

**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

**NOTICE OF MOTION OF THE DEFENDANT/MOVING PARTY,
NOVUS WIRELESS COMMUNICATIONS INC.**

The Defendant, Novus Wireless Communications Inc. ("**Novus**"), will make a motion to a judge on a date to be determined at 10:00 a.m., or as soon after that time as the motion can be heard, at the courthouse at 330 University Avenue, Toronto, Ontario.

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

THE MOTION IS FOR:

1. an Order dismissing or permanently staying this proceeding as against Novus on the ground that it is an abuse of process;
2. to the extent necessary, leave to admit into evidence the record in Court File No. CV-16-11272-00CL in the Superior Court of Justice (Commercial List) (the "**Moyse Litigation**");

3. to the extent necessary, an Order striking the Jury Notice served by Catalyst in this case;
4. costs of this motion, and this proceeding, on a full indemnity basis; and
5. such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTION ARE:

A. Overview

4. This action, commenced by way of Statement of Claim issued May 31, 2016 (the “**Action**”), concerns a transaction by which a consortium of investors including Novus, West Face Capital Inc. (“**West Face**”), Tennenbaum Capital Partners LLC (“**Tennenbaum**”), LG Capital Investors LLC (“**LG**”) and Serruya Private Equity Inc. (“**Serruya**”) (collectively, the “**Consortium**”) acquired interests in WIND Mobile Corp. (“**WIND**”) from VimpelCom Ltd. (“**VimpelCom**”).
5. In 2014, after expiry of a period of exclusive negotiations, The Catalyst Group Inc. (“**Catalyst**”) failed to conclude a transaction by which it sought to acquire VimpelCom’s interests in WIND. Catalyst has, since then, engaged in litigation by installment in an effort to pin its failure on the vendor, the successful bidders, and various other parties.
6. Catalyst alleges, as against Novus, that:
 - a. Novus knowingly received and misused Catalyst’s confidential information so as to prevent Catalyst from successfully purchasing WIND;
 - b. Novus participated in a conspiracy with the Consortium, the predominant purpose of which was to induce VimpelCom to breach its exclusivity agreement with Catalyst; and

- c. As a result of 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 the transaction.
7. After failing to acquire WIND, Catalyst amended an existing action against West Face and its former analyst, Brandon Moyse, to add claims concerning the Consortium's successful transaction. Catalyst amended its claim several times, eventually asserting that West Face misused Catalyst's confidential information which prevented Catalyst from acquiring WIND. The Moyse Litigation was dismissed in its entirety by Justice Newbould. In his Reasons, Justice Newbould made a series of factual findings that are fatal to this Action.
8. On December 23, 2015, Mid-Bowline Group Corp. ("**Mid-Bowline**") (the entity through which the Consortium held their interests in WIND) commenced an application for approval of a plan of arrangement pursuant to which the shares of Mid-Bowline were to be transferred to Shaw Communications Inc. ("**Shaw**") free and clear of Catalyst's claim for a constructive trust over West Face's indirect interest in WIND, which Catalyst had asserted in the Moyse Litigation.
9. Catalyst opposed approval by the Court of the proposed plan of arrangement, asserting a claim of inducing breach of contract the morning of the hearing of the application. Justice Newbould did not permit Catalyst to raise that issue at that juncture.
10. Catalyst elected not to assert its claim of inducing breach of contract until the hearing of the application for court approval of the sale of the same company, WIND, that Catalyst had already sued West Face about over a year earlier.
11. Catalyst also elected not to assert claims against Novus in the Moyse Litigation, which was predicated on entirely the same circumstances which required findings to be made on the very issues it raises in its present claim.

12. Catalyst is clearly engaging in litigation by installment and abusing this Court's process.

B. Background

13. WIND is a Canadian telecommunications provider. At the end of 2013, the majority of its voting shares were held by Globalive Capital Inc. ("**Globalive**"), while a majority of the total equity was held by the VimpelCom.
14. Catalyst negotiated with VimpelCom for the purchase of its interests in WIND in 2014. Catalyst, however, was not willing to purchase WIND unless it obtained regulatory concessions from Industry Canada granting to Catalyst the unrestricted right to sell or transfer WIND's wireless spectrum to one of the incumbent wireless carriers after five years.
15. On July 23, 2014, VimpelCom entered into exclusive negotiations with Catalyst concerning the negotiation of a Share Purchase Agreement for the acquisition of WIND. This period of exclusivity was extended several times, ultimately to August 18, 2014.
16. VimpelCom and Catalyst failed to conclude a transaction at the expiry of the exclusivity agreement on August 18, 2014.
17. After the expiry of the exclusivity agreement as between VimpelCom and Catalyst, Novus was approached to discuss participating, along with other investors, in the transaction at issue in these proceedings.
18. The Consortium was granted exclusive rights to negotiate the purchase of WIND on August 25, 2014. The negotiation was successful, and on September 16, 2014, VimpelCom and members of the Consortium announced that they had reached an agreement whereby the Consortium would acquire all of VimpelCom's debt and equity interests in WIND through an acquisition vehicle, Mid-Bowline.

19. A plan of arrangement, by which all outstanding shares of Mid-Bowline were sold to Shaw Communications Inc., was approved by Justice Newbould on February 3, 2016.

C. Catalyst's Claim is an Abuse of Process

20. Catalyst's claim is an abuse of process by re-litigation. In Reasons for Decision in Court File No. CV-15-11238-00CL, concerning court approval of the plan of arrangement, Justice Newbould found that Catalyst knew the facts which underscore its claims against Novus in this Action as of no later than March, 2015, yet failed to raise the issue until the hearing of that application. Justice Newbould characterized Catalyst's conduct of "lying in the weeds" as one of bad faith and did not permit Catalyst to raise the issue of inducing breach of contract in those proceedings:

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 minute 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 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

21. At that time, Catalyst could have added Novus and the other defendants to this Action as defendants to the Moyse Litigation (to the extent that they were not already defendants).

¹ *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669 at paras 59-60.

22. Catalyst, however, sat on its rights and made a tactical decision not to assert its claims against Novus, a decision from which it seeks to resile by way of this Action following Catalyst's defeat in the Moyse Litigation.

23. Catalyst's action against Novus is barred by the doctrine abuse of process by relitigation. This doctrine can be relied upon by parties 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.

D. Catalyst's Claim Seeks Findings Inconsistent with the Reasons for Decision of Justice Newbould in the Moyse Litigation

24. Catalyst's claim in the Moyse Litigation asserted that Mr. Moyse provided West Face with confidential information concerning Catalyst's bidding strategy in its effort to acquire interests in WIND, and that West Face successfully acquired WIND by misusing that confidential information.

25. On the basis of the evidence before him, upon which Novus intends to rely in support of this motion, Justice Newbould made the following findings of fact in his Reasons for Decision in the Moyse Litigation:

- a. that Catalyst did not suffer any damages as a result of the alleged misuse of confidential Catalyst information;
- b. that it was Catalyst's refusal to agree to a particular term (i.e., a break fee) requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom;
- c. that VimpelCom would not agree to any deal that carried any risk of not obtaining Government approval; and
- d. that Catalyst was not willing to complete an acquisition of WIND without obtaining certain regulatory concessions from the Government of Canada (namely, the right to transfer WIND's spectrum to an incumbent after five years), that these concessions were not forthcoming and, as a result, there

was no chance that Catalyst could have successfully concluded a deal with VimpelCom.

26. In order to obtain judgment for its claims of conspiracy and inducing breach of contract as against Novus in this Action, this Court will need to make findings of fact that would be inconsistent with the findings of fact made by Justice Newbould in the Moyses Litigation. These findings were made on the basis of a full and complete record with extensive argument, and they were fundamental or necessarily incidental to Justice Newbould's dismissal of the Moyses Litigation.
27. As a result of Justice Newbould's finding in the Moyses Litigation that Catalyst failed to establish that it suffered any damages (as Catalyst was the author of its own fate in failing to conclude the transaction), Catalyst has no tenable cause of action against Novus for inducing breach of contract or conspiracy.
28. It would therefore be an abuse of process and it would bring the administration of justice into disrepute to allow Catalyst's claim to proceed as against Novus.

E. The Jury Notice Ought to be Struck

29. This matter cannot be fairly tried by a jury.
30. This action raises complex issues of fact, law and mixed fact and law, which issues will have to be decided following a proper application of the legal principles of cause of action estoppel, issue estoppel, collateral attack, and abuse of process.
31. The Court has the discretion to strike a jury notice in the appropriate case. Justice to the parties in this action will be better served by the striking of the jury notice.

F. Other Grounds

32. Sections 106, 108, 138 and 140 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

33. Rules 1.04, 21.01(3), 25.11, 37, 39, 47.02(2) and 57 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; and
34. 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:

35. The Motion Record of the Defendant/Moving Party West Face Capital Inc.;
36. The pleadings in the within action; and
37. Such further and other evidence as counsel may advise and this Honourable Court may permit.

January 26, 2017

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THE CATALYST CAPITAL GROUP INC. VIMPELCOM LTD., et al.
Plaintiff and Defendants

Court File No.: CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

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