance its claim against Novus where contrary findings have been made by this Court and upheld on appellate review.

(b) ***Second,*** should Catalyst's appeal be entirely successful such that judgment is substituted in its favour, this action will be moot. Catalyst

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[26] *Paszkowski v. R*, [2001] F.C.J. No. 129 at paras 5-7.

cannot successfully advance its claim against Novus in the face of a judgment that imposes liability elsewhere for the same alleged loss.

(c) ***Third,*** should Catalyst's appeal be successful such that a new trial is ordered, the result is that Catalyst will be pursuing two separate actions which allege inconsistent theories of liability. A party is not free to deliberately argue diametrically inconsistent facts in various actions, thus knowingly advancing irreconcilable positions which are not articulated as alternative claims.[27] It is often an abuse of process to bring an action based on allegations which are inconsistent with allegations made in support of another action, and, should a retrial be ordered in the Moyse Action, this is precisely what Catalyst will be attempting.[28]

40. Accordingly, whether Catalyst's conduct in pursuing this action against Novus is an abuse of process does not hinge on the outcome of the appeal. In seeking to relitigate matters which have already been before this Court, Catalyst is abusing the adjudicative process in any event.

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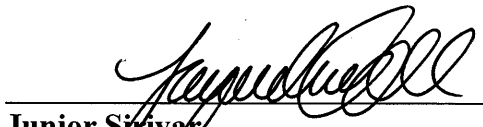
[27] *Stewart v. Clark*, 2012 BCSC 1093 (CanLII) at para. 28, aff'd 2013 BCCA 359 (CanLII), citing *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480 (CanLII) at para. 49.
[28] *Stewart v. Clark*, 2013 BCCA 359 at para. 51.

PART IV - ORDER REQUESTED

41. For all of these reasons, Novus respectfully requests an Order dismissing or permanently staying this action as against Novus, with costs on a full indemnity basis.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21st day of July, 2017.



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Lawyers for the Defendant/Moving Party,
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TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Canam Enterprises Inc. v. Coles*, [2000] OJ No 4607 (C.A.), rev'd 2002 SCC 63 (CanLII)
2. *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271 (CanLII)
3. *Currie v. Halton (Region) Police Services Board*, [2003] O.J. No. 4516 (C.A.)
4. *Duhamel v. R.*, 1984 CarswellAlta 174, [1984] S.C.J. No. 58
5. *Erschbamer v. Wallster*, 2013 BCCA 76 (CanLII)
6. *Gravelle v. Ontario*, 2012 ONSC 5149 (CanLII)
7. *Mid-Bowline Group Corp., Re*, 2016 ONSC 669 (CanLII)
8. *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480 (CanLII)
9. *Nowak v. Burhoe*, [2002] O.J. No. 2729 (S.C.J.)
10. *Ontario v. Ontario Public Service Employees Union (O.P.S.E.U.)*, 2003 SCC 64 (CanLII)
11. *Orlandello v. Nova Scotia (A.G.)*, 2005 NSCA 98 (CanLII)
12. *Paszkowski v. R*, [2001] F.C.J. No. 129
13. *Solomon v. Smith*, 1987 CarswellMan 233, [1987] M.J. No. 502 (C.A.)
14. *Stewart v. Clark*, 2012 BCSC 1093 (CanLII), aff'd 2013 BCCA 359 (CanLII)
15. *Toronto (City) v. C.U.P.E., Local 79*, [2003] 3 S.C.R. 77

TAB B

SCHEDULE "B"
RELEVANT STATUTES

N/A

THE CATALYST CAPITAL GROUP INC.
Plaintiff

and

VIMPELCOM LTD., et al.
Defendants

Court File No.: CV-16-1159500CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at TORONTO

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