

Court File No.: CV-16-553800

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

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

AMENDED NOTICE OF MOTION

The Defendant VimpelCom Ltd. (**VimpelCom**) will make a motion to a judge on ~~a date to~~
~~be determined~~ August 16, 17, and 18, 2017 at 10:00 a.m., or as soon after that time as the
motion can be heard, at 393 University Avenue, Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

- (a) an order dismissing this action as against VimpelCom on the basis that it is
barred by the Release contained in the Plan of Arrangement approved by the
order of Justice Newbould dated February 3, 2016;
- (b) in addition or in the alternative, an order dismissing or permanently staying this
action on the basis that it is an abuse of process and/or estopped;
- (c) the costs of this motion and this proceeding; and

- (d) such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

Catalyst's claim is barred by the Release

- (a) by order dated February 3, 2016, Justice Newbould approved a Plan of Arrangement (the **Plan of Arrangement**) which effected the sale of WIND Mobile Corp. (**WIND**) through the acquisition of shares in Mid-Bowline Group Corp. (**Mid-Bowline**) by a company controlled by Shaw Communications Inc. (**Shaw**);
- (b) the Plan of Arrangement included a release for "all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares..." (the **Release**);
- (c) the Release is a complete defence to Catalyst's claim:
- (i) Catalyst is bound by the Release;
 - (ii) VimpelCom is a beneficiary of the Release; and
 - (iii) Catalyst's claim is captured by the terms of the Release;
- (d) accordingly, Catalyst's claim has been released and should be dismissed;

Catalyst's claim is an abuse of process and/or estopped

(i) Catalyst's claim is abusive in light of *The Catalyst Capital Group Inc v Moyse*

- (e) on August 18, 2016, Justice Newbould rendered his decision in *The Catalyst Capital Group Inc v Moyse* (**Moyse**),

- (f) *Moyso* involved, *inter alia*, a claim by Catalyst that West Face Capital Inc. (**West Face**) unlawfully obtained and used confidential information of Catalyst to acquire WIND from VimpelCom;
- (g) Justice Newbould made several findings of fact in *Moyso* that bear directly on the issues raised by Catalyst's claim against VimpelCom in this proceeding;
- (h) in particular, but without limitation, Justice Newbould found that:
 - (i) VimpelCom had no discussions "with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014" (*Moyse*, para 105);
 - (ii) West Face independently knew that "VimpelCom wanted a clean exit without regulatory issues getting in the way" based on its own deal discussions and not because of confidential information it received about the Catalyst bid during the exclusivity period (*Moyse*, para 109);
 - (iii) there was "no chance that Catalyst would have successfully concluded a deal with VimpelCom" (*Moyse*, para 131); and
 - (iv) "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was for looking for from the Government" (*Moyse*, para 124) and "from the start Government officials had made clear that no such concessions would be given" (*Moyse*, para 11(d));
- (i) Justice Newbould's findings directly contradict allegations made by Catalyst that are central to its claim against VimpelCom, including specifically the allegations that:

- (i) VimpelCom negotiated with members of the consortium during the period of exclusivity with Catalyst – Justice Newbould specifically found that VimpelCom did not negotiate with the consortium after receiving the unsolicited bid;
 - (ii) VimpelCom used Catalyst as a “stalking horse to improve the terms of the [unsolicited] Proposal” – Justice Newbould found that the unsolicited bid was based on information received outside of the exclusivity period; and
 - (iii) Catalyst suffered damages arising from the sale of WIND to Mid-Bowline and then to Shaw – Justice Newbould found that Catalyst would have never completed a deal for WIND and therefore would never have realized profits from a sale to Shaw;
- (j) Catalyst’s claim against VimpelCom in this action thus constitutes an attempt to re-litigate findings made in *Moyse* and should accordingly be dismissed or permanently stayed as an abuse of process;

(ii) Catalyst’s claim against VimpelCom is estopped

- (k) Catalyst was aware that it had a potential claim for breach of contract against VimpelCom by no later than March 2015;
- (l) in a decision rendered in the course of the Plan of Arrangement proceedings (***Re Mid-Bowline Group Corp.***), Justice Newbould held that:
- (i) “it is quite clear that the information regarding the unsolicited bid was known by [Catalyst] early in 2015. It was contained in Mr. Griffin’s affidavit sworn March 7, 2015...” (*Re Mid-Bowline Group Corp.*, para 53);

- (ii) "...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 aware of the nature of a breach of contract action as disclosed on his cross-examination...." (*Re Mid-Bowline Group Corp.*, para 56); and
- (iii) an action for inducing breach of contract (and therefore necessarily an action for breach of contract) "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" (*Re Mid-Bowline Group Corp.*, para 59);
- (m) Catalyst has abused the Court's process by pleading in this action, contrary to the clear findings of Justice Newbould, that the affidavits filed in the Plan of Arrangement proceedings in January 2016 "revealed to Catalyst for the first time that VimpelCom did, in fact, breach the Exclusivity Agreement and had failed to negotiate with Catalyst in good faith throughout the exclusivity period";
- (n) Catalyst could have and should have pursued the allegations it raises in this action at the same time as the *Moyse* action given they involve the same factual matrix, a similar documentary record and many of the same witnesses. Instead, Catalyst made the tactical choice to "lie in the weeds" and litigate by instalment;
- (o) permitting Catalyst's claim against VimpelCom to proceed in a wholly separate action gives rise to an unnecessary multiplicity of proceedings, the risk of inconsistent judgments and a duplication and waste of the court's resources;

- (p) Catalyst's claim is therefore estopped and an abuse of process and should be dismissed or permanently stayed;

Other grounds

- (q) Rules 1.04, 21.01(1)(a), 21.01(3)(d), 25.11, and 37 of the *Rules of Civil Procedure*, RRO 1990, Reg 194;
- (r) sections 106 and 138 of the *Courts of Justice Act*, RSO 1990, c C.43; and
- (s) such further and other grounds as counsel may advise and this Honourable Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- ~~(a) the Reasons for Judgment in *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669;~~
- ~~(b) the February 3, 2016 order of Justice Newbould approving the Plan of Arrangement;~~
- ~~(c) the Reasons for Judgment in *Moyse*, 2016 ONSC 5271;~~
- ~~(d) the Court's record in both *Moyse* and the Plan of Arrangement;~~
- ~~(e) the affidavit of Catherine Ma, to be sworn; and~~
- (a) the Motion Record of the Defendant/Moving Party West Face Capital Inc.;
- (b) the pleadings in the within action; and,
- (c) such further and other material as counsel may advise and this Honourable Court permit.

~~October~~ • February 8, 2016 2017

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THE CATALYST CAPITAL GROUP INC.
Plaintiff

VIMPELCOM LTD. et al.
and Defendants

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Proceeding commenced at Toronto

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(Returnable August 16, 17, 18, 2017)

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