Court File No. C62655

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents)

FACTUM OF THE DEFENDANT (RESPONDENT), WEST FACE CAPITAL INC.

June 30, 2017

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent Thomson (LSUC# 24264J)
Tel: 416.863.5566
kentthomson@dwpv.com

Matthew Milne-Smith (LSUC# 44266P)
Tel: 416.863.5595
mmilne-smith@dwpv.com

Andrew Carlson (LSUC# 58850N)
Tel: 416.367.7437
acarlson@dwpv.com

Fax: 416.863.0871

Lawyers for the Defendant (Respondent),
West Face Capital Inc.

TO: **Lax O'Sullivan Lisus Gottlieb LLP**
145 King Street West
Suite 2750
Toronto ON M5H 1J8

Rocco DiPucchio (LSUC# 381851)
Tel: 416.598.2268
rdipucchio@counsel-toronto.com

Andrew Winton (LSUC# 54473I)
Tel: 416.644.5342
awinton@counsel-toronto.com

Bradley Vermeersch (LSUC# 69004K)
Tel: 416.646.7997
bvermeersch@counsel-toronto.com

Fax: 416.598.3730

Lawyers for the Plaintiff (Appellant)
The Catalyst Capital Group Inc.

AND TO: **Paliare Roland Rosenberg Rothstein LLP**
155 Wellington Street West
35th Floor
Toronto ON M5V 3H1

Robert A. Centa (LSUC# 44298M)
Tel: 416.646.4314
Robert.Centa@paliareroland.com

Kristian Borg-Olivier (LSUC# 53041R)
Tel: 416.646.7490
Kris.Borg-Olivier@paliareroland.com

Denise Cooney (LSUC# 64358R)
Tel: 416.646.7422
Denise.Cooney@paliareroland.com

Fax: 416.646.4301

Lawyers for the Defendant (Respondent)
Brandon Moyse

TABLE OF CONTENTS

Court File No. C62655

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents)

FACTUM OF THE DEFENDANT (RESPONDENT), WEST FACE CAPITAL INC.

PART I ~ OVERVIEW

1. In this classic "bitter bidder" claim for breach of confidence, Justice Newbould, the most senior and experienced Justice of the Commercial List, made a series of unimpeachable factual findings against the Appellant, The Catalyst Capital Group Inc. ("**Catalyst**"). Those findings defeated Catalyst's claims against the Respondent, West Face Capital Inc. ("**West Face**"). All of Catalyst's claims against West Face were dismissed. Many of the Trial Judge's findings against Catalyst were based upon his assessments of the credibility of the various witnesses who testified at trial, including senior executives of Catalyst who, as explained more fully below, were entirely unimpressive witnesses.

2. The Trial Judge held that West Face did not receive any relevant confidential information belonging to Catalyst from the Respondent Brandon Moyse ("**Moyse**"), a former junior analyst of Catalyst who was employed very briefly by West Face in late June and early July 2014. The Trial Judge also held that, even if it could be inferred that West Face had received confidential information of Catalyst (which it could not), West Face did not misuse

any such information. Furthermore, the Trial Judge held that even if West Face had both received and misused Catalyst's confidential information, Catalyst would not and could not have suffered any harm as a result. Each of these findings was grounded firmly in the evidence adduced at trial, and each of them, standing alone, was sufficient to doom Catalyst's claims against West Face. Those claims are utterly devoid of merit.

3. Catalyst's claims concerned its failed attempt to acquire WIND Mobile Inc. ("**WIND**") in August 2014, and its efforts to blame West Face for that failure. In advancing its claims, Catalyst sought to impute to West Face conduct that West Face did not engage in, as well as motives it did not have. Catalyst's claims were fatally flawed for many reasons.

4. First, Catalyst's claims ignored safeguards, including a Confidentiality Wall, that West Face had put into place before Moyse joined its employ, and that West Face enforced assiduously thereafter. The purpose and effect of those safeguards was to prevent Moyse from sharing with anyone at West Face any information of Catalyst concerning WIND.

5. Catalyst's claims also ignored the real reasons underlying its failure to acquire WIND. The evidence adduced at trial demonstrated clearly that Catalyst's failure was attributable to, among other things: (i) Catalyst's unnecessary, unreasonable, and unachievable demands for significant regulatory concessions from the Government of Canada, which Catalyst viewed as a pre-condition to acquiring WIND; (ii) Catalyst's duplicitous conduct during its negotiations with VimpelCom Ltd. ("**VimpelCom**"), the principal owner of WIND, particularly with respect to Catalyst's seeking those concessions; and (iii) Catalyst's unreasonable refusal to negotiate with VimpelCom in mid-August 2014 concerning VimpelCom's request for a break fee as a safeguard against the risk to

VimpelCom that the sale of WIND to Catalyst might not receive the necessary regulatory approval.

6. Significantly, the law germane to Catalyst's claims against West Face was not in dispute. Indeed, the Trial Judge applied the legal test recommended to him by Catalyst for breach of confidence in dismissing all of Catalyst's claims against West Face. Rather, the areas of dispute were factual in nature, and the Trial Judge's findings went against Catalyst on every material point. The Trial Judge considered carefully the extensive evidence led at trial, and found that Catalyst had not established any element of its claims for breach of confidence against West Face. Far from amounting to palpable and overriding error, those findings were entirely correct. They were supported by overwhelming evidence, including the testimony of multiple witnesses as well as numerous corroborating, contemporaneous documents. Put as simply as possible, Catalyst's claims were based upon the suspicions and self-serving speculation of its principals. West Face's defence, on the other hand, was based upon direct evidence from the key participants in the events in question. The Trial Judge was fully entitled to prefer the latter to the former, and he did just that.

7. On appeal, Catalyst makes a veiled – and baseless – allegation of bias against the Trial Judge, which Catalyst characterizes euphemistically as a "denial of procedural fairness". That allegation is also devoid of merit. Catalyst makes this unfortunate claim simply because the Trial Judge believed and accepted the evidence of witnesses called by West Face and Moyse while being critical of and rejecting evidence given by Catalyst's witnesses. Catalyst confuses bias with discernment. Its principal witnesses were argumentative, evasive, and contradictory. They gave evidence that conflicted squarely with their own affidavits, with Catalyst's evidence at discovery, with numerous contemporaneous

documents, and with the evidence of other witnesses (including between Catalyst witnesses). Their evidence was unworthy of belief on the material points in dispute.

8. In the end, the Trial Judge properly saw this case for what it was: a contrived attempt by a losing bidder to lay the blame for its own poor strategic choices at the feet of the successful party. There is no proper basis to interfere with any of the findings of the Trial Judge complained of by Catalyst. Its appeal should be dismissed.

PART II ~ THE FACTS

9. There are three constellations of facts relevant to this appeal: (a) facts pertaining to West Face's hiring and temporary employment of Moyse; (b) facts concerning West Face's role in the consortium of investors that succeeded in acquiring WIND in September 2014; and (c) facts pertaining to Catalyst's failure to acquire WIND. While the timelines of these three series of events overlap, the factual narratives do not. They are therefore discussed separately below.[1]

10. The only paragraphs in Catalyst's Factum that West Face accepts as factually correct are paragraphs 18, 19, 22, 23, 38 and 44.

PART II.1 ~ THE FACTS RELEVANT TO WEST FACE'S HIRING AND EMPLOYMENT OF MOYSE

A. West Face's Interactions With Moyse

(i) Moyse's Approach to West Face in March 2014

11. Brandon Moyse first applied for a job at West Face in 2012, but accepted a position at Catalyst instead. By late 2013, Moyse was dissatisfied with his role and lack of

---

[1] Citations in this Factum are to three sources: (i) Catalyst's Appeal Book and Compendium ("**CC**"); (ii) West Face's Witness Compendium ("**WF WC**"), which contains copies of the relevant excerpts from the various witnesses' affidavits and transcripts of evidence referred to in this Factum, arranged alphabetically by witness and then chronologically by date of the relevant affidavit/transcript; and (iii) West Face's Document Compendium ("**WF DC**"), which contains copies of the relevant exhibits and other documents referred to in this Factum, arranged chronologically.

learning opportunities at Catalyst, as well as with the oppressive and toxic work environment there. As a result, he began searching for alternative employment.[2]

12. On March 14, 2014, Moyse emailed Tom Dea of West Face in response to a recent press release of West Face announcing the launch of its new Alternative Credit Fund.[3] Mr. Dea – the West Face Partner with primary responsibility for recruiting a new analyst – testified that, at the time, West Face "had a critical need for some additional analytical work".[4] The Trial Judge accepted this evidence.[5]

(ii) Moyse Sent Mr. Dea Four Writing Samples that had Nothing to do with WIND, and Which the Trial Judge Held Were a "Red Herring"

13. Mr. Dea met with Moyse at a local coffee shop on March 26, 2014 to discuss Moyse's potential employment at West Face.[6] Mr. Dea and Moyse both testified that at no point during this "fairly standard", "run-of-the-mill" discussion did either of them mention WIND. Rather, Mr. Dea explored with Moyse his work background, career goals, and reasons for wanting to move on from Catalyst. At the conclusion of their discussion, Mr. Dea asked Moyse to provide him with his resume, a deal sheet, and writing samples demonstrating his written communication skills. Mr. Dea and Moyse both testified that Mr.

---

2 Trial Reasons, at paras. 53-54, CC, Tab 4. See also Affidavit of Thomas Dea sworn June 3, 2016 ("**Dea Trial Affidavit**"), at paras. 5-6 & 10-13, WF WC, Tab 17; Dea Chief, June 10, 2016, pp. 1212:21-1213:17, WF WC, Tab 18; Affidavit of Brandon Moyse affirmed June 2, 2016 ("**Moyse Trial Affidavit**"), at paras. 113-114, WF WC, Tab 51; Moyse Chief, June 13, 2016, pp. 1372:14-1382:9, WF WC, Tab 52 and BM0004976, WF DC, Tab 31. See also of Brandon Moyse sworn July 7, 2014 (BM003688), WF WC, Tab 49, at paras. 23-25.

3 Trial Reasons, at para. 55, CC, Tab 4. See also WFC0031084, WF DC, Tab 15; Dea Trial Affidavit, at paras. 7-9, WF WC, Tab 17; Dea Chief, June 10, 2016, pp. 1213:18-1215:15, WF WC, Tab 18; Moyse Trial Affidavit, at para. 114, WF WC, Tab 51; and Moyse Chief, June 13, 2016, pp. 1380:15-1385:6, WF WC, Tab 52.

4 Dea Chief, June 10, 2016, pp. 1229:17-1232:10, especially pp. 1231:14-1232:1, WF WC, Tab 18. See also Dea Trial Affidavit, at paras. 9 & 20, WF WC, Tab 17; and WFC0109161, WF DC, Tab 24 and WFC0109181, WF DC, Tab 35. See also Griffin Chief, June 8, 2016, pp. 771:21-772:13, WF WC, Tab 34.

5 Trial Reasons, at para. 55, CC, Tab 4.

6 Moyse's evidence was that he only began working on Catalyst's March 27 Presentation after he met with Mr. Dea, and no Catalyst witness offered evidence to the contrary. Moyse Chief, June 13, 2016, pp. 1415:21-1417:8, WF WC, Tab 53.

Dea explicitly instructed Moyse to redact from his writing samples any confidential information they might otherwise contain.[7]

14. On March 27, 2014, Moyse sent Mr. Dea an email (the "**March 27 Email**") attaching his resume, a deal sheet, and four investment memos as writing samples. Importantly, these memos had nothing whatsoever to do with WIND, or even with the telecommunications industry more generally.[8] Rather, they related to unrelated companies called Homburg, NSI, Rona, and Arcan.[9] While these memos were marked "confidential", Moyse noted in his covering email to Mr. Dea that three of the four memos contained only compilations of public information.[10]

15. Moreover, West Face took seriously Moyse's mistake in sending the "confidential" writing samples, and the Trial Judge so found.[11] By way of example, before West Face made an offer of employment to Moyse in late May 2014, West Face Partner Anthony Griffin expressed concern to Mr. Dea about Moyse's having sent the writing samples. Mr. Griffin ultimately supported Moyse's hiring because he viewed the sending of

---

7 Dea Chief, June 10, 2016, pp. 1214:10-1217:19 & 1218:21-1221:23, WF WC, Tab 18; and Moyse Chief, June 13, 2016, pp. 1380:15-1387:13, WF WC, Tab 52. See also Dea Trial Affidavit, at paras. 10-12, WF WC, Tab 17, WFC0079574, WF DC, Tab 16 and Moyse Trial Affidavit, at paras. 115-116, WF WC, Tab 51. See also Trial Reasons, at paras. 56-57, CC, Tab 4.

8 Trial Reasons, at para. 57, CC, Tab 4. See also WFC0075126, WF DC, Tab 18. In his Opening Statement, Catalyst's counsel admitted to the Trial Judge that the investment memos attached to the March 27 Email were "not connected in any way to ultimately what's at issue here" and would "form no part of what [the Trial Judge had] to decide…". Catalyst's Opening Statement, June 6, 2016, pp. 21:21-23:8, WF WC, Tab 1.

9 Riley Cross, June 8, 2016, pp. 585:2-589:9, WF WC, Tab 63; and Affidavit of Anthony Griffin sworn March 7, 2015 (WFC0080746), at paras. 51-57, WF WC, Tab 30. In fact, Catalyst stopped treating the March 27 email as confidential in January 2015, more than a year before trial. See Riley Cross, June 8, 2016, pp. 589:10-596:21, WF WC, Tab 63; and WFC0081342, WF DC, Tab 86. See also Affidavit of Anthony Griffin sworn June 4, 2016 ("**Griffin Trial Affidavit**"), at para. 71, WF WC, Tab 31; Dea Trial Affidavit, at paras. 17-18, WF WC, Tab 17; Griffin Chief, June 8, 2016, pp. 773:11-777:10, especially 776:25-777:10, WF WC, Tab 34; and Dea Chief, June 10, 2016, pp. 1218:21-1225:25, especially 1223:9-1225:9, WF WC, Tab 18.

10 WFC0075126, WF DC, Tab 18. See also Moyse Trial Affidavit, at para. 116, WF WC, Tab 51.

11 Trial Reasons, at paras. 57-60, CC, Tab 4.

the samples as an honest mistake made by a young and inexperienced analyst.[12] Furthermore, at Mr. Dea's request, West Face's General Counsel – Alexander Singh – advised Moyse on May 22, 2014 that West Face took matters of confidentiality very seriously and instructed him that he was not to disclose to anyone at West Face information belonging to Catalyst. Moyse assured Mr. Singh that he understood and would abide by his confidentiality obligations both to Catalyst and to West Face. On May 23, Mr. Dea had a similar conversation with Moyse.[13] Moreover, the obligation to safeguard Catalyst's confidential information was incorporated expressly into Moyse's written employment agreement with West Face.[14] *Notably, all of this occurred well before Moyse began working at West Face on June 23, 2014*.

16. Ultimately, the Trial Judge concluded correctly that the March 27 Email was a "red herring with little or no substance", and that West Face "treated seriously the issue of the confidentiality of the memoranda sent by Mr. Moyse to Mr. Dea" in the March 27 Email.[15] This finding was supported by ample evidence, *including the undisputed fact that, as stated above, these writing samples had nothing whatsoever to do with WIND*.

(iii) Moyse Attended at West Face's Office for Interviews, and Never Mentioned WIND During His Hiring Process

17. Moyse attended at West Face's office for interviews on April 15 and April 28, 2014, when he met with West Face's other Partners (Mr. Griffin, Peter Fraser and Greg

---

12 Trial Reasons, at para. 60, CC, Tab 4. See also Griffin Chief, June 8, 2016, pp. 773:11-776:18, WF WC, Tab 34; and WFC0109149, WF DC, Tab 23; and Dea Chief, June 10, 2016, pp. 1232:15-1235:22, WF WC, Tab 18.

13 Trial Reasons, at para. 60, CC, Tab 4. See also Affidavit of Alexander Singh sworn July 7, 2014 (WFC0075056), at paras. 3-6, WF WC, Tab 65 ("**Singh Affidavit**"); Dea Trial Affidavit, at para. 30, WF WC, Tab 17; Dea Chief, June 10, 2016, pp. 1235:23-1238:13, WF WC, Tab 18; Moyse Trial Affidavit, at paras. 129-130, WF WC, Tab 51; Moyse Chief, June 13, 2016, pp. 1388:4-1389:22, WF WC, Tab 52; and WFC0109530, WF DC, Tab 95.

14 WFC0075090, at s. 1.05(d), WF DC, Tab 49. See also Dea Trial Affidavit, at paras. 28-29, WF WC, Tab 17; and Singh Affidavit, at para. 3, WF WC, Tab 65.

15 Trial Reasons, at paras.59, 60 & 84, CC, Tab 4.

Boland) and its Vice-President (Yu-Jia Zhu). The uncontradicted evidence at trial concerning these interviews was that WIND was not discussed at any time. [16]

18. Ultimately, West Face decided to offer Moyse a position as a junior associate based on his superb credentials, transferable experience, excellent references, and West Face's pressing need for an analyst.[17] Conversely, West Face's hiring of Moyse had nothing whatsoever to do with WIND. In fact, at the time West Face extended the job offer to Moyse, no one at West Face had any inkling that Moyse had worked on WIND during his employment at Catalyst.[18] On May 16, 2014, Mr. Dea contacted Moyse by phone to offer him a position at West Face. West Face provided Moyse with a written employment agreement on May 22.[19] After his conversations with Mr. Singh and Mr. Dea regarding the importance of confidentiality (described above), Moyse accepted West Face's offer, and returned to West Face an executed copy of his employment agreement on May 26, 2014.[20]

---

16 Trial Reasons, at para. 58, CC, Tab 4. See also Griffin Trial Affidavit, at para. 67, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 771:21-773:10, WF WC, Tab 34; Affidavit of Yu-Jia Zhu sworn June 3, 2016 ("**Zhu Trial Affidavit**"), WF WC, Tab 66; WFC0109978, WF DC, Tab 20; WFC0112456, WF DC, Tab 20; Zhu Chief, June 10, 2016, pp. 1297:22-1301:17, WF WC, Tab 67; Zhu Cross, June 10, 2016, pp. 1304:20-1307:9, WF WC, Tab 68; Moyse Trial Affidavit, at paras. 118-120, WF WC, Tab 51; Moyse Chief, June 13, 2016, pp. 1389:23-1392:14, WF WC, Tab 52; Dea Trial Affidavit, at paras. 19-20, WF WC, Tab 17; and Dea Chief, June 10, 2016, pp. 1225:10-1225:25, WF WC, Tab 18.

17 Among other things, Mr. Moyse was described by his references as "very smart and hard working" and "among the very best analysts [Credit Suisse] had". Dea Trial Affidavit, at paras. 20-26, WF WC, Tab 17; WFC0109161, WF DC, Tab 24; WFC0109171, WF DC, Tab 34; WFC0109186, WF DC, Tab 36; WFC0109181, WF DC, Tab 35; and Dea Chief, June 10, 2016 pp. 1226:1-1232:10, WF WC, Tab 18. Notably, Catalyst often attempted to rely on Moyse's undisputedly good credentials to exaggerate his importance to the Catalyst WIND deal team. See, for example, Catalyst's Opening Statement, June 6, 2016, p. 9:7-11, WF WC, Tab 1; and De Alba Chief, June 6, 2016, pp. 146:7-149:8, WF WC, Tab 10.

18 Dea Trial Affidavit, at para. 26, WF WC, Tab 17; Dea Chief, June 10, 2016, pp. 1229:17-1232:10, especially pp. 1232:2-1232:10, WF WC, Tab 18.

19 Moyse Trial Affidavit, at paras. 122-123, WF WC, Tab 51; WFC0031168, WF DC, Tab 43; Moyse Chief, June 13, 2016, pp. 1392:15-1394:7, WF WC, Tab 52; Dea Trial Affidavit, at paras. 27-28, WF WC, Tab 17; WFC0031203, WF DC, Tab 44.

20 Trial Reasons, at para. 58, CC, Tab 4. See also Moyse Trial Affidavit, at para. 125, WF WC, Tab 51; Dea Trial Affidavit, at para. 28, WF WC, Tab 17; WFC0032710, WF DC, Tab 47; and WFC0075090, WF DC, Tab 49.

B. Moyse Received No Confidential Information From Catalyst After His Departure from Catalyst on May 26, 2014

19. On Saturday, May 24, 2014, Moyse formally notified Catalyst of his resignation.[21] On Monday, May 26, 2014, Moyse returned to Catalyst following a ten-day vacation in Asia. He was immediately sent home by James Riley, the Chief Operating Officer of Catalyst, for the balance of the 30-day notice period provided for in his employment agreement with Catalyst. Moyse's access to Catalyst's servers and emails was immediately terminated. In short, Moyse was completely shut out of Catalyst from that date onward. Importantly, he received no information concerning Catalyst's pursuit of WIND, including its ongoing discussions and negotiations with VimpelCom and the Government of Canada, after his departure on May 26, 2014.[22]

20. As of May 26, 2014, the date Moyse left Catalyst: (i) Catalyst had only had access to the WIND data room for approximately two weeks (beginning on May 9);[23] (ii) Moyse had been on vacation for the majority of that time (beginning on May 16), and had had "almost no direct involvement on the file" while away on his holiday;[24] and (iii) as set out below, the draft Share Purchase Agreement then under discussion between Catalyst and VimpelCom contained terms (particularly with respect to crucial regulatory issues that lay at

---

21 Moyse Trial Affidavit, at para. 104, WF WC, Tab 51; CCG0018691, WF DC, Tab 45; and Moyse Chief, June 13, 2016, pp. 1399:4-1400:6, WF WC, Tab 52. Note that Moyse had previously informed Catalyst Vice-President Zach Michaud and fellow Catalyst analyst Lorne Creighton that he had received a job offer from West Face that he would likely accept. Notably, these individuals did not react by expressing any kind of concern that Moyse had "intimate knowledge" of Catalyst's confidential regulatory strategy for WIND. Moyse Trial Affidavit, at para. 99, WF WC, Tab 51; Moyse Chief, June 13, 2016, pp. 1393:5-1396:3 & 1397:21-1399:3, WF WC, Tab 52; BM0005334, WF DC, Tab 38; and BM0004979, WF DC, Tab 39.

22 Trial Reasons, at para. 61, CC, Tab 4. See also Riley Cross, June 8, 2016, pp. 580:7-582:21, WF WC, Tab 63; Glassman Cross, June 7, 2016, pp. 359:23-363:10, especially pp. 362:19-363:10, WF WC, Tab 22; and Moyse Chief, June 13, 2016, pp. 1401:11-1402:22, WF WC, Tab 52. See also WFC0032731, WF DC, Tab 48.

23 De Alba Cross, June 6, 2016, pp. 245:15-250:23, WF WC, Tab 14; CCG0028351, WF DC, Tab 27; CCG0028356, WF DC, Tab 28. See also Glassman Cross, June 7, 2016, pp. 368:19-371:2, WF WC, Tab 22.

24 Moyse Trial Affidavit, at paras. 98-102, WF WC, Tab 51. See also Moyse Cross, June 13, 2016, pp. 1577:7-1578:4, WF WC, Tab 55.

the heart of Catalyst's claims against West Face) that were fundamentally different from the terms of the agreement that Catalyst ultimately negotiated with VimpelCom months later, in August 2014.[25] Moyse of course did not know those revised terms, let alone share them with West Face.

C. West Face Implemented a Confidentiality Wall in Direct Response to Catalyst's Stated Concerns

21. As alluded to above, West Face addressed properly and thoroughly Catalyst's concerns about Moyse's potential knowledge of Catalyst's regulatory strategy for WIND, well before Moyse began working at West Face on Monday, June 23, 2014.

22. Within days of Moyse's departure from Catalyst, its counsel sent a demand letter to West Face concerning its hiring of Moyse, and Moyse's alleged non-compliance with a six-month non-compete covenant in his employment agreement with Catalyst.[26] On June 18, 2014, Catalyst's counsel advised employment counsel to West Face that Catalyst was particularly concerned about Moyse's work at Catalyst on a "telecom deal".[27]

23. As set out below, West Face had been pursuing a potential investment in WIND since at least as early as November 2013, well before Moyse first emailed Mr. Dea in March 2014 seeking employment. As WIND was the only telecom-related matter that West

---

[25] Compare CCG0011362 and its attachment CCG0011364, WF DC, Tab 46 to CCG0026616 and its attachment CCG0026625, WF DC, Tab 67. The differences between these versions of the Catalyst-VimpelCom SPA are discussed in more detail below. See also De Alba Cross, June 6, 2016, pp. 257:15-260:13, WF WC, Tab 14 and De Alba Cross, June 7, 2016, pp. 296:18-300:7, WF WC, Tab 16.

[26] Trial Reasons, at para. 62, CC, Tab 4. See also Dea Trial Affidavit, at para. 31, WF WC, Tab 17, CCG0018692, WF DC, Tab 50; and CCG0018693, WF DC, Tab 51. In his Opening Statement, Catalyst's counsel noted that this case started "quite innocuously as an action to enforce the restrictive covenant and the confidentiality undertaking of Moyse's employment [agreement] with Catalyst". See Catalyst's Opening Statement, June 6, 2016, p. 6:5-9, WF WC, Tab 1.

[27] Trial Reasons, at para. 63, CC, Tab 4. See also Dea Trial Affidavit, at paras. 32-33, WF WC, Tab 17; Griffin Trial Affidavit, at paras. 68-69, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 777:11-779:16, WF WC, Tab 34; and WFC0075125, WF DC, Tab 56.

Face was working on at the time,[28] West Face responded immediately by erecting a comprehensive confidentiality wall (the "**Confidentiality Wall**"). Pursuant to this Confidentiality Wall: (1) Moyse was forbidden from communicating with anyone at West Face concerning WIND; and (2) West Face's IT group denied Moyse access to all of West Face's WIND-related documents. West Face's counsel disclosed the terms of the Confidentiality Wall to counsel for Catalyst the following day, on June 19, 2014.[29]

24. That evening, West Face's Chief Compliance Officer, Supriya Kapoor, phoned Moyse to advise him of the Confidentiality Wall. During this call, Ms. Kapoor told Moyse in unmistakably clear terms that he was required to comply strictly with the Confidentiality Wall, including by not discussing WIND with anyone at West Face, by not disclosing to anyone at West Face information concerning WIND, and by not attempting to access any of West Face's files concerning WIND. Moyse assured Ms. Kapoor that he understood and would comply.[30] That day Ms. Kapoor also sent a memo to Moyse and to the appropriate staff of West Face detailing the terms of the Confidentiality Wall.[31] In addition, Mr. Dea informed the entire investment team at West Face that they were not to communicate with Moyse concerning WIND.[32] Further, once Moyse began working at West Face (on Monday, June

---

28 Trial Reasons, at para. 63, CC, Tab 4. See also Griffin Trial Affidavit, at para. 28, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 714:11-715:2, WF WC, Tab 32; Griffin Cross, June 9, 2016, pp. 1004:4-1013:23, especially pp. 1007:25-1008:12, WF WC, Tab 37; and Dea Cross, June 10, 2016, pp. 1274:15-1279:22, especially 1278:20-1279:22, WF WC, Tab 19.

29 Trial Reasons, at paras. 63-65, CC, Tab 4. See also Affidavit of Supriya Kapoor sworn June 2, 2016 ("**Kapoor Trial Affidavit**"), WF WC, Tab 40; WFC0000049 and its attachment WFC0000050, WF DC, Tab 55; WFC0000054, WF DC, Tab 57; WFC0111141, WF DC, Tab 59; Kapoor Chief, June 10, 2016, pp. 1290:19-1296:9, WF WC, Tab 41; Dea Trial Affidavit, at paras. 31-38, WF WC, Tab 17; Dea Chief, June 10, 2016, pp. 1238:14-1243:13, WF WC, Tab 18; and WFC0075125, WF DC, Tab 56.

30 Trial Reasons, at para. 65, CC, Tab 4. See also Kapoor Trial Affidavit, at para. 4, WF WC, Tab 40; and Kapoor Chief, June 10, 2016, pp. 1290:19-1296:9, especially pp. 1293:22-1295:1, WF WC, Tab 41.

31 See footnote 29.

32 Dea Trial Affidavit, at para. 38, WF WC, Tab 17; and Dea Cross, June 10, 2016, p. 1274:15-1276:3, WF WC, Tab 19.

23), West Face's WIND deal team only met in private, behind closed doors, and away from the area where Moyse was located.[33]

25. Ultimately, Moyse worked at West Face for a mere three and a half weeks, from June 23 to July 16, 2014, when he was placed on an indefinite leave of absence pursuant to an Interim Consent Order issued by Justice Firestone.[34] All of the relevant witnesses – Mr. Griffin, Mr. Dea, Ms. Kapoor and Moyse – confirmed at trial that the Confidentiality Wall was complied with fully.[35] Catalyst's witnesses had no evidence to the contrary, and there is quite simply no basis for an inference that the Confidentiality Wall was breached at any time.

D. Conclusion: West Face Never Received Confidential Information of Catalyst Concerning WIND

26. All of the voluminous evidence led at trial concerning West Face's hiring and employment of Moyse established overwhelmingly the Trial Judge's finding that: "*Mr. Moyse never communicated to anyone at West Face, either in the interview process or later, anything about Catalyst's dealings with WIND or of Catalyst's regulatory or telecommunications industry strategy regarding its interest in WIND*".[36] Catalyst has no basis to appeal this quintessential fact,[37] and, significantly, it has not done so. This finding alone is fatal to Catalyst's entire claim against West Face, and dispositive of this appeal.

---

33 Trial Reasons, at para. 65, CC, Tab 4. See also Dea Trial Affidavit, at para. 39, WF WC, Tab 17; and Dea Chief, June 10, 2016 pp. 1239:23-1242:6, WF WC, Tab 18.

34 WFC0081954, WF DC, Tab 63.

35 Griffin Chief, June 8, 2016, pp. 777:11-779:16, WF WC, Tab 34; Dea Chief, June 10, 2016, pp. 1238:14-1243:13, WF WC, Tab 18; Kapoor Chief, June 10, 2016, pp. 1290:19-1296:9, WF WC, Tab 41; Moyse Chief, June 13, 2016, pp. 1370:3-1371:25, WF WC, Tab 52; and pp. 1403:21-1404:16, WF WC, Tab 52.

36 Trial Reasons, at para. 117, CC, Tab 4. See also Trial Reasons, at paras. 82-87, 93, 95, 108, and 113, CC, Tab 4.

37 Catalyst "candidly" admitted that it had no evidence that any confidential Catalyst information concerning WIND had ever been conveyed by Mr. Moyse to West Face. See Catalyst's Written Closing Submissions, at paras. 305, WF DC, Tab 91; De Alba Cross, June 6, 2016, p. 234:9-236:5,

PART II.2 ~ THE FACTS RELEVANT TO WEST FACE'S PARTICIPATION IN THE ACQUISITION OF WIND

A. Background to the WIND Opportunity

27. The relevant background to the WIND opportunity is not in dispute, and was summarized accurately by the Trial Judge in his Reasons.[38] The key facts from a regulatory perspective include the following, all of which were widely and publicly known at the time of the events in question in 2014: (i) as a result of Canadian ownership requirements, the majority of WIND's voting shares were owned by Globalive, a Canadian company controlled by Anthony Lacavera, while the majority of the non-voting equity, and $1.3 billion in shareholder debt, was held by VimpelCom; (ii) perhaps because it was owned by foreign nationals, including a Russian oligarch, VimpelCom had experienced numerous regulatory difficulties with the Government of Canada in the past; (iii) VimpelCom established a price based on $300 million in enterprise value; and (iv) VimpelCom prioritized deal certainty, including a clear, straightforward, and easily achievable path to obtaining any regulatory approvals that may have been required to dispose of its interest in WIND.[39]

B. West Face's Efforts to Acquire WIND

(i) West Face Received Consistent Feedback from VimpelCom that it Wanted a Quick, Clean and Complete Exit From Its Investment in WIND

WF WC, Tab 14; Riley Cross, June 8, 2016, pp. 582:22-584:19, WF WC, Tab 63; and Glassman Cross, June 7, 2016, pp. 356:8-357:21, WF WC, Tab 22.

38 Trial Reasons, at paras. 17-28, CC, Tab 4. See also Griffin Trial Affidavit, at paras. 21-27, WF WC, Tab 31. This evidence was either uncontested by Catalyst or admitted in cross-examination by Mr. De Alba.

39 Trial Reasons, at paras. 27, 94, 121, & 131, CC, Tab 4. See also De Alba Cross, June 6, 2016, pp. 244:19-245:14, WF WC, Tab 14; Griffin Trial Affidavit, at paras. 21-27, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 723:22-725:19, WF WC, Tab 32; and Griffin Cross, June 9, 2016, pp. 953:24-957:13, WF WC, Tab 35; and WFC0080891, WF DC, Tab 71.

28. West Face first learned of the WIND opportunity directly from WIND's founder and then-Chairman and CEO, Anthony Lacavera, in early November 2013.[40] West Face: (i) delivered an expression of interest to VimpelCom four days later, on November 8, 2013; (ii) entered into a confidentiality agreement with VimpelCom on December 7, 2013; (iii) gained access to the WIND data room on December 10, 2013; and (iv) participated in a management presentation from WIND on December 18, 2013.[41] All of the above occurred months before Moyse first approached West Face seeking employment in March 2014.

29. Moreover, throughout the period from January to mid-June 2014 – before Moyse joined West Face – West Face invested significant time, effort, and expense in its pursuit of WIND. West Face had extensive interactions with VimpelCom and its financial advisors from UBS. West Face also retained legal counsel and engaged a number of industry consultants to advise West Face regarding WIND's business and prospects.[42]

30. Throughout this period, West Face made a number of proposals to VimpelCom in its efforts to acquire debt and/or equity interests in WIND. While none of these proposals proved acceptable to VimpelCom, West Face received invaluable feedback about what VimpelCom wanted most – a complete, quick and clean exit from its investment

---

40 Trial Reasons, at para. 28, CC, Tab 4. See also Griffin Trial Affidavit, at para. 29, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 718:19-720:19, WF WC, Tab 32. See also public articles reporting on VimpelCom's failures to sell WIND to Verizon and Birch Hill: WFC0109538, WF DC, Tab 5; WFC0109542, WF DC, Tab 6 and WFC0109540, WF DC, Tab 7.

41 Trial Reasons, at para. 28, CC, Tab 4. See also Griffin Trial Affidavit, at paras. 30-31, WF WC, Tab 31; WFC0080889, WF DC, Tab 8; WFC0107228, WF DC, Tab 9; and Griffin Cross, June 9, 2016, pp. 962:2- 965:17, WF WC, Tab 36. In contrast, Catalyst did not deliver an expression of interest to VimpelCom until January 2, 2014, did not enter into a confidentiality agreement until March 21, 2014, and did not gain access to the WIND data room or receive a management presentation from WIND until early May 2014. De Alba Cross, June 6, 2016, pp. 245:15-250:23, especially pp. 245:15-246:18, WF WC, Tab 14; CCG0025176 and attachment CCG0025177, WF DC, Tab 11; CCG0023894, WF DC, Tab 14; CCG0028351, WF DC, Tab 27; and CCG0028356, WF DC, Tab 28.

42 See Griffin Trial Affidavit, at para. 45, WF WC, Tab 31; and Griffin Chief, June 8, 2016, pp. 735:9-736:25, WF WC, Tab 32.

in WIND, with as little regulatory or other risk to VimpelCom as possible.[43] As explained below, it was responsiveness to this simple but consistent message from VimpelCom – not the misuse of non-existent information from Moyse concerning Catalyst's regulatory strategy – that ultimately shaped the successful strategy that West Face and its co-investors employed in acquiring WIND in September 2014 after Catalyst's efforts to acquire WIND had collapsed.

(ii) VimpelCom Entered Exclusivity with Catalyst and Shut Down Negotiations with the New Investors

31. In late July 2014, West Face joined an investment syndicate to pursue a transaction involving WIND. The syndicate was comprised of West Face, Tennenbaum Capital Partners and LG Capital Investors LLC (the "**New Investors**"). All were highly sophisticated investors, with extensive expertise in the telecom industry.[44] On July 23, 2014, the New Investors learned from UBS that VimpelCom had entered into exclusivity arrangements with another bidder.[45] Although UBS did not identify that bidder, the New Investors believed that the bidder was Catalyst. Their reasons for that belief included the following:

---

43 West Face made a series of proposals and offers to VimpelCom on April 23, May 4 and June 3, 2014. Along the way, VimpelCom made clear repeatedly that it was proceeding on the basis of an "enterprise value" for WIND of $300 million and that it wanted a quick, clean exit at that valuation. VimpelCom conveyed the same message to other potential investors, including Catalyst. See, for example, Griffin Trial Affidavit, at paras. 34-58, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 725:20-733:12, , 749:19-751:12, 752:7-753:6; 756:20-758:8, WF WC, Tab 32; Griffin Cross, June 9, 2016, pp. 968:2-972:23 & 1001:16-1004:3, WF WC, Tab 36; WFC0066640, WF DC, Tab 21; WFC0066644, WF DC, Tab 22; WFC0109163, WF DC, Tab 25; WFC0106772, WF DC, Tab 26; WFC0106765, WF DC, Tab 52; WFC0058252, WF DC, Tab 54; and WFC0067814, WF DC, Tab 58.

44 Trial Reasons, at paras. 85 & 87, CC, Tab 4. See also Affidavit of Michael Leitner sworn June 1, 2016 ("**Leitner Trial Affidavit**"), at paras. 8-15, WF WC, Tab 42; Leitner Chief, June 9, 2016, pp. 864:9-867:12 & 873:3-874:17, WF WC, Tab 43; Affidavit of Hamish Burt sworn June 1, 2016 ("**Burt Trial Affidavit**"), at paras. 7-12, WF WC, Tab 5; Burt Chief, June 9, 2016, pp. 834:1-835:2, WF WC, Tab 6.

45 Griffin Trial Affidavit, at para. 84, WF WC, Tab 31; Leitner Trial Affidavit, at para. 22, WF WC, Tab 42; Burt Trial Affidavit, at para. 19, WF WC, Tab 5; and WFC0048724, WF DC, Tab 64. See also the following footnotes citing the trial testimony of Messrs. Griffin, Leitner, and Burt.

(a) Catalyst's interest in acquiring WIND, and in combining WIND with Mobilicity, was widely known, and had been reported on in the press;[46]

(b) as set out above, Catalyst's counsel had advised West Face's counsel over a month earlier (on June 18) that Catalyst was actively involved in a "telecom deal" during the period that Moyse was employed by Catalyst; and

(c) there was "market chatter" that Catalyst had been seeking financing in respect of a pending transaction.[47]

32. Each of Mr. Griffin (of West Face), Michael Leitner (of Tennenbaum), and Hamish Burt (of LG Capital/64NM) testified that they were not told, and therefore did not know for certain, that it was Catalyst that was in exclusivity with VimpelCom, but that they believed that it was.[48] Notably, Catalyst relied on similar clues to infer (correctly) that West Face was also pursuing an investment in WIND.[49]

(iii) The New Investors Made a Proposal to VimpelCom on August 7, 2014 Based on VimpelCom's Stated Desire to Avoid Regulatory Risk

33. By the beginning of August 2014, the New Investors knew that their chances of acquiring WIND were disappearing.[50] With the window of opportunity closing, the New Investors knew that the only way that they might acquire WIND was to hope VimpelCom

---

46 Trial Reasons, at paras. 89-93, CC, Tab 4. See also De Alba Cross, June 6, 2016, pp. 236:8-237:2, WF WC, Tab 14; Glassman Cross, June 7, 2016, pp. 410:14-412:16, WF WC, Tab 23; WFC0109533, WF DC, Tab 2 and WFC0078062, WF DC, Tab 4.

47 Trial Reasons, at paras. 89-93, CC, Tab 4. See also Leitner Trial Affidavit, at para. 22, WF WC, Tab 42; Leitner Cross, June 9, 2016, pp. 916:20-920:24, WF WC, Tab 46.

48 Griffin Chief, June 8, 2016, p. 762:11-21, WF WC, Tab 34; Griffin Cross, June 9, 2016, pp. 1031:7-1033:15, WF WC, Tab 38; Leitner Cross, June 9, 2016, pp. 916:20-920:24, WF WC, Tab 46; Burt Cross, June 9, 2016, pp. 848:10-849:25, WF WC, Tab 7; and Burt Cross, June 9, 2016, pp. 855:22-858:7, WF WC, Tab 8.

49 Cross-examination of James Riley held July 29, 2014 (TRAN000920), pp. 184:19-185:13, WF WC, Tab 57; De Alba Chief, June 6, 2016, pp. 145:10-146:6, WF WC, Tab 10; De Alba Chief, June 6, 2016, pp. 164:13-165:4, WF WC, Tab 12; West Face Read-In Brief at Tab A, De Alba Examination for Discovery, May 11, 2016, p. 13:11-20; and De Alba Cross, June 6, 2016, pp. 237:11-24, WF WC, Tab 14.

50 Griffin Trial Affidavit, at paras. 113-114, WF WC, Tab 31.

could not reach an agreement with the other bidder during its period of exclusivity, and present a pragmatic and credible proposal to VimpelCom that could close quickly and with minimal risk of regulatory approval.[51] As the New Investors were not parties to the Catalyst-VimpelCom exclusivity agreement, they were not bound to any of its exclusivity obligations and so nothing prevented them from making an unsolicited offer to VimpelCom during the exclusivity period.

34. In this context, Larry Guffey of LG Capital and Michael Leitner of Tennenbaum – rather than anyone from West Face – developed a transaction structure whereby, as a first step, the New Investors would simply buy out VimpelCom's interests in WIND while leaving Globalive as the legally controlling shareholder. As a second subsequent step, the New Investors would reorganize the ownership structure of WIND with Globalive so that each party's voting rights matched that party's equity investment. The "elegance" of this simplified two-step approach was that the first step did not trigger a change of voting equity control of WIND, because only VimpelCom, not Globalive, would dispose of its (non-controlling) interest in WIND. Because there was no change of control at that stage, there was no need for regulatory approval to complete the first step, and hence no "regulatory risk" to VimpelCom associated with the sale of its interest in WIND.[52]

35. At trial, senior representatives of all three New Investors – Messrs. Griffin, Burt, and Leitner – described the development of this acquisition strategy. They explained in

---

[51] Griffin Trial Affidavit, at para. 115, WF WC, Tab 31. See also Griffin Chief, June 8, 2016, pp. 767:5-768:9, WF WC, Tab 34; Griffin Cross, June 10, 2016, pp. 1093:5-1095:4, WF WC, Tab 39; Leitner Trial Affidavit, at paras. 22 and 25, WF WC, Tab 42; and Leitner Cross, June 9, 2016, pp. 895:18-896:15, WF WC, Tab 45.

[52] Griffin Trial Affidavit, at paras. 115-120, WF WC, Tab 31; WFC0040932, WF DC, Tab 71; WFC0051622, WF DC, Tab 70; Griffin Chief, June 8, 2016, pp. 764:5-767:4 & 768:10-769:3, WF WC, Tab 34; Leitner Trial Affidavit, at paras. 24-28, WF WC, Tab 42; Leitner Chief, June 9, 2016, pp. 876:6-877:10, WF WC, Tab 43; Leitner Cross, June 9, 2016, pp. 886:22-890:11, WF WC, Tab 44. See also Trial Reasons, at para. 104, CC, Tab 4. For WIND's corporate structure, see CCG0025258, p. 9, WF DC, Tab 13.

detail that their strategy had nothing whatsoever to do with Moyse, or with the regulatory strategy of Catalyst.[53] They also explained why this strategy represented a reasonable business risk for their investors.

36. The New Investors made an unsolicited offer using this two-step transaction structure to VimpelCom on August 7, 2014 (the "**August 7 Proposal**").[54] The August 7 Proposal was made conditional on the participation of Globalive in the two-step transaction, given Globalive's voting control of WIND. Globalive had not participated in the August 7 Proposal. Unfortunately for the New Investors, however, the very day that their proposal was made to VimpelCom, Globalive entered into a Support Agreement with VimpelCom, pursuant to which Globalive committed to supporting VimpelCom's proposed transaction with Catalyst. Globalive also agreed to support VimpelCom's decision to seek insolvency protection for WIND under the CCAA in the event that its proposed transaction with Catalyst did not proceed.[55]

37. Significantly, VimpelCom did not respond to the New Investors' August 7 Proposal. Indeed, no evidence was led by Catalyst at trial to establish that VimpelCom's Board was even made aware of the New Investors' August 7 Proposal.[56] Instead, on August 8, 2014, VimpelCom agreed to *extend* its exclusivity period with Catalyst to August 18.[57] During that extended period of exclusivity, neither VimpelCom nor Globalive engaged in any

---

53 Griffin Chief, June 8, 2016, pp. 764:5-769:3, WF WC, Tab 34; Burt Chief, June 9, 2016, pp. 836:25-839:9, WF WC, Tab 6; Leitner Chief, June 9, 2016, pp. 876:6-880:9, WF WC, Tab 43; and Leitner Cross, June 9, 2016, pp. 899:16-907:6, WF WC, Tab 45.

54 Trial Reasons, at para. 104, CC, Tab 4. See also WFC0051622, WF DC, Tab 70; and WFC0040932, WF DC, Tab 71.

55 Trial Reasons, at para. 105, CC, Tab 4. See also Griffin Trial Affidavit, at paras. 120-122, WF WC, Tab 31; and WFC0063562, WF DC, Tab 72. See also Lockie Chief, June 10, 2016, pp. 1176:8-1176:13 & 1178:10-1183:11, WF WC, Tab 48.

56 Trial Reasons, at para. 127, CC, Tab 4. See also De Alba Cross, June 7, 2016, pp. 305:25-307:11, WF WC, Tab 16.

57 De Alba Cross, June 7, 2016, pp. 304:23-305:24, WF WC, Tab 16; CCG0027224, WF DC, Tab 73; and CCG0024633 and its attachment CCG0024634, WF DC, Tab 77.

negotiations whatsoever with any of the New Investors, and the New Investors made no further proposals to VimpelCom.[58]

(iv) After Catalyst Let its Exclusivity Expire, VimpelCom Resumed Negotiations with the New Investors, and the Parties Ultimately Reached an Agreement for the Acquisition of WIND

38. As explained below, in mid-August 2014, Catalyst made the tactical decision to permit its period of exclusivity with VimpelCom to expire, and to allow VimpelCom to explore its alternatives.[59] From that point on, the New Investors joined with Globalive and other investors (the "**Consortium**") and together worked hard to present themselves to VimpelCom as a viable alternative. Ultimately, they reached a consensus based on the simplified two-step transaction structure referred to above, and executed a definitive purchase agreement for WIND. The first stage of their transaction, in which the Consortium acquired VimpelCom's interest, closed on September 16, 2014.[60]

PART II.3 ~ THE FACTS RELEVANT TO CATALYST'S FAILURE TO ACQUIRE WIND

A. Introduction: Catalyst Has Not Appealed the Dispositive Finding that Catalyst Would Not Have Acquired WIND Regardless of West Face's Alleged Misuse of its Confidential Information

39. Catalyst's claims against West Face required it to establish that, <u>but for</u> West Face's alleged misuse of Catalyst's confidential information, Catalyst <u>would have</u> acquired WIND.[61] However, the evidence of Catalyst's own witnesses – its three Partners Newton

---

58 Leitner Trial Affidavit, at paras. 29-30, WF WC, Tab 42; Griffin Trial Affidavit, at para. 122, WF WC, Tab 31; Griffin Cross, June 10, pp. 1109:5-1110-15, WF WC, Tab 39; Burt Trial Affidavit, at paras. 19 and 26, WF WC, Tab 5; Burt Cross, June 9, 2016, pp. 858:13-860:6, WF WC, Tab 8.

59 Indeed, Catalyst knew that its strategy would effectively force VimpelCom to consider its alternatives. See CCG0024802, WF DC Tab 83; and paragraph 52 of this Factum.

60 Griffin Trial Affidavit, at paras. 124-126, WF WC, Tab 31; Affidavit of Simon Lockie sworn June 6, 2016 ("**Lockie Trial Affidavit**"), at paras. 37-38, WF WC, Tab 47; WFC0080940, WF DC, Tab 85; Lockie Chief, June 10, 2016, pp. 1185:22-1187:23, WF WC, Tab 48; and WFC0080325, WF DC, Tab 84. Mr. Glassman admitted at trial that Catalyst continued to negotiate with VimpelCom after its exclusivity period expired. However, Catalyst refused to produce any of its documents dated later than August 18, 2014. See Glassman Cross, June 7, 2016, p. 544:5-15, WF WC, Tab 27.

61 Amended Amended Amended Statement of Claim, at para. 34.14, CC Tab 8.

Glassman, Gabriel De Alba, and James Riley – and its contemporaneous documents demonstrated that Catalyst could not have closed its proposed acquisition of WIND, regardless of West Face's alleged wrongdoing.[62] This is precisely what the Trial Judge found,[63] and Catalyst has not appealed either that dispositive finding or the important findings of the Trial Judge underlying his conclusions in that regard. That failure is fatal to Catalyst's claims against West Face, and therefore to its appeal. In the face of those findings, Catalyst cannot establish that it suffered any loss as a result of West Face's (alleged, but non-existent) misuse of any Catalyst confidential information.

B. Catalyst's Regulatory Strategy

40. The supposedly "confidential" information that Catalyst alleged was misused by West Face concerned Catalyst's so-called "regulatory strategy".[64] While Catalyst's description of this strategy changed on multiple occasions during the course of this proceeding,[65] it is clear on the evidence that the strategy Catalyst devised and implemented was comprised of three essential elements:

(a) Catalyst intended to negotiate and execute a Share Purchase Agreement (or "**SPA**") with VimpelCom that, at VimpelCom's repeated insistence, included a

---

62 Ironically, and as set out below, this dispositive issue was one of the few about which Catalyst's witnesses testified consistently with each other and with the contemporaneous documents.

63 Trial Reasons, at paras. 126-131, CC, Tab 4.

64 Notably, given certain admissions made by Catalyst, Catalyst failed to prove that its regulatory strategy was even confidential. Trial Reasons, at para. 120, footnote 11, CC, Tab 4. See also Glassman Cross, June 8, 2016, pp. 565:8-569:5, WF WC, Tab 29; and Catalyst's Opening Statement, June 6, 2016, pp. 16:11-17:3 & 19:2-23, WF WC, Tab 1. See also Griffin Trial Affidavit, at paras. 32, 52, and 103, WF WC, Tab 31; WFC0109981, WF DC, Tab 10; and WFC0107350, WF DC, Tab 60.

65 For example, up until May 27, 2016 – the date Catalyst delivered the Glassman and De Alba Trial Affidavits, Catalyst's position was that its share purchase agreement with VimpelCom was conditional on receiving regulatory concessions from the Government of Canada. See, for example, Affidavit of James Riley sworn February 18, 2015 (CCG0028716), at paras. 17, 45, WF WC, Tab 58; and Supplementary Affidavit of James Riley sworn May 1, 2015 (CCG0028720), at para. 42, WF WC, Tab 59. At trial, Mr. De Alba (and Mr. Riley) were forced to admit that at no time was the Catalyst-VimpelCom SPA subject to such a condition. See De Alba Cross, June 6, 2016, pp. 262:2-264:5, WF WC, Tab 14; and Riley Cross, June 8, 2016, pp. 614:21-621:3, WF WC, Tab 64. Contrast this with how Catalyst now describes its "regulatory strategy". See Catalyst's Appeal Factum, at paras. 4, 27, 28, 53, 56, 57-65.

term explicitly prohibiting Catalyst from seeking regulatory concessions from the Government of Canada during the Interim Period between the execution of the SPA and closing;[66]

(b) immediately following the execution of its SPA with VimpelCom, but before closing, Catalyst intended to breach the SPA by using its executed SPA with VimpelCom to pressure the Government into granting the regulatory concessions Catalyst had agreed not to seek;[67] and

(c) Catalyst would only close the transaction with VimpelCom if it could obtain the regulatory concessions it had demanded, and it intended to abandon its transaction with VimpelCom if those concessions could not, in fact, be obtained prior to closing.[68]

41. As will be explained below, the problem for Catalyst is that the concessions it needed were not forthcoming.

(i) The "Regulatory Concessions" Sought by Catalyst

42. During a meeting with senior officials of Industry Canada on March 27, 2014, Messrs. Glassman and Riley presented three "Options" in respect of Catalyst's plans for

---

66 VimpelCom insisted on this condition because of its concern that any attempt Catalyst might make to obtain regulatory concessions (regarding the future regulatory regime applicable to WIND's ongoing operations) could impair or undermine its ability to obtain regulatory approval concerning the sale by VimpelCom of its interest of WIND. As stated above, VimpelCom made clear repeatedly not only to Catalyst but also to other potential bidders (including West Face) that it wanted a simple, clean and expeditious exit from its investment in WIND with the smallest possible risks concerning the grant of any regulatory approvals that may have been required. De Alba Cross, June 6, 2016, pp. 252:22-257:14, WF WC, Tab 14; CCG0009527, at s. 6.3, WF DC, Tab 33; and De Alba Cross, June 7, 2016, pp. 281:13-282:25, WF WC, Tab 15.

67 De Alba Cross, June 7, 2016, pp. 278:1-281:1, WF WC, Tab 15. See also Catalyst's Opening Statement, June 6, 2016, pp. 30:1-30:21, WF WC, Tab 2.

68 De Alba Cross, June 7, 2016, pp. 278:1-281:1, WF WC, Tab 15; Glassman Cross, June 7, 2016, pp. 504:19-507:19, WF WC, Tab 26. See also Catalyst's Opening Statement, June 6, 2016, p. 12:3-20, WF WC, Tab 1.

WIND (the "**March 27 Presentation**").[69] The first two Options were both premised on Catalyst acquiring WIND, while the third was essentially threatening the Canadian Government with adverse publicity if Options one or two were not allowed.[70] Catalyst made clear in its March 27 Presentation that, before it could complete its proposed acquisition of WIND, it required the unrestricted right to sell WIND and/or its wireless spectrum to any of the incumbent national wireless carriers (namely Rogers, Bell or Telus) after five years.[71] Catalyst demanded that concession even though it was inconsistent with the Federal Government's well-established and publicly-announced policy of stimulating enhanced competition in the wireless industry by encouraging the development of nation-wide competitors to the incumbents.[72] The last thing the Government wanted was to permit the buyer of WIND to transfer scarce and highly valuable wireless spectrum to any of Rogers, Bell or Telus, particularly where the Government had licensed that spectrum to WIND several years before, at heavily discounted prices.[73]

(ii) Catalyst Was Told Consistently and Repeatedly That the Government Would Not Grant the Regulatory Concessions

43. Between March and August 2014, Catalyst was told consistently and repeatedly by the Government of Canada and by its own advisors, on at least six occasions, that the regulatory concessions it had demanded would not be granted:

---

69 CCG0011565, WF DC, Tab 17.

70 CCG0011565, WF DC, Tab 17; Affidavit of Newton Glassman sworn May 27, 2016 ("**Glassman Trial Affidavit**"), at paras 23-27, WF WC, Tab 20; and Glassman Cross, June 7, 2016, pp. 426:4-428:17, WF WC, Tab 24.

71 Glassman Cross, June 7, 2016, pp. 407:22-421:6, WF WC, Tab 23. See also Catalyst's Opening Statement, June 6, 2016, pp. 12:3-16:10, WF WC, Tab 1.

72 All parties agreed that this had been the Government's longstanding policy. See, for example, Glassman Cross, June 7, 2016, pp. 404:12-406:11, WF WC, Tab 23; Griffin Cross, June 9, 2016, pp. 995:24-996:14, WF WC, Tab 37; and WFC0111504, WF DC, Tab 3.

73 In its efforts to facilitate the launch of a new national wireless carrier, the Government of Canada "set aside" valuable wireless spectrum for new entrants in its most recent spectrum auction, and licensed that spectrum to WIND, Mobilicity and Public Mobile at heavily discounted prices. Incumbents such as Rogers, Telus and Bell were precluded for bidding for the set aside spectrum. See WFC0111642, WF DC, Tab 1.

(a) first, on March 27, 2014, when Messrs. Glassman and Riley delivered the March 27 Presentation to senior officials of Industry Canada.[74] Mr. Glassman conceded in cross-examination that during this meeting the Government's "explicit official reaction" was "we will not give [Catalyst] or anybody else regulatory relief";[75]

(b) second, on May 7, 2014, when senior officials of the Government told Catalyst's highly experienced government-relations consultant, Bruce Drysdale, that it would not give Catalyst the right to sell WIND's spectrum in five years. Mr. Glassman noted in a contemporaneous email that this took Catalyst's first Option "off the table";[76]

(c) third, on May 12, 2014, when Messrs. Glassman, Riley and Drysdale had a second in-person meeting with Government representatives.[77] Again, the Government refused to commit to granting Catalyst any of the regulatory concessions it required;[78]

(d) fourth, on May 19, 2014, when Catalyst's highly experienced regulatory counsel (Steven Acker of Faskens) provided it with a comprehensive written

---

74 At trial, Mr. Glassman stated that he was not aware of Catalyst ever having made another presentation to the Government. Glassman Cross, June 8, 2016, pp. 560:5-20, WF WC, Tab 28. Mr. De Alba did not attend this meeting. See De Alba Chief, June 6, 2016, pp. 155:23-156:1, WF WC, Tab 11.

75 Glassman Cross, June 7, 2016, pp. 412:17-414:20, WF WC, Tab 23 and Glassman Cross, June 7, 2016, pp. 435:18-436:8, WF WC, Tab 25. For Mr. Glassman's trial testimony regarding the Government of Canada's alleged and wholly undocumented "unofficial" reaction, see Glassman Cross, June 7, 2016, pp. 435:18-439:11, WF WC, Tab 25.

76 CCG0009482, WF DC, Tab 29. Mr. Drysdale was a Founding Partner of Drysdale, Forstner Hamilton Public Affairs Ltd. He had extensive experience working for three Federal Cabinet Members, as well as in the Prime Minister's Office, and had also worked with representatives of Government in a variety of capacities over a period of almost two decades. By contrast, Mr. Glassman had virtually no experience dealing with Government officials. See Glassman Cross, June 7, 2016 at pp. 390:17-394:4, WF WC, Tab 22; WFC0110505, WF DC, Tab 89.

77 Notably, this was Mr. Glassman's last direct communication with the Government.

78 Glassman Cross, June 7, 2016, pp. 465:10-472:17, WF WC, Tab 26; and CCG0009517, WF DC, Tab 32.

opinion noting that the Government had "made it clear that any proposed transfer of commercial mobile spectrum to an incumbent will be subject to very close scrutiny and, in the current climate, [is] most unlikely to succeed"; [79]

(e) fifth, on July 25, 2014, when Industry Canada representatives again reached out to Mr. Drysdale to advise "that Catalyst seeking any concessions was a dead end" as Catalyst had already "gone down that road twice before" (*i.e.,* on March 27 and May 12);[80] and

(f) finally, on August 3, 2014, when Mr. Drysdale advised Catalyst that senior Government officials (including James Nicholson of Industry Canada) had indicated in the clearest possible terms that Catalyst would not be granted regulatory concessions if it proceeded with its proposed acquisition of WIND.[81]

44. Mr. Drysdale's email of August 3, 2014 to Messrs. Glassman and De Alba is particularly important. He stated:

> - **Both Industry Canada and [the Privy Council Office and Prime Minister's Office] are adamant that the current federal policy will not change**.
>
> - Nicholson clarified the federal position saying Minister Moore and [Industry Canada] officials would not be opposed to Catalyst buying Wind **but Ottawa would not provide [the] concessions Catalyst outlined in its May presentation for building out a fourth carrier nor would Ottawa allow Catalyst or anyone else to become a re-seller**.

---

79 CCG0026600, WF DC, Tab 41.

80 CCG0025815, WF DC, Tab 65. For Mr. Glassman's remarkable testimony about what he took from this email, see Glassman Cross, June 7, 2016, pp. 476:20-486:11, WF WC, Tab 26. Messrs. Glassman, Riley or De Alba had no meetings with the Government between July 25 and when West Face completed its acquisition of WIND in mid-September 2014.

81 CCG0025843, WF DC, Tab 68. After August 3, 2014, neither Catalyst nor Mr. Drysdale had further communications with the Government regarding Catalyst's demand for regulatory concessions.

- Nicholson said that if Catalyst signs a Sale and Purchase Agreement with Wind **it should do so with a clear understanding it would have to build out a fourth carrier without concessions and without ability to sell to an incumbent after 5 years**.

- **Nicholson and [the Privy Council Office] both told me that Quebecor** (both prior to [Pierre Karl Péladeau] running for office as a separatist and since) **has lobbied hard in Ottawa at all levels for concessions to build out a fourth carrier and have been told Ottawa will not be providing them with any concessions** (beyond what regulatory changes are being rolled out by the CRTC in coming months). **Nicholson said Minister Moore and PM Harper are entrenched and there will be no flip flop**. (emphasis added)[82]

45. In sum, the one and only message that was conveyed repeatedly to Catalyst from the most senior officials of the Government of Canada was that the Government would not accede to Catalyst's demands for regulatory concessions. Since the Trial Judge also held correctly that Catalyst would not have closed its proposed acquisition of WIND without these concessions, the Trial Judge's inescapable conclusion was that Catalyst could not have acquired WIND regardless of West Face's conduct.[83]

C. Catalyst's Negotiations with VimpelCom

(i) Catalyst's Negotiations with VimpelCom Resulted in a Share Purchase Agreement that Expressly Precluded Catalyst from Seeking the Regulatory Concessions It Required from the Government

46. Mr. De Alba led Catalyst's negotiations with VimpelCom. From the outset of their negotiations, Catalyst and VimpelCom were at odds with respect to the key issue of regulatory risk.[84] As stated above, VimpelCom wanted to minimize to the extent possible

---

82 CCG0025843, WF DC, Tab 68. For Mr. Glassman's incredible explanation of why this email confirmed to him that there was "no reason" to think that there were not "going to be further discussions about concessions", see Glassman Cross, June 7, 2016, pp. 486:12-504:12, WF WC, Tab 26.

83 Trial Reasons, at para. 131, CC, Tab 4.

84 At trial, Catalyst conflated the issues of regulatory approval, on the one hand, and regulatory concessions on the other. As Mr. De Alba conceded in cross-examination, the fact that Catalyst's proposed transaction involved a change of control of WIND, and therefore required regulatory

the risk of regulatory approval for the sale of WIND not being obtained, and for that reason insisted that Catalyst not seek regulatory concessions from the Government in the Interim Period between the signing of a SPA and closing. Conversely, at the outset of its negotiations with VimpelCom, Catalyst wanted the ability to seek the regulatory concessions it believed were necessary in order to ensure the viability of its acquisition of WIND.[85]

47. Ultimately, VimpelCom prevailed. On Friday, August 1, 2014, VimpelCom sent Mr. De Alba an email attaching a draft of the SPA that VimpelCom considered to be substantially settled.[86] On Sunday, August 3, Mr. De Alba responded to VimpelCom's email and agreed with VimpelCom's assessment in this regard.[87] Significantly, Mr. De Alba conceded in cross-examination that section 6.3(d) of this final version of the Catalyst-VimpelCom SPA expressly precluded Catalyst from, in the Interim Period between signing and closing, seeking regulatory concessions from the Government of Canada to permit the transfer or sale of WIND or its wireless spectrum to an incumbent wireless carrier at a future date. Indeed, Catalyst was precluded during that Interim Period from even developing, evaluating or analyzing any studies, plans, analysis or reports concerning the sale or transfer of WIND or its spectrum to an incumbent wireless carrier.[88]

---

approval, was never a matter of controversy between VimpelCom and Catalyst. VimpelCom's first draft of the Share Purchase Agreement provided that closing of the transaction was conditional on the parties obtaining approval for the transaction from the relevant regulatory authorities. De Alba Cross, June 6, 2016, pp. 252:22-257:14, WF WC, Tab 14 and CCG0009527, WF DC, Tab 33. See also Griffin Trial Affidavit at para. 54, WF WC, Tab 31; and WFC0106564, WF DC, Tab 30. VimpelCom provided the same first draft Share Purchase Agreement to Catalyst, West Face, and presumably all other interested parties. WFC0106564 is identical to CCG0009527, WF DC, Tab 33 and a duplicate of WFC0075344 (not included in the WF DC). As explained above, regulatory concessions were an entirely different matter.

85 De Alba Cross, June 6, 2016, pp. 252:23-256:5, especially 255:24-256:5, WF WC, Tab 14. See also Trial Reasons, at para. 131, CC, Tab 4. See also De Alba Cross, June 7, 2016, pp. 281:12-282:25, WF WC, Tab 15.

86 CCG0026616 and attachment CCG0026625, WF DC, Tab 67.

87 CCG0024442, WF DC, Tab 69; and De Alba Cross, June 7, 2016, pp. 288:1-291:1, WF WC, Tab 16.

88 CCG0026625, WF DC, Tab 67; De Alba Cross, June 7, 2016, pp. 291:9-293:14 and pp. 300:3-7, WF WC, Tab 16.

(ii) When VimpelCom Raised the Prospect of a Break Fee, Catalyst Made the Tactical Decision to Abandon Negotiations and Walk Away

48. After the negotiators for Catalyst and VimpelCom agreed that the SPA was "substantially settled" in early August 2014, VimpelCom sought approval for the proposed transaction from its Board of Directors and other relevant governance committees. Catalyst had previously been informed that the proposed transaction was subject to approval by VimpelCom's Board of Directors.[89] Despite never having dealt with VimpelCom before, Mr. Glassman somehow assumed that VimpelCom's Board would act as a rubber stamp, and would approve whatever transaction was presented to it. His assumption, however, was contrary to the experience of Catalyst's own lead financial advisor, Ben Babcock of Morgan Stanley, and proved to be mistaken.[90]

49. On the morning of August 11, 2014, VimpelCom's lead negotiator, Felix Saratovsky, advised Catalyst that, while there was "broad support" within VimpelCom for the proposed transaction with Catalyst, its Board had yet to approve the transaction. He advised that the VimpelCom Board wanted to seek protection for VimpelCom in the event that the Government did not approve the sale of WIND to Catalyst, and that VimpelCom viewed the amount it would cost VimpelCom to fund WIND's operations in the Interim Period between signing and closing as the amount at risk.[91] In order to address this risk, the Chairman of VimpelCom requested that Catalyst agree to pay to VimpelCom a $5 to $20 million break fee in the event that regulatory approval was not granted within 60 days.[92]

---

89 See, for example, CCG0024196, WF DC, Tab 62.

90 Indeed, see Catalyst's Opening Statement, June 6, 2016, pp. 40:14-40:23 & 42:7-42:20, WF WC, Tab 3. See also Glassman Cross, June 7, 2016, pp. 507:20-512:7, WF WC, Tab 26; and CCG0024567, WF DC, Tab 74.

91 CCG0027248, WF DC, Tab 75.

92 Glassman Trial Affidavit, at para. 46, WF WC, Tab 20; Affidavit of Gabriel De Alba sworn May 27, 2016 ("**De Alba Trial Affidavit**"), at para. 157, WF WC, Tab 9. See also CCG0024774, WF DC, Tab 82. Remarkably, even though VimpelCom's request for a break fee led directly to the demise of the

50. Instead of attempting to address VimpelCom's request in a constructive manner, Mr. Glassman became "furious" both at VimpelCom and at his own deal team and professional advisors. He demanded repeatedly that the WIND deal be signed immediately and announced publicly, or else there would be "no deal".[93] On August 12, Mr. De Alba gave Mr. Saratovsky an ultimatum that unless VimpelCom provided a clear approach regarding its approval of the deal within two hours, Catalyst was going to walk away.[94] On August 14, Mr. Glassman opined that the deal was "technically dead".[95]

51. Although Mr. Glassman had given up on the proposed WIND transaction by August 14 at the latest, VimpelCom had not. After August 11, Mr. Saratovsky continued to attempt to negotiate with Catalyst in good faith. He stated expressly that he was "open to other ideas" concerning a mutually acceptable solution that would protect VimpelCom against the downside risk it perceived.[96]

52. Catalyst, however, decided not to compromise or negotiate. It made that decision after receiving advice from its highly experienced external legal and financial advisors (Jon Levin of Faskens and Mr. Babcock of Morgan Stanley). In response to a proposed compromise by Mr. Saratovsky made on August 15: (i) Mr. Levin opined to Mr. Babcock and Mr. De Alba that: "They are out to lunch and I think we should tell them";

---

proposed transaction between VimpelCom and Catalyst in August 2014, and one of the central issues in this proceeding concerned the reasons for that demise, Catalyst (and its Chief Operating Officer, James Riley) failed or refused to disclose the existence of VimpelCom's request until shortly before trial. Cross-examination of James Riley held May 13, 2015, pp. 127:15-128:4 (TRAN000397), WF WC, Tab 61; UTS000020 at U/T 15 and 16, WF WC, Tab 62; Riley Cross, June 8, 2016, pp. 597:4-608:11, WF WC, Tab 63. Notably, however, Mr. Glassman testified that Mr. Riley knew about VimpelCom's request for a break fee by the end of September 2014 at the latest. Glassman Cross, June 7, 2016, pp. 363:11-365:5, WF WC, Tab 22.

93 Trial Reasons, at para. 128, CC, Tab 4. See also Glassman Cross, June 7, 2016, pp. 522:2-533:15, WF WC, Tab 26; CCG0024632, WF DC, Tab 76 and CCG0024640, WF DC, Tab 78. Contrast this with what Catalyst says it told Industry Canada on August 11, 2014. See CCG0024726, WF DC, Tab 79.

94 CCG0027262, WF DC, Tab 80.

95 CCG0028615, WF DC, Tab 81.

96 See, for example, CCG0024802, WF DC, Tab 83.

(ii) Mr. De Alba responded: "ABSOLUTELY!"; and (iii) Mr. Babcock advised: "Tell them and then shut down communication. This needs to go past the exclusivity time and [the Chairman of VimpelCom] needs to see his alternatives and their terms…".[97]

53. Mr. Glassman conceded in cross-examination that Catalyst followed the advice of its legal and financial advisors: in mid-August 2014, Catalyst told VimpelCom that the proposed break fee of $5 to $20 million was unacceptable, shut down all communications with VimpelCom, and allowed its period of exclusivity to expire.[98]

54. In short, Catalyst made an informed tactical choice to "play hardball" with the Board of VimpelCom, including its Chairman. Catalyst could have accepted VimpelCom's request for a modest break fee of only $5 to $20 million, or at least negotiated with VimpelCom over this issue. It chose not to do so, however, and instead terminated discussions with VimpelCom and allowed its period of exclusivity to expire, thereby allowing VimpelCom to consider its options. That is precisely what VimpelCom did. One of those options was the simplified two-step sale transaction involving West Face that was negotiated, structured, completed, and implemented shortly thereafter.

55. It is perhaps significant that in interlocutory proceedings prior to trial, Catalyst consistently maintained that its deal with VimpelCom was conditional on "the granting of certain regulatory concessions" to Catalyst, and that the Catalyst-VimpelCom negotiations collapsed because, at the eleventh hour, VimpelCom reversed course and "would not agree

---

97 CCG0024802, WF DC, Tab 83. Alexey Reznikovich was the Chair of VimpelCom. Glassman Cross, June 7, 2016, pp. 542:12-543:11, WF WC, Tab 27.

98 Glassman Cross, June 7, 2016, pp. 540:25-544:4, WF WC, Tab 27; Glassman Trial Affidavit, at para. 46, WF WC, Tab 20.

to the conditions Catalyst sought."[99] Catalyst alleged that VimpelCom only refused to agree to a condition requiring the granting of the regulatory concessions because of the New Investors' unsolicited August 7 Proposal, allegedly made with the benefit of Moyse's insight. As we now know, this description of what went wrong with the Catalyst deal was completely false – no draft of the Catalyst-VimpelCom share purchase agreement was conditional on Catalyst being granted regulatory concessions, and in fact, the final draft precluded Catalyst from even seeking them in the Interim Period before closing.

56. Catalyst is a highly sophisticated investor, and was represented throughout its dealings with the Government of Canada and with VimpelCom by senior and experienced advisors. Catalyst made a cascading series of errors and miscalculations along the way, and has only itself to blame for its failure to complete its proposed acquisition of WIND. Catalyst's efforts to blame West Face and Moyse for its failures were (and are) both contrived, and were doomed from the beginning.

PART III ~ ISSUES, LAW AND ARGUMENT

57. The issues raised by Catalyst's appeal are as follows:

(a) Did the Trial Judge commit an error of law in articulating and/or applying the appropriate legal test for the independent tort of spoliation?

(b) Did the Trial Judge deny Catalyst procedural fairness in determining that Catalyst's witnesses were not credible?

(c) Did the Trial Judge deny Catalyst procedural fairness by making findings of fact on issues that the parties put directly in issue?

---

[99] Affidavit of James Riley dated February 18, 2015, at para. 45 (CAT000066), WF WC, Tab 58; Supplementary Affidavit of James Riley dated May 1, 2015, at paras. 42-43 (CAT000382), WF WC, Tab 59. See also Riley Cross, June 8, 2016, pp. 614:21-621:3, WF WC, Tab 64.

(d) Did the Trial Judge make any of the palpable and overriding errors of fact complained of by Catalyst?

(e) Should this Court accede to Catalyst's request and order a new trial?

(f) Should Catalyst be given leave to appeal from the cost award made in favour of West Face at the conclusion of trial? If so, should that award be disturbed?

58. For the reasons set out below, West Face respectfully submits that this Court should answer all of these questions in the negative.

A. The Applicable Standard of Review

59. The applicable standards of appellate review are settled and uncontroversial. Questions of pure law are reviewed on a correctness standard, while questions of fact or mixed fact and law require a palpable and overriding error; that is, the appellant must show that the findings were clearly wrong, unreasonable, or not reasonably supported by the evidence.[100]

60. This Court's statement concerning the importance of credibility findings in *Waxman* is particularly germane to this appeal:

> The detailed and uncompromising credibility assessments made by the trial judge raise a very high hurdle for the appellants on these appeals. **At every turn in their arguments, counsel for the appellants are met with credibility findings squarely against them. They cannot escape these pervasive credibility assessments by attacking these findings where they relate to specific issues in isolation from other credibility findings.** The trial judge's finding that from the outset Chester's case was spun from dishonesty and greed

---

100 *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, at para. 50 [*Glen Grove*], West Face BOA, Tab 1; *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), at paras. 292-299 [*Waxman*], *leave to appeal refused*, [2004] S.C.C.A. 291, West Face BOA, Tab 36; *Housen v. Nikolaisen*, 2002 SCC 33, at paras. 5, 24 & 36 [*Housen*], West Face BOA, Tab 19; and *H.L. v. Canada (Attorney General)*, 2005 SCC 25, at paras. 55, 56, 69 and 70, West Face BOA, Tab 13; See also *F.H. v. McDougall*, 2008 SCC 53, at para. 72, West Face BOA, Tab 9.

> hangs like a shroud over the appellants' submissions in this court.[101] (emphasis added)

61. Catalyst does not challenge any of the legal principles on which Justice Newbould relied in dismissing Catalyst's claims against West Face. Catalyst's appeal *vis-à-vis* West Face focuses instead on the Trial Judge's findings of fact, and on the assessments of credibility he made in reaching those findings. While Catalyst argues that some of the findings it now complains of constituted "denials of procedural fairness", this self-serving characterization cannot affect the applicable standard of review.[102]

62. At no point before the Trial Judge released his Reasons did Catalyst raise objections with the manner in which the Trial Judge conducted this proceeding.[103] Catalyst's quarrel lies with the result, not with the process followed by the Trial Judge in reaching that result. The real crux of Catalyst's appeal is simply a complaint that the Trial Judge preferred direct evidence from witnesses of West Face over the unfounded, contradictory and speculative testimony of Catalyst's witnesses. The Trial Judge was fully entitled to make that choice, and Catalyst should not be permitted to reargue on appeal the same case it presented unsuccessfully at trial.

63. Reinforcing the deference that is properly owed to the findings of the Trial Judge is the fact that he presided at trial in his capacity as the Senior Justice of the Commercial List. As this Court has held, the expertise of this group of specialist judges is particularly deserving of deference on appeal in commercial cases of this nature.[104]

---

101 *Waxman*, at para. 277. See also paras. 275-276, 283, 292-299 and 359-360, West Face BOA, Tab 36.

102 *Chesebrough v. Willson*, [2002] O.J. No. 4299 (C.A.), at para. 5, West Face BOA, Tab 7.

103 This alone is arguably determinative of these issues on appeal. See *Harris v. Leikin Group Inc.*, 2014 ONCA 479, at paras. 47-56 [*Harris*], West Face BOA, Tab 16.

104 See *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722, at paras. 15-16, *leave to appeal refused*, [2014] S.C.C.A. No. 32, West Face BOA, Tab 37; *BNY Capital Corp. v. Katotakis*, [2005] O.J. No. 623 (C.A.), at para. 8, West Face BOA, Tab 4; and *BTR Global Opportunity Trading*

B. First Issue: The Trial Judge Properly Determined and Applied the Proper Legal Test for Spoliation

64. West Face adopts and relies upon the submissions of Moyse on this issue.[105]

C. Second Issue: The Trial Judge's Unfavourable Findings of Credibility Against Catalyst's Witnesses are Simply that – Findings – and Do Not Constitute "Denials of Procedural Fairness"

(i) The "Different Standards of Scrutiny" Argument is Without Merit, and Inapplicable in the Civil Context

65. Catalyst argues that Justice Newbould deprived Catalyst of procedural fairness by allegedly applying "different standards of scrutiny to the evidence of Catalyst, Moyse and West Face".[106] As the cases relied upon by Catalyst clearly demonstrate, this ground of appeal is inapplicable outside of criminal cases (or factually similar "disciplinary" proceedings), where the pivotal evidence concerning the guilt of the accused is the contradictory testimony of the accused and the complainant.[107] The constitutional protections afforded criminal defendants have no application in the civil context.

66. In any event, as described below, the Trial Judge did not apply different standards of scrutiny to the evidence of witnesses called by different parties. Instead, he simply found West Face's witnesses and Moyse to be credible, and Catalyst's witnesses to lack credibility. Making determinations of that nature is the quintessential role of trial judges, who have the distinct advantage of being able to directly evaluate the witnesses, to assess their demeanour, and to consider their evidence in light of the evidence of other witnesses, the contemporaneous documents, and in the relevant context. As this Court noted in *Waxman*, trial judges see and appreciate the whole of the narrative in a complex story of this

---

Ltd. v. RBC Dexia Investor Services Trust, 2011 ONCA 518, at para. 3, *leave to appeal filed (with no further record)*, [2011] S.C.C.A. No. 382, West Face BOA, Tab 6.

105 Moyse's Appeal Factum, at paras. 75-109.

106 Catalyst's Appeal Factum, at para. 111.

107 *R. v. Phan*, 2013 ONCA 787, at para. 32 [*Phan*], West Face BOA, Tab 30, citing *R. v. Howe*, 2005 CarswellOnt 44 (C.A.), at para. 59 [*Howe*], West Face BOA, Tab 27.

nature in a way that an error-correcting appellate court cannot.[108] In the case at bar, the credibility assessments of the Trial Judge were entirely justified. As in *Waxman*, Catalysts' witnesses' lack of credibility "hangs like a shroud" over its entire appeal.[109]

(ii) The "Different Standards of Scrutiny" Argument is a "Difficult" Test for an Appellant to Meet

67. Even if the "different standards of scrutiny" argument could be transplanted from a criminal setting into the civil context, this Court has stated repeatedly that this argument should be looked upon with a high degree of skepticism. It is, in essence, a thinly veiled attempt to lure appellate courts into overturning credibility findings of trial judges.[110]

68. In *R. v. Howe*, this Court warned that this type of argument is unlikely to succeed, because it involves the application of an extraordinarily difficult test:

> **This is a difficult argument to make successfully**. It is **not enough** to show that a different trial judge could have reached a different credibility assessment, **or that the trial judge failed to say something that he could have said in assessing the respective credibility of the complainant and the accused,** or that he failed to expressly set out legal principles relevant to that credibility assessment.[111] (emphasis added)

(iii) The Trial Judge Did Not Make "Assumptions" About Credibility – He Made Findings That Were Grounded Firmly In the Evidence

69. There is no substance to Catalyst's complaint that in assessing credibility the Trial Judge made "presumptions" or "assumptions" in favour of Moyse or West Face, and

---

108 *Waxman,* at para. 294, West Face BOA, Tab 36 ("In a case as lengthy and factually complex as this case, appellate judges are very much like the blind men in the parable of the blind men and the elephant. Counsel invite the court to carefully examine isolated parts of the evidence, but the court cannot possibly see and comprehend the whole of the narrative. Like the inapt comparisons to the whole of the elephant made by the blind men who felt only one small part of the beast, appellate fact-finding is not likely to reflect an accurate appreciation of the entirety of the narrative. This case demonstrates that the 'palpable and overriding' standard of review is a realistic reflection of the limitations and pitfalls inherent in appellate fact-finding").

109 *Waxman*, at para. 277, West Face BOA, Tab 36.

110 *R. v. Aird*, 2013 ONCA 447 (C.A.), at para. 39, West Face BOA, Tab 25, citing *Howe*, at para. 59, West Face BOA, Tab 27. See also *R. v. MacIsaac*, 2015 ONCA 587 (C.A), West Face BOA, Tab 29.

111 *Howe*, at para. 59. West Face BOA, Tab 27.

against Catalyst.[112] The only "evidence" Catalyst relies on to support this masked allegation of bias[113] are passages from the Costs Endorsement (not the Trial Reasons) of the Trial Judge in which he explained his reasons for awarding substantial indemnity costs in favour of West Face.[114] That Endorsement was issued long after the Trial Judge had already delivered his Reasons explaining in detail his dismissal of Catalyst's claims. Catalyst has identified no evidence to demonstrate that the Trial Judge predetermined the credibility of any witness called at trial. None of the examples cited by Catalyst demonstrate that the Trial Judge "viewed the Catalyst witnesses, and specifically Mr. Glassman, as aggressive and unlikely to be truthful" in advance of trial, or that he somehow "assumed" that Moyse and the West Face witnesses would tell the truth.[115] Rather, after a full and fair trial, the Trial Judge determined that Messrs. Glassman, De Alba and Riley were not credible on contested issues, and that West Face's witnesses and Moyse had told the truth.[116] As explained below, he relied properly on the various findings that resulted from his assessments of credibility in dismissing Catalyst's claims against West Face, and in awarding costs to West Face on an elevated scale.

70. The transcripts of the cross-examinations of Messrs. Glassman, De Alba and Riley are instructive. They demonstrate that: (i) *Mr. Glassman* was argumentative and evasive, and gave evidence that was flatly inconsistent both with his own Affidavit and with numerous contemporaneous documents, including his own emails. He was aggressive,

---

112 See Catalyst's Appeal Factum, at paras. 114-117.

113 See the Cost Submissions of West Face, at paras. 24 and 86, regarding Catalyst's public statement attributing the result at trial to "severe indications of possible bias" by Justice Newbould. See also the article titled: "Catalyst Capital Group Inc to appeal after judge dismisses Wind Mobile lawsuit" by the *Financial Post*, dated August 19, 2016, WF DC, Tab 93.

114 Note that footnotes 84 and 85 of Catalyst's Appeal Factum incorrectly cite the block quotations in paragraphs 115 and 116 of Catalyst's Appeal Factum to the Trial Reasons. To be clear, these block quotations are not from the Trial Reasons, but instead from the Costs Endorsement, which followed almost two months later (CC, Tab 6).

115 Catalyst's Appeal Factum, at para. 117.

116 See also *Waxman*, at para. 283, West Face BOA, Tab 36.

sarcastic, and confrontational, and had to be reminded by the Trial Judge on numerous occasions of his duties as a witness;[117] (ii) *Mr. De Alba's* evidence was also unsatisfactory, and was inconsistent with his evidence at discovery, with a number of contemporaneous documents, and with the evidence of other witnesses (including Moyse);[118] and (iii) *Mr. Riley* swore five Affidavits in respect of interlocutory motions prior to trial, which were re-filed by Catalyst as his evidence at trial. Regrettably, those five Affidavits were replete with misstatements and inaccuracies. Moreover, Mr. Riley gave incorrect evidence during cross-examinations prior to trial on matters of central importance in this proceeding, including evidence regarding VimpelCom's request for a break fee, which was one of the central reasons why Catalyst's efforts to acquire WIND failed in August 2014.[119]

(iv) Justice Newbould Did Not "Discount" Catalyst's Affidavit Evidence Because it Was Repetitive

71. There is no merit whatsoever to Catalyst's argument that the Trial Judge somehow treated the repetition of evidence in the parties' Trial Affidavits differently.[120]

72. This argument is based on the misreading by Catalyst of an innocuous remark made by the Trial Judge in paragraph 10 of his Reasons concerning the fact that, in "hybrid trials" of this nature, where the evidence-in-chief of witnesses is given by way of affidavits, evidence is sometimes repeated by more than one witness. The Trial Judge never suggested that Catalyst's evidence lacked credibility <u>because</u> it was repetitive. Rather, he

---

117 See, for example, Glassman Cross, June 7, 2016, pp. 356:8-357:21; 368:19-369:13; 376:22-383:5; 383:6-386:17; 408:9-409:15; 412:17-416:19; 416:24-418:5; 439:12-440:15; 461:12-463:24; 472:24-476:19; 486:12-495:20; 498:5-504:12; 504:19-507:5; 512:8-522:1; & 522:2-524:9, WF WC, Tabs 22, 23, 25 and 26. See also Trial Reasons, at paras. 10, 11, 37, 38, 43, 45, 46, 48, 49 footnote 3, 50, and 51, CC, Tab 4.

118 See, for example, De Alba Cross, June 6, 2016, pp. 238:18-243:17, 278:1-279:25, 291:9-293:14, WF WC, Tabs 14, 15 and 16. See also Trial Reasons, at paras. 10, 12, 37, 38, 41, 43, 48, 49 footnote 3, and 50, CC, Tab 4.

119 Riley Cross, May 13, 2015, pp. 127:15-128:4 (TRAN000397), WF WC, Tab 61; UTS000020 at U/T 15 and 16, WF WC, Tab 62; Riley Cross, June 8, 2016, pp. 598:20-608:11, WF WC, Tab 63. See also Trial Reasons, at para. 13, CC Tab 4.

120 See Catalyst's Appeal Factum, at para. 122.

found independently that Catalyst's (repetitive) evidence "was an overstatement of what occurred", and went on to explain why.[121]

73. In paragraphs 42 to 45 of his Reasons, the Trial Judge explained precisely why he did not believe the self-serving evidence of Mr. Glassman and Mr. De Alba that Moyse had "led" the creation of the March 27 Presentation, and why he preferred the evidence of Moyse in respect of this issue. Among other things, the evidence of Messrs. Glassman and De Alba was inconsistent not only with the evidence of Moyse, but also with the evidence of their Partner, Mr. Riley, who deposed that Moyse "helped create" (rather than "led the preparation of") the March 27 Presentation. Ultimately, having considered the conflicting evidence concerning this matter, including the evidence of Moyse, the Trial Judge held that Mr. Riley's evidence concerning this issue was "much closer to the truth". He was fully entitled to make that finding.[122]

(v) The Trial Judge Quite Properly Found Catalyst's Principal Witnesses – Messrs. Glassman and De Alba – To Be Not Credible

74. Catalyst also argues that the Trial Judge erred by "discount[ing] Catalyst's evidence for inconsistency",[123] (while "excusing" supposed inconsistencies in the evidence of West Face's witnesses and Moyse). There is no substance to this contention. As noted by Catalyst, the Trial Judge identified in his Reasons numerous examples of "contradictions or refusals to concede a point in cross-examination by Mr. Glassman", and further examples where Mr. De Alba "overstated matters and refused to concede points that he should

---

121 Trial Reasons, at para. 10, CC, Tab 4.

122 Trial Reasons, at paras. 42-45, CC, Tab 4. See also Moyse Trial Affidavit, at paras. 39-52, WF WC, Tab 51; Moyse Chief, June 13, 2016, pp. 1415:21-1420:22, WF WC, Tab 53;. Moyse Cross, June 13, 2016, pp. 1543:12-1553:21, WF WC, Tab 54; De Alba Trial Affidavit, at paras. 58, 61, & 62, WF WC, Tab 9; De Alba Chief, June 6, 2016, pp. 150:9-151:19, WF WC, Tab 10; De Alba Cross, June 6, 2016, pp. 215:6-221:24, WF WC, Tab 13; Glassman Trial Affidavit, at paras. 16, 18, WF WC, Tab 20; Glassman Cross, June 7, 2016, p. 365:6-19, WF WC, Tab 22; and Supplementary Affidavit of James Riley sworn May 1, 2015 (CCG0028720), at para. 42, WF WC, Tab 59.

123 Catalyst's Appeal Factum, subheading B(iii).

have".[124] Catalyst now seeks to re-argue, before this Court, the significance of each of these specific examples. This is precisely the approach that this Court criticized and rejected in *Waxman*.[125]

(a) Mr. Glassman's Refusal to Concede that Catalyst Misled the Government in its March 27 Presentation

75. In its March 27 Presentation, Catalyst represented to the Government that, as of the date of that Presentation, Catalyst was engaged in "advanced negotiations" with VimpelCom.[126] The Trial Judge assessed carefully the contemporaneous evidence concerning Catalyst's discussions and interactions with VimpelCom and held properly that this statement was "surely misleading".[127] Remarkably, Catalyst now argues that the Trial Judge erred in making this finding because Mr. Glassman's "subjective opinion" was that Catalyst was in "advanced negotiations" with VimpelCom, and that "there was **no evidence** to contradict Mr. Glassman's subjective opinion…".[128]

76. Catalyst's reliance on Mr. Glassman's "subjective opinion" is entirely misplaced. If Mr. Glassman honestly believed something that was objectively untrue, that fact alone would seriously undermine his judgment and credibility.[129] What matters, and what the Trial Judge properly focussed on, are the objective facts. Those facts established that – whatever his subjective opinion – Mr. Glassman had no proper basis to represent to

---

124 Catalyst's Appeal Factum, at paras. 124 & 132.

125 *Waxman*, at paras. 275-277, West Face BOA, Tab 36.

126 CCG0011565, WF DC, Tab 17.

127 Trial Reasons, at para. 11(b), CC, Tab 4.

128 Catalyst's Appeal Factum, at para. 125 (emphasis in original).

129 It has long been a principle of Canadian law that assessments of credibility do not depend solely upon the witness's honesty or desire to tell the truth – one's credibility also depends on his or her capacity to accurately observe and report the objective facts. See, for example, *Wallace v. Davis*, [1926] O.J. No. 212 (Sup. Ct. (H. Ct. Div.)), West Face BOA, Tab 35; *Mandeville v. Manufacturers Life Insurance Co.*, 2012 ONSC 4316, at para. 8 (S.C.J.), aff'd 2014 ONCA 417, West Face BOA, Tab 22; *Husky Injection Molding Systems Ltd. v. Schad*, 2016 ONSC 2297 (Commercial List), at paras. 34-39, West Face BOA, Tab 20; and Alan Mewett & Peter Sankoff, *Witnesses*, looseleaf (Toronto: Thomson Reuters Canada, 2017), p. 11-2, West Face BOA, Tab 31.

the Government that, as of March 27, 2014, Catalyst was engaged in advanced negotiations with VimpelCom.

77. In paragraph 11 of his Reasons, the Trial Judge surveyed the contemporaneous evidence and concluded that it was flatly inconsistent with Mr. Glassman's claimed "opinion." More particularly, as at March 27, 2014, Catalyst: (i) "had not yet retained its financial advisor"; (ii) "had by then had no access to the WIND data room"; (iii) "had not yet retained a technical expert"; and (iv) had not exchanged even a single draft of a Share Purchase Agreement with VimpelCom. Indeed, each of those occurrences happened many weeks later, in May 2014.[130]

78. In short, Mr. Glassman's purported "subjective opinion" was neither "reasonable" nor "defensible".[131] The evidence Catalyst relies upon in respect of this issue only undermines its argument, by reinforcing how preliminary Catalyst's discussions with VimpelCom actually were as at March 27. All Catalyst had at that stage was a non-binding letter of intent, a few sporadic communications with VimpelCom or its financial advisor, and a confidentiality agreement that had just been executed on March 22, five days before the March 27 Presentation.[132]

---

130 Trial Reasons, at paras. 11(b) & 76 footnote 5, CC, Tab 4. See also Glassman Cross, June 7, 2016, pp. 371:3-377:10 and pp. 395:6-396:21, WF WC, Tab 22; De Alba Cross, June 6, 2016, pp. 245:15-250:23, especially p. 246:16-18, WF WC, Tab 14; CCG0018051, WF DC, Tab 37; CCG0009547, WF DC, Tab 40; West Face Read-In Brief at Tab A, De Alba Examination for Discovery, May 11, 2016 (WFC0111936) pp. 65:25-67:1, WF WC, Tab 70. See also CCG0009525 and attachment CCG0009527, WF DC, Tab 33. Note that Mr. Glassman refused to agree with this evidence (nor the integrity of Catalyst's own document production). See Glassman Cross, June 7, 2016, at pp. 376:32-383:5, WF WC, Tab 22.

131 Indeed, later in the Trial Reasons Justice Newbould noted the additional facts that, as at March 27: (i) Catalyst had had no negotiations with VimpelCom, having only delivered an executed confidentiality agreement to VimpelCom on March 21 (which was less than a week earlier); and (ii) VimpelCom had not yet communicated its $300 million asking price to Catalyst (which only happened in May). See Trial Reasons, at para. 76 footnote 5, CC, Tab 4.

132 CCG0023893 and attachment CCG0023894, WF DC, Tab 14.

(b) Mr. Glassman's Alleged Subjective Impression that the Government was "Softening" its Position Towards Granting Catalyst the Regulatory Concessions It Had Sought

79. In a similar vein, Catalyst argues that no evidence was led at trial to contradict Mr. Glassman's alleged "subjective impression" that the Government of Canada was somehow "softening" its refusal to grant to Catalyst the regulatory concessions it had sought as a pre-condition to completing its proposed acquisition of WIND. The basis of Mr. Glassman's supposed belief was his reading of the "body language" allegedly exhibited by Government officials during the two meetings Mr. Glassman attended on March 27 and May 12, 2014.[133] Again, there is no substance whatsoever to Catalyst's complaint.

80. The Trial Judge was properly skeptical of the self-serving and entirely subjective belief Mr. Glassman claimed at trial to have held in 2014 concerning the "softening" of the Government's position, given that: (i) there was not a single contemporaneous document confirming or corroborating his claim, which defied common sense; and (ii) numerous contemporaneous documents of Catalyst and its government relations advisor (Mr. Drysdale) told exactly the opposite story. They demonstrated beyond peradventure that the Government's resistance to Catalyst's requests for regulatory concessions was steadfast, unwavering, and if anything, strengthened over time.

81. In the circumstances, the Trial Judge was entirely justified in placing no reliance on the subjective beliefs that Mr. Glassman now claims to have had at the time. Our courts have treated evidence of this nature with considerable suspicion for many years,

---

133 Catalyst's Appeal Factum at paras. 128-130.

because it is inherently self-serving and unreliable, and "open[s] wide a doorway to fraud and deception".[134]

(c) Mr. Glassman's Argumentative Parsing of the Word "Crucial"

82. Catalyst takes issue with the Trial Judge's reference to Mr. Glassman's resistance in cross-examination to the use of the word "crucial" in describing Catalyst's need to obtain regulatory concessions before it would complete its proposed acquisition of WIND.[135] Contrary to Catalyst's argument, at no point did the Trial Judge "fault" Mr. Glassman "for not memorizing every word" in his Trial Affidavit. Rather, the Trial Judge was properly critical of Mr. Glassman's refusal to concede fairly and in a straightforward manner that the key regulatory concession Catalyst had sought from the Government of Canada – granting Catalyst the unrestricted right to sell WIND's spectrum to an incumbent wireless carrier after five years – was, indeed, "crucial" to Catalyst, even after counsel to West Face reminded Mr. Glassman in cross-examination that he had used that very term in his Trial Affidavit in describing the importance of this concession.[136]

(d) Mr. De Alba Overstated Moyse's Importance

83. Finally, Catalyst takes issue with the Trial Judge's assessment of the credibility of Mr. De Alba. In particular, Catalyst argues that the Trial Judge erred in finding that Mr. De Alba overstated Moyse's importance to the Catalyst WIND deal team. Catalyst asserts that "there was no question" that Moyse was an important part of that team, and that Mr. De Alba's evidence in this regard was "uncontroverted".[137] None of this is true. In reality, Moyse's importance to the WIND team was very much disputed by Moyse himself, who gave

---

134 *Law-Woman Management Corp. v. Peel*, [1991] O.J. No. 338 (Gen. Div.) at paras. 90-95, West Face BOA, Tab 21.

135 Catalyst's Appeal Factum at para. 131.

136 Glassman Cross, June 7, 2016, pp. 412:17-416:19, especially 415:1-416:19, WF WC, Tab 23.

137 Catalyst's Appeal Factum, at para. 133.

detailed evidence at trial concerning the role that he played and did not play at Catalyst. Mr. De Alba's evidence in this regard was seriously undermined in cross-examination and inconsistent with contemporaneous documents, as well as with the evidence of other witnesses. West Face adopts and relies upon the submissions of Moyse on this issue.[138]

(vi) The Trial Judge Did Not "Excuse Similar Problems" with West Face's Evidence – West Face's Evidence Simply Did Not Suffer From the Same Frailties as the Evidence of Catalyst

84. Catalyst claims on appeal that, although the Trial Judge criticized the evidence of Catalyst, he "excused" "similar problems" with West Face's evidence. That claim is also seriously misplaced. Indeed, the only example offered of an alleged "inconsistency" in West Face's evidence concerns Mr. Griffin's testimony about an investment memo he assisted in preparing dated September 10, 2014. The memo noted that, if WIND failed "and there [were] no other buyer options", the Government could not logically continue to block a sale of WIND to an incumbent.

85. As the Trial Judge properly held, this statement was entirely consistent with Mr. Griffin's evidence at trial. The hypothetical scenario addressed in the investment memo would only have arisen in a "worst case" scenario that never arose, and involved an "educated guess" by West Face concerning the position the Government might take if it had no options whatsoever other than to authorize the sale of WIND to an incumbent carrier. Unlike Catalyst, West Face's strategy never included seeking a regulatory concession

---

138 Moyse's Appeal Factum, at paras. 12-29 & 117-120. Ironically, Catalyst concedes in its Appeal Factum that Moyse's "relative importance" on the Catalyst WIND deal team can be the subject of debate. See Catalyst's Appeal Factum, at para. 170.

before closing the acquisition of WIND that would give it the right to sell WIND to an incumbent, because West Face was confident that WIND would not fail (and it never did).[139]

(vii) Conclusion

86. In sum, the Trial Judge's assessments of the credibility of the various witnesses that testified were entirely fair and appropriate.[140] They were based upon the demeanour of the witnesses and the substance of their evidence. Assessing the credibility of witnesses is one of the core functions of a trial judge. Those assessments deserve considerable deference on appeal. There is simply no proper basis upon which this Court can or should interfere with the findings of the Trial Judge complained of by Catalyst.

D. Third Issue: The Trial Judge's Factual Findings Concerning VimpelCom Were Not Unnecessary or Unfair – They Were Directly Relevant to Catalyst's Claims

87. Catalyst raises three arguments in support of its claim that the Trial Judge made findings that were unnecessary and unfair:

(a) First, that the Trial Judge allegedly "barred" Catalyst from amending its Statement of Claim to assert a claim that West Face induced VimpelCom to breach its exclusivity agreement with Catalyst;[141]

(b) Second, that Catalyst was allegedly prevented by the Trial Judge from leading evidence in support of this claim of inducing breach;[142] and

---

139 See, variously, Griffin Trial Affidavit, at paras. 46-53, WF WC, Tab 31; WFC0106480, WF DC, Tab 42; WFC0109480, WF DC, Tab 12; Griffin Chief, June 8, 2016, pp. 733:13-745:12, WF WC, Tab 34; WFC0109450, WF DC, Tab 61; Leitner Chief, June 9, 2016, pp. 868:21-872:21 & 879:14-880:7, WF WC, Tab 43; and Leitner Cross, June 9, 2016, pp. 914:11-915:25, WF WC, Tab 46.

140 In fact, counsel for Catalyst explicitly invited the Trial Judge to make these very assessments of credibility in his Opening Statement at trial. See Catalyst's Opening Statement, June 6, 2016, p. 47:1-11, WF WC, Tab 4.

141 Catalyst's Appeal Factum, at paras. 148-150.

142 Catalyst's Appeal Factum, at paras. 151-153.

(c) Third, that the Trial Judge's findings concerning West Face's communications with VimpelCom during its period of exclusivity with Catalyst were "unnecessary" and "unfair", in that they were allegedly made in a "factual vacuum" on the Trial Judge's own initiative.[143]

88. None of these arguments has merit. They are based on a clear distortion of what transpired both before and during the course of trial.

89. All of the Trial Judge's disputed findings relate to VimpelCom's negotiations with Catalyst during the period from July 23 to August 18, 2014, when Catalyst enjoyed exclusivity with VimpelCom. These findings were directly relevant to the issue of whether Catalyst adduced sufficient evidence at trial to establish that West Face caused Catalyst to suffer the loss it asserted in its claim. Contrary to Catalyst's allegations on appeal, Catalyst was most assuredly not prevented by the Trial Judge from amending its Statement of Claim in this proceeding to assert claims of inducing breach. Nor was Catalyst prevented at trial from leading evidence concerning this issue—and in fact, Catalyst did so.

(i) The Trial Judge Did Not Prohibit Catalyst from Amending its Statement of Claim in this Proceeding

90. In December 2015, Mid-Bowline (the entity through which the Consortium held their equity interests in WIND) commenced an application for approval of a Plan of Arrangement pursuant to which the shares of Mid-Bowline were to be sold to Shaw (the "**Plan of Arrangement Application**").[144] A term of the Plan was that any existing claims on the shares of WIND were eliminated so that Shaw could obtain clear title. The proposed sale of WIND to Shaw proceeded by way of Plan of Arrangement because Catalyst had

---

143 Catalyst's Appeal Factum, at paras. 154-158.

144 WFC0075682, WF DC, Tab 88.

asserted in this case a constructive trust over the indirect interest of West Face in WIND.[145] The Plan of Arrangement Application was a separate proceeding involving different parties and different issues. It proceeded to a hearing before Justice Newbould on January 25, 2016.

91. Catalyst opposed the approval of the Plan of Arrangement on various bases. One basis, raised by Catalyst for the first time on the day of the hearing, was Catalyst's revelation that it intended to launch a claim against West Face and potentially other parties for inducing a breach of Catalyst's exclusivity agreement with VimpelCom (based on the August 7 Proposal).[146] Catalyst argued that the approval of the Plan of Arrangement would pre-empt its right to proceed with its proposed but unasserted claim for inducing breach.

92. Justice Newbould delivered his Reasons in the Plan of Arrangement Application the next day, on January 26, 2016 (the "**Plan of Arrangement Reasons**").[147] In the Plan of Arrangement Reasons, Justice Newbould held that Catalyst had known the facts necessary to assert its proposed inducing breach claim since at least as early as March 2015, but had chosen not to do so.[148] He further concluded that Catalyst had not acted in good faith, but rather had chosen to "lie in the weeds until the hearing of the [Plan of Arrangement Application]", and only then "springing a new theory at the last moment".[149]

93. Nevertheless, Justice Newbould was extremely fair to Catalyst. Despite holding that the proposed Plan of Arrangement was "fair and reasonable" – and noting that

---

145 Griffin Trial Affidavit, at para. 4, WF WC, Tab 31. As Justice Newbould noted in the Plan of Arrangement Reasons, "The only reason that this transaction [proceeded] by way of plan of arrangement [was] to provide Shaw with clear title to the shares of WIND". See *Re Mid-Bowline Group Corp.*, 2016 ONSC 669 at para. 6, Catalyst BOA, Tab 22 [Plan of Arrangement Reasons, CC Tab 7].

146 Plan of Arrangement Reasons, at paras. 51-52, CC Tab 7; Catalyst BOA, Tab 22.

147 Plan of Arrangement Reasons, CC Tab 7; Catalyst BOA, Tab 22.

148 Plan of Arrangement Reasons, at para. 53, CC Tab 7; Catalyst BOA, Tab 22. See also West Face Read-In Brief at Tab A, De Alba Examination for Discovery, May 11, 2016 (WFC0111936) pp. 187:25-192:15, WF WC, Tab 72.

149 Plan of Arrangement Reasons, at paras. 51-61, especially para. 59, CC Tab 7; Catalyst BOA, Tab 22.

Catalyst had failed to file any meaningful evidence on the Plan of Arrangement Application or to cross-examine any of Mid-Bowline's witnesses on their Affidavits filed in support of the Application – Justice Newbould gave Catalyst "one last chance to call evidence" in the Plan of Arrangement Application before deciding whether to approve the proposed Plan.[150]

94. In an attempt to accommodate Catalyst – while balancing the rights of Mid-Bowline, the Consortium, and Shaw to proceed expeditiously with their Plan of Arrangement Application in respect of a pending $1.6 billion transaction – Justice Newbould ordered an expedited trial of an issue in the Plan of Arrangement Application. The sole issue on this trial was to be resolving the specific issue of "whether Catalyst has a right to a constructive trust" over West Face's indirect interest in WIND. The expedited trial of an issue in the Plan of Arrangement Application was scheduled to be heard from February 22 to 26, 2016.[151] Justice Newbould also held that, given how Catalyst had belatedly raised the prospect of asserting an inducing breach claim against West Face, that claim would not be addressed as part of the expedited trial of an issue. In short, Justice Newbould only prohibited Catalyst from raising its unasserted inducing breach claim in contesting the Court's approval of the proposed Plan of Arrangement. *He made no such Order or Direction limiting in any way the claims that Catalyst could pursue at trial in Catalyst's separate action against Moyse and West Face*. Nor was he asked to do so at any time.

95. Shortly after Justice Newbould released his Plan of Arrangement Reasons,[152] Catalyst withdrew its claim for a constructive trust over West Face's interest in WIND. As a result, the expedited trial of an issue in the Plan of Arrangement Application was no longer needed, and did not proceed. Instead, the proposed Plan of Arrangement was approved (on

---

150 Plan of Arrangement Reasons, at para. 46, CC Tab 7; Catalyst BOA, Tab 22.
151 Plan of Arrangement Reasons, at para. 50, CC Tab 7; Catalyst BOA, Tab 22.
152 This was before the Court had issued a formal order reflecting those Reasons.

consent) by Justice Newbould several days later, and was implemented immediately thereafter. Shaw has owned and operated WIND since March 2016.

96. Significantly, Catalyst *did* amend its Claim in this proceeding after the Plan of Arrangement Application was resolved.[153] In doing so, however, Catalyst made the tactical choice not to add the inducing breach claim, which it now incorrectly maintains it was prevented from asserting. In reality, as the facts, circumstances and discovery evidence of Mr. De Alba made clear, no such amendment was proposed or pursued by Catalyst.[154] Nor was such an amendment objected to by West Face or denied by the Trial Judge in the case at bar.

(ii) Catalyst Was Allowed to And Did Lead Evidence at Trial Concerning the Inducing Breach Issue

97. Even though Catalyst did not amend its Statement of Claim in this proceeding to assert a *claim* of inducing breach against West Face, it clearly pursued evidence relevant to whether West Face and/or the New Investors were in communication with VimpelCom and/or UBS during Catalyst's exclusivity period. Indeed, significant portions of Catalyst's cross-examinations of Mr. Burt, Mr. Leitner, and Mr. Griffin involved attempts to elicit evidence to support Catalyst's positions at trial that: (i) in making the August 7 Proposal, the New Investors intended to induce VimpelCom to breach its exclusivity obligations to Catalyst; and (ii) VimpelCom engaged the New Investors in substantive negotiations during Catalyst's period of exclusivity.[155]

---

153 Amended Amended Amended Statement of Claim, CC Tab 8.

154 West Face Read-In Brief at Tab A, De Alba Examination for Discovery, May 11, 2016 (WFC0111936) pp. 135:2-136:16 and 187:25-192:15, WF WC, Tab 71 and 72. West Face Read-In Brief at Tab B, Revised Undertakings, Under Advisements and Refusals Chart of the De Alba Examination for Discovery held May 11, 2016 (CCG0028722) at U/Ts 34 and 48, WF WC, Tab 73.

155 See, for example, Burt Cross, June 9, 2016, pp. 855:22-861:24, especially p. 857:11-17, WF WC, Tab 8; Leitner Cross, June 9, 2016, pp. 920:25-933-8, WF WC, Tab 46; and Griffin Cross, June 9, 2016, pp. 1031:7-1042:24, WF WC, Tab 38.

98. During Mr. Griffin's cross-examination (after counsel for Catalyst had already cross-examined Messrs. Burt and Leitner on these issues), West Face's counsel finally objected to these types of questions on the basis that they were not relevant to the allegations Catalyst had chosen to plead.[156] After counsel explained their respective positions concerning West Face's objection, the Trial Judge asked Catalyst's counsel whether he was finished with this line of questioning, and counsel for Catalyst answered that he was.[157] The Trial Judge did not rule on West Face's objection. Instead, he took it under advisement.[158] Counsel for Catalyst then continued asking questions of Mr. Griffin along the same lines for another 50 pages of the trial transcript.[159] In sum, Catalyst was not precluded from adducing evidence concerning West Face's communications with VimpelCom during its exclusivity period. Instead, Catalyst was given ample opportunity to attempt to substantiate its unpleaded allegations of inducing breach.

(iii) The Findings of the Trial Judge Concerning West Face's Communications with VimpelCom Were Made at the Request of Both West Face and Catalyst and Were Not Made in a "Factual Vacuum"

99. Notwithstanding the procedural history set out above, Catalyst attacks as improper two findings made by the Trial Judge:

(a) First, his finding that VimpelCom had no substantive communications with the New Investors during Catalyst's period of exclusivity; and

---

156 Griffin Cross, June 9, 2016, pp. 1042:25- 1049:22, WF WC, Tab 38.

157 Griffin Cross, June 9, 2016, pp. 1042:25-1054:22, especially pp. 1053:4-1054:22, WF WC, Tab 38.

158 Griffin Cross, June 9, 2016, p. 1054:12-16, WF WC, Tab 38.

159 Griffin Cross, June 9, 2016, pp. 1054:23-1081:21, WF WC, Tab 38; Griffin Cross, June 10, 2016, pp. 1090:7-1112:21, WF WC, Tab 39.

(b) Second, his finding that there was no evidence that the August 7 Proposal offered by the New Investors "was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst".[160]

100. Each of these findings was supported by the evidence, as well as by the *absence of evidence* led by Catalyst at trial.[161] Indeed, Catalyst does not contend that either finding was made in error, let alone that any such errors were palpable and overriding. Catalyst simply contends, without justification, that these findings were "unnecessary" and "unfair".

101. Contrary to Catalyst's assertions, both of these findings were directly relevant to the key causation question the Trial Judge was required to determine. To make out a claim for breach of confidence, Catalyst needed to establish that West Face caused Catalyst harm by submitting offers to VimpelCom that were allegedly tainted by Moyse's breach of confidence. If the New Investors' unsolicited August 7 Proposal had nothing to do with Catalyst's failure to acquire WIND during its period of exclusivity, Catalyst could not make out its claim. This, in turn, gave rise to the central issue of why Catalyst failed in its efforts to acquire WIND. This is why West Face expressly requested that the Trial Judge make the findings in question in its written Closing Submissions, and why Catalyst invited the Trial Judge to make very different findings.[162] In fact, West Face put Catalyst squarely on notice

---

160 Catalyst's Appeal Factum, at paras. 154(a) and (b). See also Trial Reasons, at paras. 105 & 127, CC, Tab 4.

161 There was, in fact, no evidence that the August 7 Proposal was reviewed or even seen by VimpelCom's Board during Catalyst's exclusivity period. De Alba Cross, June 7, 2016, pp. 305:25-307:11, WF WC, Tab 16. Notably, at several points Catalyst asked the Trial Judge to make inferences from the absence of evidence. See, for example, Catalyst's Written Closing Submissions, at paras. 139 & 253, WF DC, Tab 91.

162 West Face's Written Closing Submissions, at paras. 236; 400-402, WF DC, Tab 92. Catalyst's Written Closing Submissions, at para. 330, WF DC, Tab 91.

(during Mr. De Alba's examination for discovery on May 11, 2016) that West Face would be seeking findings at trial concerning these very issues.[163]

102. In light of the above, Catalyst's complaints that it was "unnecessary" and "unfair" for the Trial Judge to make findings concerning these issues because these findings "were not relevant" are simply incorrect.[164] Catalyst had the onus of proving its case, which hinged on proving that West Face caused Catalyst's alleged loss. This case was pending for two years before it reached trial. Catalyst could have adduced evidence from VimpelCom at trial, but made the tactical choice not to do so. That decision cannot now be laid at the feet of West Face, or be used as the launching pad for unwarranted criticisms of the Trial Judge.[165]

E. Fourth Issue: The Trial Judge Made no Palpable and Overriding Errors of Fact

(i) Introduction

103. Catalyst alleges that the Trial Judge made three palpable and overriding factual errors. Ironically, the first of Catalyst's attacks concerns a phantom finding that the Trial Judge did not make. The second and third findings were not errors at all, let alone palpable and overriding errors. On the contrary, those findings were supported by ample evidence. Catalyst cannot establish palpable and overriding errors by claiming, as it does, that its evidence should have been preferred over the evidence of West Face.

(ii) First Alleged Factual Error: The Knowledge of Moyse

104. The first "finding" complained of by Catalyst concerns the "conclusion" of the Trial Judge that Moyse "had no knowledge of Catalyst's [allegedly] confidential regulatory

---

163 West Face's Written Closing Submissions, at para. 401, WF DC, Tab 92. See also De Alba Cross, June 7, 2016, pp. 305:25-307:11, WF WC, Tab 16.

164 Catalyst's Appeal Factum, at para. 157.

165 It is respectfully submitted that Catalyst's motive for even raising this issue on this appeal is to attempt to have this Court retroactively "cure" Catalyst's abuse of process by relitigation in commencing an essentially duplicative proceeding on the eve of trial. See WFC0112395, WF DC, Tab 90.

strategy…".[166] The Trial Judge made no such error because he made no such finding. For that reason alone, this ground of appeal must fail. A plain reading of the Reasons of the Trial Judge reveals that – while he found that Catalyst's witnesses exaggerated the importance of Moyse's role on Catalyst's WIND deal team[167] – the Trial Judge did not find that Moyse had no knowledge of Catalyst's confidential regulatory strategy. On the contrary, the Trial Judge found expressly that Moyse was aware of the regulatory concessions Catalyst had asked the Government of Canada to grant, as described in the March 27 Presentation:

> [49] …I take from the evidence **that Mr. Moyse was aware when he prepared the PowerPoint presentation on [March] 26, 2014 of the concessions Catalyst would be looking for from the Government of Canada**….[168] (emphasis added)

105. Having found that Moyse was aware of confidential information of Catalyst concerning its "regulatory strategy", the Trial Judge then asked whether a reasonable inference "should be made that there was a transfer of such confidential information by Mr. Moyse to West Face".[169] For the many reasons discussed above, he found that no such inference should be drawn. *Tellingly, and fatally to its appeal, Catalyst does not challenge Justice Newbould's dispositive finding that Moyse did not transmit this or any other confidential information of Catalyst concerning WIND to West Face.*

(iii) Second Alleged Factual Error: The Knowledge of West Face

106. Catalyst asserts that the Trial Judge made a second factual error when he (allegedly) found that West Face "had no knowledge that Catalyst was a bidder".[170] Again, this assertion mischaracterizes the findings of the Trial Judge, and ignores extensive

---

166 Catalyst's Appeal Factum, at paras. 163-170, especially para. 165.

167 See, for example, Trial Reasons, at paras. 10, 12, 37-39, 43, 44-46, 50 and 51, CC, Tab 4.

168 Trial Reasons, at para. 49, CC, Tab 4. Moyse candidly admitted this fact at trial. Moyse Cross, June 13, 2016, pp. 1543:12-1544:18, WF WC, Tab 54.

169 Trial Reasons, at paras. 76 to 118, especially at para. 81, CC, Tab 4.

170 Catalyst's Appeal Factum at para. 179.

evidence led at trial on this very issue. The Trial Judge can hardly be faulted on appeal for preferring the direct evidence of multiple witnesses for West Face concerning this issue over the speculative inferences Catalyst wishes he had drawn instead.

107. The Trial Judge concluded that, although West Face (and the other New Investors) believed that Catalyst was a bidder for WIND, they did not know for sure that it was. He further concluded that neither West Face nor any of the other New Investors had received any such information from Moyse. In this regard, the Trial Judge found that "there was sufficient information in the marketplace for West Face to put two and two together to believe or presume that Catalyst was a bidder".[171]

108. These findings were supported by ample evidence:

(a) *First*, Mr. Griffin testified that West Face did not know for certain that Catalyst was a bidder for WIND but believed that it was, because West Face had seen "press discussion" of Catalyst's interest in combining Mobilicity and WIND.[172] Mr. De Alba conceded in cross-examination that Catalyst's interest in doing so was a matter of public discussion by as early as 2013.[173]

(b) *Second*, Catalyst's counsel told West Face's counsel on June 18, 2014 that Catalyst was concerned about Moyse's involvement in an active "telecom deal" at Catalyst.[174] As noted by Justice Newbould:

---

171 Trial Reasons, at para. 89, CC, Tab 4. Whether West Face knew for certain that Catalyst was a bidder -- or merely drew an inference to this effect -- is ultimately irrelevant, as there is no dispute that West Face believed this to be the case.

172 Griffin Chief, June 8, 2016 pp. 753:7-754:13, WF WC, Tab 33; and Griffin Trial Affidavit, at para. 56, WF WC, Tab 31. See also Trial Reasons, at para. 90, CC, Tab 4.

173 De Alba Cross, June 6, 2016, pp. 236:8-237:2, WF WC, Tab 14. See also WFC0109533, WF DC, Tab 2; WFC0078062, WF DC, Tab 4; and Glassman Cross, June 7, 2016, pp. 410:14-412:16, WF WC, Tab 23. See also Trial Reasons, at para. 90, CC, Tab 4.

174 WFC0075125, WF DC, Tab 56.

> In the context of what was occurring in the marketplace at the time and the known desire of VimpelCom to quickly sell its interest in WIND, this was a very strong indication to West Face from Catalyst itself through its counsel that Catalyst had made a bid for WIND.[175]

(c) *Finally*, the evidence of both Messrs. Leitner and Burt was that, although they did not know for certain that Catalyst was a bidder for WIND, they believed that it was a bidder because they became aware through third parties of Catalyst's efforts to obtain financing in the market.[176] Mr. Leitner also testified that he had only the most superficial information about the status of the competing bid for WIND -- namely, (i) the fact of exclusivity, (ii) a rumour that a bid was to be put to VimpelCom, and (iii) the fact that the transaction was at the "price level" of $300 million that had been established by VimpelCom in the Spring of 2014.[177] In any event, Catalyst never explained how Mr. Leitner could have received confidential information about the status of Catalyst's bid as it stood in July or August 2014, given that Moyse had been completely shut out from Catalyst since May 26, 2014.

109. None of the evidence that Catalyst relies upon establishes that West Face had actual knowledge of Catalyst having submitted a bid for WIND. Remarkably, Catalyst relies primarily on Mr. Griffin's email of June 4, 2014 – in which he stated "Catalyst seems to be a lot of air" – as proof that West Face somehow had "direct" knowledge that Catalyst was a competing bidder, and even of the "quality of Catalyst's bid".[178] Mr. Griffin addressed this email directly in his evidence at trial, however, and explained that this statement merely

---

175 Trial Reasons, at para. 90, CC, Tab 4.

176 Leitner Trial Affidavit, at para. 22, WF WC, Tab 42; Leitner Cross, June 9, 2016, pp. 917:10-920:15, WF WC, Tab 44; Burt Trial Affidavit, at para. 27, WF WC, Tab 5; Burt Cross, June 9, 2016, pp. 848:10-849:25, WF WC, Tab 7. See also Trial Reasons, at paras. 91-92, CC, Tab 4.

177 Leitner Cross, June 9, 2016, pp. 916:20-933:8, WF WC, Tab 46; and WFC0080891, WF DC, Tab 66.

178 See Catalyst's Appeal Factum, at paras. 63, 183-187; WFC0068142, WF DC, Tab 53.

meant that – despite speculation in the press concerning Catalyst's involvement – West Face had no actual information at the time to substantiate that Catalyst was, in fact, a serious or credible bidder.[179]

110. The Trial Judge was entirely justified in concluding that this email demonstrated that Mr. Griffin was "by no means certain that Catalyst was a real bidder for WIND",[180] and certainly did not establish that he knew anything about the "quality" of Catalyst's bid.

111. Catalyst makes the remarkable claim that Mr. Griffin's testimony regarding his June 4 email was a "contrivance" because he initially testified that he was aware of Catalyst's presence because of its counsel's letter of June 18 advising that Moyse had worked on a "telecom file". There is no substance to this assertion. It is unsurprising that a witness, two years after the fact, could not recall the precise sequence of events surrounding how he came to believe that Catalyst was bidding on WIND. The Trial Judge was entitled to believe Mr. Griffin's evidence that his understanding that Catalyst was a bidder for WIND arose independent of Moyse.

(iv) Third Alleged Factual Error: The Conduct of West Face

112. The third factual error alleged by Catalyst concerns the finding of the Trial Judge that West Face did not misuse Catalyst's confidential information. In support of its assertion, Catalyst relies on a single word in a single email: Mr. Leitner's use of the word "superior" in describing the August 7 Proposal that he submitted to VimpelCom.[181]

---

179 Griffin Trial Affidavit, at paras. 55 and 56, WF WC, Tab 31; Griffin Chief, June 8, 2016, pp. 754:14-756:19, WF WC, Tab 33; and Griffin Cross, June 9, 2016 pp. 1010:16-1013:23, WF WC, Tab 37.

180 Trial Reasons, at para. 90, CC, Tab 4.

181 WFC0051622, WF WC, Tab 70.

113. There are any number of insurmountable problems associated with this ground of appeal, not the least of which is that neither Mr. Griffin nor anyone else at West Face played any role in drafting Mr. Leitner's August 6 email.[182] Moreover, and as the Trial Judge explicitly noted, counsel for Catalyst did not put the August 6 email to Mr. Leitner in cross-examination.[183] The Trial Judge properly held that, in the circumstances, it would have been unfair to Mr. Leitner to draw conclusions from this email concerning what he knew or did not know.[184]

114. Even if Catalyst's arguments concerning this email are entertained on appeal despite the manifest unfairness that its trial strategy gives rise to, its argument cannot withstand scrutiny. There are any number of credible explanations for Mr. Leitner's use of the word "superior" that did not require the Trial Judge to draw the multi-layered inferences Catalyst now contends that he was required to make, namely that the New Investors: (i) knew the details of Catalyst's most recent proposal to VimpelCom; (ii) somehow obtained that information from Moyse (even though Moyse left Catalyst in May 2014, well before that proposal was either formulated or made); and (iii) used that knowledge to structure their own August 7 Proposal to VimpelCom.

115. There is no basis to assert that the Trial Judge somehow erred in failing to draw illogical and speculative inferences of this nature. Moreover, there were (and are) much more simple and straightforward explanations for the use by Mr. Leitner of the word "superior" in his email of August 6. By way of example, Mr. Leitner could well have been engaging in a simple marketing pitch, positioning the New Investors' Proposal as "superior"

---

182 Griffin Cross, June 10, 2016, pp. 1095:5-1104:24, especially at 1101:14-1104:24, WF WC, Tab 39; Trial Reasons, at para. 115, CC, Tab 4.

183 Trial Reasons, at para. 113, CC, Tab 4.

184 Trial Reasons, at para. 113, CC, Tab 4. This would, of course, have violated the "Rule in *Browne v. Dunn.*" See *R. v. Lyttle*, 2004 SCC 5, at paras. 64-65, West Face BOA, Tab 28; and *R. v. Dexter*, 2013 ONCA 744, at paras. 4, 17-21, West Face BOA, Tab 26.

even though he did not know the details of other offers VimpelCom may have received. Mr. Griffin's interpretation of Mr. Leitner's email was simply that the Proposal of the New Investors was "superior" to any previous offer the New Investors had submitted.[185] In any event, the Trial Judge was unable to find from the language in the August 6 email that West Face knew the terms of offers made by Catalyst to VimpelCom in circumstances where multiple witnesses testified that West Face and the other New Investors had no such knowledge, and where there were no contemporaneous documents indicating that they did.[186] This finding was supported by the evidence, and entirely reasonable.

F. Fifth Issue: There is No Basis On Which This Court Should Order a New Trial

116. Even if this Court concludes that the Trial Judge committed one or more of the errors identified by Catalyst (which is denied), it would not be appropriate to order a new trial as a result. As this Court has repeatedly confirmed, such relief should be reserved for extraordinary circumstances: "Not every error by a trial judge entitles an aggrieved party to a new trial".[187] Section 134(6) of the *Courts of Justice Act* explicitly stipulates that this Court should order a new trial *only* where "some substantial wrong or miscarriage of justice has occurred".[188] This is "a stringent standard" which reflects "the underlying policy that new trials ordinarily are contrary to the public interest. New trials cause increased costs or wasted costs as well as delay in resolving disputes, and are therefore to be avoided unless plainly required by the interests of justice."[189]

---

185 Griffin Cross, June 10, 2016, pp. 1095:5-1104:24, especially p. 1104:17-24, WF WC, Tab 39. See also Trial Reasons, at para. 115, CC, Tab 4.

186 Trial Reasons, at para. 115, CC, Tab 4.

187 *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, 2007 ONCA 425, at para. 17 [*Prudential*], West Face BOA, Tab 24;

188 *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 134.

189 *Prudential*, at para. 17, West Face BOA, Tab 24.

117. For this reason, even unquestionable legal errors (*e.g.*, a fundamental misapprehension of the respective roles of experts and counsel), glaring procedural flaws in the trial itself (*e.g.*, an inadvertent failure to allow a party to make closing submissions), or repeated, forceful and improper interventions by the trial judge, have been found not to justify the granting of a new trial.[190] The "critically important" question is whether, had the court below not committed the errors in question, the result of the trial would have been different.[191] In light of the numerous findings of the Trial Judge that are fatal to Catalyst's claim, and which have not been challenged in the appeal before this Court – including, in particular, Justice Newbould's findings that West Face received no confidential information from Moyse and that Catalyst would not have suffered any detriment or damage as a result of West Face's alleged misuse (because Catalyst could not have purchased WIND in any event) – it is clear that none of the alleged errors attributed to the Trial Judge did or could have affected the outcome of the proceeding below.

G. Sixth and Final Issue: The Trial Judge Did Not Err in Awarding Costs to West Face on a Substantial Indemnity Basis

(i) Catalyst Cannot Meet the Test for Leave to Appeal

118. Leave to appeal an award of costs is granted only in "obvious cases" where there are "strong grounds" for finding that the judge in question erred in exercising his or her

---

190 *Moore v. Getahun*, 2015 ONCA 55, at paras. 102-105, 115 and 117 [*Moore*], West Face BOA, Tab 23; and *Prudential,* at paras. 18-20, West Face BOA, Tab 24.

191 *Prudential*, at paras. 22-25, West Face BOA, Tab 24; and *Moore*, at paras. 106-117, West Face BOA, Tab 23.

discretion.[192] Put differently, an appellate court should only interfere with a costs order if it was the product of "an error in principle", or if the award was "plainly wrong".[193]

119. Catalyst should not be granted leave to appeal the costs award. The Trial Judge applied well-established principles in exercising his discretion to award West Face its costs on a substantial indemnity scale. He did so because Catalyst made unfounded allegations of improper conduct that attacked West Face's integrity and business ethics.[194] Nowhere in its Appeal Factum does Catalyst argue that the costs award was an "error in principle".[195] In fact, the one case relied upon by Catalyst explicitly cites with approval the very principle that the Trial Judge relied upon.[196]

(ii) The Costs Award Should be Upheld

120. Even if leave to appeal is granted, the costs award made in favour of West Face should be upheld for the principled reasons stated by the Trial Judge in his Costs Endorsement – namely, that Catalyst made damaging and inflammatory allegations of intentional dishonesty against West Face in this hard fought, high stakes commercial litigation, and wholly failed to prove them.[197]

121. Canadian courts have recognized for many years that the making of allegations of intentional misconduct is a very serious step in any litigation, and should not

---

192 *Brad-Jay Investments Ltd. v. Szijjarto*, [2006] O.J. No. 5078 (C.A.), at para. 21, West Face BOA, Tab 5; *Feinstein v. Freedman*, 2014 ONCA 205, at para. 52, West Face BOA, Tab 10; *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 131; and *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57.

193 *Hearing Clinic (Niagara Falls) Inc. v. 866073 Ontario Ltd.*, 2016 ONSC 4509 (Div. Ct.), at para. 8, West Face BOA, Tab 18, citing *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, at para. 27, West Face BOA, Tab 15 [*Open Window Bakery*].

194 Costs Endorsement, at paras. 3-11, CC Tab 6. West Face explicitly relied on these well-established principles in its Costs Submissions. See West Face's Costs Submissions, at paras. 72-77, WF DC, Tab 94.

195 See Catalyst's Appeal Factum, at paras. 199-203.

196 *Toronto-Dominion Bank v. Grande Caledon Developments Inc.*, 1998 CarswellOnt 2092 (C.A.), at paras. 13-15, West Face BOA, Tab 34, citing *Apotex Inc. v. Egis Pharmaceuticals*, [1990] O.J. No. 2187 (Gen. Div.), p. 5, [*Apotex (1990)*], *with further reasons at Apotex Inc. v. Egis Pharmaceuticals*, [1991] O.J. No. 1232 (Gen. Div.) [*Apotex (1991)*], West Face BOA, Tab 2.

197 Costs Endorsement, at paras. 3-11, CC Tab 6.

be taken lightly.[198] Courts have viewed as particularly egregious the making of "baseless and speculative allegations" of intentional misconduct by a party who, at trial, "proffer[s] no evidence whatsoever that would support any finding of wrongdoing".[199] As was explained by the Supreme Court in *Open Window Bakery*, such allegations "are serious and potentially very damaging to those accused of deception". The Court noted that substantial indemnity costs are therefore appropriate in cases where the plaintiff could and should have recognized that the defendant's conduct was "neither dishonest nor fraudulent".[200]

122. This principle is one of general application, and is not limited to unproven allegations of conspiracy, fraud or deceit. Any baseless allegation that impugns a defendant's honestly or integrity will potentially attract the sanction of elevated costs.[201]

123. In awarding West Face its costs on a substantial indemnity basis, the Trial Judge exercised his broad discretion properly, on the basis of well-established jurisprudence, including the decision of this Court in *Davies v. Clarington (Municipality)*.[202] Even more relevantly, the Trial Judge relied on precedent – in the case of *Thoughtcorp Systems v. Tanju* – holding that unsubstantiated allegations of breach of confidence may justify an elevated costs award against a plaintiff.[203]

---

198 *Hawley v. Bapoo*, [2006] O.J. No. 2938 (S.C.J.), at para. 21, *affirmed on this ground, varied on other grounds*, 2007 ONCA 503 at para. 18 [*Hawley*], West Face BOA, Tab 17.

199 *Fitzpatrick v. Orwin*, 2012 ONSC 6712, at paras. 7-9, West Face BOA, Tab 11. See also *Smith Estate v. Rotstein*, 2010 ONSC 4487, at para. 45, *varied on other grounds*, 2011 ONCA 491, *leave to appeal refused*, [2011] S.C.C.A. No. 441, West Face BOA, Tab 32; and *Foglia v. 1144341 Ontario Ltd*., [2006] O.J. No. 1629 (S.C.J.), at paras. 17, 19 and 23, West Face BOA, Tab 12.

200 *Open Window Bakery*, at para. 26, West Face BOA, Tab 15.

201 See, for example, *Hawley*, at paras. 23-25, West Face BOA, Tab 17; *Bieberstein v. Kirchberger*, 2015 ONSC 6136 (Commercial List), at para. 7, West Face BOA, Tab 3; and *Hamalengwa v. Duncan*, [2005] O.J. No. 3993 (C.A.), at para. 17, *leave to appeal refused*, [2005] S.C.C.A. No. 508, West Face BOA, Tab 14.

202 *Davies v. Clarington (Municipality)*, 2009 ONCA 722, West Face BOA, Tab 8. See also Costs Endorsement, at para. 3, CC Tab 6.

203 *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856 (S.C.J.), para. 21, West Face BOA, Tab 33. See also Costs Endorsement, at para. 4, CC Tab 6.

124. In this case, Catalyst persisted in attacking the honesty and integrity of West Face and its Partners to the very conclusion of trial despite the absence of any evidence to support its serious allegations of misconduct. Indeed, Catalyst persisted in pursuing its allegations well after ample evidence was tendered demonstrating that its initial suspicions were unfounded:

(a) the Independent Supervising Solicitor appointed by Justice Lederer in November 2014 concluded, after reviewing voluminous electronic evidence, that there was no evidence whatsoever that Moyse had communicated confidential information concerning WIND to West Face;[204] and

(b) well before trial, Catalyst received the benefit of extensive and comprehensive affidavits, thousands of productions, and oral discovery from Moyse and West Face, all of which demonstrated that Catalyst's claims and allegations were without merit and doomed to fail.[205]

PART IV ~ NO ADDITIONAL ISSUES

125. West Face raises no issues in addition to those raised by Catalyst's appeal.

PART V ~ ORDER REQUESTED

126. For all of these reasons, West Face respectfully requests that an Order be made dismissing Catalyst's appeal, with costs in an amount to be agreed by the parties or determined by this Court.

---

204 Report of the ISS dated February 17, 2015 (WFC0081988), at para. 59, WF DC, Tab 87.

205 This is, in essence, what the Trial Judge found in his Costs Endorsement, and what Mr. Riley admitted to at trial. See, for example, Costs Endorsement, at paras. 7-10, CC Tab 6; and Riley Cross, June 8, 2016, pp. 627:9-628:16 & 629:21-652:11, WF WC, Tab 64.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of June, 2017.

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC# 24264J)
Matthew Milne-Smith (LSUC# 44266P)
Andrew Carlson (LSUC# 58850N)

Lawyers for the Defendant (Respondent),
West Face Capital Inc.

Court File No. C62655

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff
(Appellant)

and

BRANDON MOYSE and WEST FACE CAPITAL INC.

Defendants
(Respondents)

CERTIFICATE

I estimate that two and a half hours will be needed for West Face's oral argument of the appeal. An order under subrule 61.09(2) (original record and exhibits) is not required.

DATED AT Toronto, Ontario this 30th day of June, 2017.

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent E. Thomson (LSUC# 24264J)
Matthew Milne-Smith (LSUC# 44266P)
Andrew Carlson (LSUC# 58850N)

Lawyers for the Defendant (Respondent),
West Face Capital Inc.

SCHEDULE A

LIST OF AUTHORITIES

1 *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580

2 *Apotex Inc. v. Egis Pharmaceuticals*, [1990] O.J. No. 2187 (Gen. Div.), *with further reasons at* [1991] O.J. No. 1232 (Gen. Div.)

3 *Bieberstein v. Kirchberger*, 2015 ONSC 6136 (Commercial List)

4 *BNY Capital Corp. v. Katotakis*, [2005] O.J. No. 623 (C.A.)

5 *Brad-Jay Investments Ltd. v. Szijjarto*, [2006] O.J. No. 5078 (C.A.)

6 *BTR Global Opportunity Trading Ltd. v. RBC Dexia Investor Services Trust*, 2011 ONCA 518, *leave to appeal filed (with no further record)*, [2011] S.C.C.A. No. 382

7 *Chesebrough v. Willson*, [2002] O.J. No. 4299 (C.A)

8 *Davies v. Clarington (Municipality)*, 2009 ONCA 722

9 *F.H. v. McDougall*, 2008 SCC 53

10 *Feinstein v. Freedman*, 2014 ONCA 205

11 *Fitzpatrick v. Orwin*, 2012 ONSC 6712

12 *Foglia v. 1144341 Ontario Ltd.*, [2006] O.J. No. 1629 (S.C.J.)

13 *H.L. v. Canada (Attorney General)*, 2005 SCC 25

14 *Hamalengwa v. Duncan*, [2005] O.J. No. 3993 (C.A.), *leave to appeal refused*, [2005] S.C.C.A. No. 508

15 *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9

16 *Harris v. Leikin Group Inc.*, 2014 ONCA 479

17 *Hawley v. Bapoo*, [2006] O.J. No. 2938 (S.C.J.), *affirmed on this ground, varied on other grounds*, 2007 ONCA 503

18 *Hearing Clinic (Niagara Falls) Inc. v. 866073 Ontario Ltd.*, 2016 ONSC 4509 (Div. Ct.)

19 *Housen v. Nikolaisen*, 2002 SCC 33

20 *Husky Injection Molding Systems Ltd. v. Schad*, 2016 ONSC 2297

21 *Law-Woman Management Corp. v. Peel*, [1991] O.J. No. 338 (Gen. Div)

22 *Mandeville v. Manufacturers Life Insurance Co*., 2012 ONSC 4316, *affirmed at* 2014 ONCA 417

23 *Moore v. Getahun*, 2015 ONCA 55

24 *Prudential Securities Credit Corp., LLC v. Cobrand Foods Ltd.*, 2007 ONCA 425

25 *R. v. Aird*, 2013 ONCA 447 (C.A.)

26 *R. v. Dexter*, 2013 ONCA 744

27 *R. v. Howe*, 2005 CarswellOnt 44 (C.A.)

28 *R. v. Lyttle*, 2004 SCC 5

29 *R. v. MacIsaac*, 2015 ONCA 587 (C.A.)

30 *R. v. Phan*, 2013 ONCA 787

31 Sankofff, Peter J., Witnesses, looseleaf (Toronto Thomson Reuters Canada, 2017)

32 *Smith Estate v. Rotstein*, 2010 ONSC 4487, *varied on other grounds*, 2011 ONCA 491, leave to appeal refused, [2011] S.C.C.A. No. 441

33 *Thoughtcorp Systems v. Tanju*, [2009] O.J. No. 1856 (S.C.J.)

34 *Toronto-Dominion Bank v. Grande Caledon Developments Inc*., 1998 CarswellOnt 2092 (C.A.)

35 *Wallace v. Davis*, [1926] O.J. No. 212 (Sup. Ct. (H. Ct. Div.))

36 *Waxman v. Waxman*, [2004] O.J. No. 1765 (C.A.), *leave to appeal refused* [2004] S.C.C.A. No. 291

37 *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722, *leave to appeal refused*, [2014] S.C.C.A. No. 32

SCHEDULE B

TEXT OF STATUTES, REGULATIONS & BY - LAWS

Courts of Justice Act, R.S.O. 1990, c. C.43, ss. 131 and 134

Costs

131 (1) Subject to the provisions of an Act or rules of court, the costs of and incidental to a proceeding or a step in a proceeding are in the discretion of the court, and the court may determine by whom and to what extent the costs shall be paid. R.S.O. 1990, c. C.43, s. 131 (1).

Powers on appeal

134 (1) Unless otherwise provided, a court to which an appeal is taken may,

(a) make any order or decision that ought to or could have been made by the court or tribunal appealed from;

(b) order a new trial;

(c) make any other order or decision that is considered just. R.S.O. 1990, c. C.43, s. 134 (1).

Interim orders

(2) On motion, a court to which a motion for leave to appeal is made or to which an appeal is taken may make any interim order that is considered just to prevent prejudice to a party pending the appeal. 1999, c. 12, Sched. B, s. 4 (3).

Power to quash

(3) On motion, a court to which an appeal is taken may, in a proper case, quash the appeal.

Determination of fact

(4) Unless otherwise provided, a court to which an appeal is taken may, in a proper case,

(a) draw inferences of fact from the evidence, except that no inference shall be drawn that is inconsistent with a finding that has not been set aside;

(b) receive further evidence by affidavit, transcript of oral examination, oral examination before the court or in such other manner as the court directs; and

(c) direct a reference or the trial of an issue,

to enable the court to determine the appeal.

Scope of decisions

(5) The powers conferred by this section may be exercised even if the appeal is as to part only of an order or decision, and may be exercised in favour of a party even though the party did not appeal. R.S.O. 1990, c. C.43, s. 134 (3-5).

New trial

(6) A court to which an appeal is taken shall not direct a new trial unless some substantial wrong or miscarriage of justice has occurred. R.S.O. 1990, c. C.43, s. 134 (6); 1994, c. 12, s. 46 (1).

Same

(7) Where some substantial wrong or miscarriage of justice has occurred but it affects only part of an order or decision or some of the parties, a new trial may be ordered in respect of only that part or those parties. R.S.O. 1990, c. C.43, s. 134 (7); 1994, c. 12, s. 46 (2).

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, R. 57.01**

Rule 57 COSTS OF PROCEEDINGS
GENERAL PRINCIPLES
Factors in Discretion

(1) In exercising its discretion under section 131 of the Courts of Justice Act to award costs, the court may consider, in addition to the result in the proceeding and any offer to settle or to contribute made in writing,

(0.a) the principle of indemnity, including, where applicable, the experience of the lawyer for the party entitled to the costs as well as the rates charged and the hours spent by that lawyer;

(0.b) the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the step in the proceeding for which costs are being fixed;

(a) the amount claimed and the amount recovered in the proceeding;

(b) the apportionment of liability;

(c) the complexity of the proceeding;

(d) the importance of the issues;

(e) the conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceeding;

(f) whether any step in the proceeding was,

(i) improper, vexatious or unnecessary, or

(ii) taken through negligence, mistake or excessive caution;

(g) a party's denial of or refusal to admit anything that should have been admitted;

(h) whether it is appropriate to award any costs or more than one set of costs where a party,

(i) commenced separate proceedings for claims that should have been made in one proceeding, or

(ii) in defending a proceeding separated unnecessarily from another party in the same interest or defended by a different lawyer; and

(i) any other matter relevant to the question of costs. R.R.O. 1990, Reg. 194, r. 57.01 (1); O. Reg. 627/98, s. 6; O. Reg. 42/05, s. 4 (1); O. Reg. 575/07, s. 1.

Costs Against Successful Party

(2) The fact that a party is successful in a proceeding or a step in a proceeding does not prevent the court from awarding costs against the party in a proper case. R.R.O. 1990, Reg. 194, r. 57.01 (2).

Fixing Costs: Tariffs

(3) When the court awards costs, it shall fix them in accordance with subrule (1) and the Tariffs. O. Reg. 284/01, s. 15 (1).

Assessment in Exceptional Cases

(3.1) Despite subrule (3), in an exceptional case the court may refer costs for assessment under Rule 58. O. Reg. 284/01, s. 15 (1).

Authority of Court

(4) Nothing in this rule or rules 57.02 to 57.07 affects the authority of the court under section 131 of the Courts of Justice Act,

(a) to award or refuse costs in respect of a particular issue or part of a proceeding;

(b) to award a percentage of assessed costs or award assessed costs up to or from a particular stage of a proceeding;

(c) to award all or part of the costs on a substantial indemnity basis;

(d) to award costs in an amount that represents full indemnity; or

(e) to award costs to a party acting in person. R.R.O. 1990, Reg. 194, r. 57.01 (4); O. Reg. 284/01, s. 15 (2); O. Reg. 42/05, s. 4 (2); O. Reg. 8/07, s. 3.

Bill of Costs

(5) After a trial, the hearing of a motion that disposes of a proceeding or the hearing of an application, a party who is awarded costs shall serve a bill of costs (Form 57A) on the other parties and shall file it, with proof of service. O. Reg. 284/01, s. 15 (3).

Costs Outline

(6) Unless the parties have agreed on the costs that it would be appropriate to award for a step in a proceeding, every party who intends to seek costs for that step shall give to every other party involved in the same step, and bring to the hearing, a costs outline (Form 57B) not exceeding three pages in length. O. Reg. 42/05, s. 4 (3).

Process for Fixing Costs

(7) The court shall devise and adopt the simplest, least expensive and most expeditious process for fixing costs and, without limiting the generality of the foregoing, costs may be fixed after receiving written submissions, without the attendance of the parties. O. Reg. 42/05, s. 4 (3).

SCHEDULE C

1. Catalyst has set out a number of additional alleged "errors of fact" in a Schedule "C" to its Appeal Factum. Not one of these findings was an error. Rather, they were proper findings of fact deeply rooted in the evidence at trial. Furthermore, even if Justice Newbould did make any palpable error in regard to one or even all of these facts, none of them, whether taken collectively or individually, amounts to an overriding error that would justify sending this matter to a new trial.

2. Catalyst's Schedule "C" submissions were also made in defiance of Justice Strathy's Order limiting the length of the factums in this appeal to sixty pages. In West Face's respectful submission, this Court should simply disregard both Catalyst's and West Face's Schedule "C" submissions in their entirety. However, should this Court choose to consider Catalyst's additional Schedule "C" allegations, West Face has addressed and refuted each one of them in turn in this responding Schedule "C".

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
The trial judge found that Catalyst's witnesses' explanation for why drafts of the PowerPoint presentations and notes from the meetings with the Government of Canada were destroyed differed from witness to witness and "made little sense".	Paragraph 49, footnote 3.	1. Contrary to Catalyst's assertions, Mr. Glassman and Mr. Riley proffered two very different reasons for the destruction of the March 27 Presentation. 2. Mr. Glassman's evidence was that the Government expressly asked that all of Catalyst's drafts of the presentation be destroyed, but that the Government had no problem with Catalyst keeping the final copy of the presentation.[206] As noted by Justice Newbould, during Mr. Glassman's examination in chief, Mr. Glassman "went so far as to say that it was his experience that this [*i.e.*, requests by Government officials that

[206] Glassman Chief, June 7, 2016, pp. 324:24-326:22, WF WC, Tab 21 and Glassman Cross, June 7, 2016, pp. 387:3-388:21, WF WC, Tab 22.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		private parties destroy their internal work product] happened often and frequently".[207] However, in cross-examination, Mr. Glassman revealed that the March 27 Presentation was the first presentation he had ever made to the Government.[208] 3. For this reason, according to Mr. Glassman, a copy of the final version of the March 27 Presentation was kept in Catalyst's "master file".[209] Mr. Glassman could not identify the specific individual at Industry Canada who allegedly made this request, nor are there any contemporaneous documents verifying that such a request was made.[210]

207 Trial Reasons, at para. 49, footnote 3, CC, Tab 4. See also Glassman Chief, June 7, 2016, at pp. 324:24-326:22, WF WC, Tab 21.
208 Trial Reasons, at para. 49, footnote 3, CC, Tab 4. See also Glassman Cross, June 8, 2016, pp. 560:5-560:20, WF WC, Tab 28.
209 Glassman Cross, June 8, 2016, at pp. 558:23-561:3, WF WC, Tab 28.
210 Glassman Cross, June 7, 2016, at pp. 387:3-388:21, WF WC, Tab 22.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		4. Mr. Glassman's evidence contrasted to that of Mr. Riley. At a May 13, 2015 cross-examination (*i.e.*, more than a year before trial and much closer in time to the events in question), Mr. Riley testified that <u>all</u> copies of the March 27 Presentation had been destroyed shortly after it was given and that <u>no</u> record of it had been maintained.[211] As an aside, Catalyst relied on Mr. Riley's evidence of May 2015 to justify its failure to produce the March 27 Presentation in the context of its then-pending motion for drastic interlocutory relief against West Face and for a finding of contempt (and imprisonment) against Mr. Moyse. 5. At trial, Mr. Riley further testified that he believed all copies of the March 27 Presentation had been destroyed or

[211] Cross-Examination of James Riley held May 13, 2015 (TRAN000397), p. 79:10-17, WF WC, Tab 61.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		deleted because he (and not a Government official) had asked all of the individuals at Catalyst who had had access to the March 27 Presentation to destroy and delete their copies.[212] 6. Furthermore, when specifically asked why he made the request to have the March 27 Presentation destroyed, Mr. Riley answered that he "believed that given the sensitivity of the information enclosed, it was best to not have maintained copies."[213] As Justice Newbould noted, Mr. Riley did not mention any direction from Industry Canada in relation to the destruction of the March 27 Presentation. Thus, while Catalyst argues that statement that the evidence proffered by its witnesses was not inconsistent because Mr. Riley was

212 Riley Chief, June 8, 2016, at pp. 577:20-579:2, WF WC, Tab 63.
213 Riley Chief, June 8, 2016 at pp. 576:20-579:2, WF WC, Tab 63.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		"carrying out the Government of Canada's desired outcome", that is not what he said he was doing. This would have been an extraordinary omission if such a request was indeed the reason why Mr. Riley ordered the presentation destroyed. 7. Notably, Mr. Riley's evidence was inconsistent with Mr. Glassman's *despite the fact that Mr. Riley was in attendance at Court and heard Mr. Glassman's evidence*.[214] 8. When confronted with Mr. Riley's evidence that <u>every</u> copy of the March 27 Presentation had been destroyed, Mr. Glassman admitted that there was a difference between Mr. Riley's account and Mr. Glassman's own recollection.[215] These

214 Riley Cross, June 8, 2016, p. 597:23-25, WF WC, Tab 63.

215 Glassman Cross, June 7, 2016, at pp. 452:4-458:13, WF WC, Tab 26.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		differing accounts, as acknowledged by Mr. Glassman, were ample grounds on which Justice Newbould made this finding. 9. As an aside, Mr. Glassman's account was also inconsistent with Catalyst's Opening Statement.[216] 10. Justice Newbould was also justified in his finding that Mr. Glassman's evidence regarding the destruction of the March 27 Presentation made little sense. As noted by Justice Newbould, "[w]hy the Government would be concerned with drafts of a presentation made to it that were never seen by the Government is puzzling indeed".[217] Indeed, Mr. Glassman never adequately explained why the Government would be

216 Catalyst's Opening Statement, June 6, 2016, pp. 20:20-21:7, WF WC, Tab 1.

217 Trial Reasons, at para. 49, footnote 3, CC, Tab 4.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		concerned about drafts it had never seen. 11. Moreover, while not specifically relied upon by Justice Newbould, it is notable that *neither* Mr. Glassman's nor Mr. Riley's explanations made sense given *which* (sole) copies of the March 27 and May 12 Presentations were produced. Specifically, the only copy of the March 27 Presentation that was produced by Catalyst was a copy attached to an email from Mr. Moyse to Messrs. Glassman, De Alba, and Riley (cc'ing Mr. Michaud and himself, Mr. Moyse).[218] No explanation was given as to why Catalyst would bother to keep the covering email in its "master file", nor was any explanation given with respect to where this email was located

[218] See CCG0011564 and attachment CCG0011565, WF DC, Tab 17.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
		(presumably, it would have been located in each of the above individuals' email inboxes as well as Mr. Moyse's sent items). Similarly, the only copy of the May 12 Presentation that was produced was attached to an email from Mr. De Alba to Messrs. Glassman, Michaud, Riley, and Catalyst's lawyer, Mr. Levin of Faskens (cc'ing Messrs. Moyse and Creighton).[219] No explanation was given as to why Catalyst would have kept this particular copy only. 12. All of the above was more than sufficient evidence upon which Justice Newbould based his finding. It was clearly not a palpable and overriding error.
The trial judge found that Moyse	Paragraph 54.	1. Mr. Moyse explicitly testified at trial that he decided to

[219] CCG0009516 and attachment CCG0009517, WF DC, Tab 32.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
decided to leave Catalyst because of a "[lack of] common decency or respect for individuals at [Catalyst]" and called these alleged facts "not surprising", without any contemporaneous documentary evidence to support these spurious allegations.		leave Catalyst because it was an oppressive work environment that lacked common decency or respect for the individuals working there: Q. Why did you start looking for a new job a little over a year after you started at Catalyst? A. There's a couple of reasons. One, I found that I wasn't getting at that point the learning opportunities that I had set out to achieve in the first place. I found the – secondly, I found the work environment to be somewhat oppressive. … A. There [are] a lot of incidents I can draw on, but just to sum it up, it was not what I would call a place that had very much common decency or respect for the individuals working there.[220]

[220] Moyse Chief, June 13, 2016, at pp. 1373:8-1375:10, WF WC, Tab 52.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		2. Mr. Moyse's trial testimony was consistent with his earlier affidavits sworn over the course of the proceeding. For example, in an Affidavit sworn in July 2014, Mr. Moyse deposed that while he was employed by Catalyst, Mr. Glassman would often have outbursts in the office – yelling, screaming, cursing profusely, and even making threats of violence directed at Catalyst's employees.[221] 3. Catalyst's allegation that there is no contemporaneous documentary evidence to support Mr. Moyse's evidence is patently incorrect. Mr. Moyse exchanged a series of emails with his girlfriend at the time he was looking for a new job. In these contemporaneous emails, Mr. Moyse noted that any

[221] Moyse Affidavit sworn July 7, 2014 (BM003688), at paras. 23-25, WF WC, Tab 49.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		other potential employer was "probably an improvement culturally" over Catalyst, as "none of the other places seem oppressive". Mr. Moyse confirmed at trial that this email accurately reflected his feelings towards Catalyst at the time.[222] 4. At no point over the two-year course of these proceedings did Catalyst make any effort to respond or refute Mr. Moyse's testimony regarding Catalyst's work environment. Rather, Catalyst's only reply was Mr. Riley's statement in an Affidavit sworn July 14, 2014 that he "[did] not intend to dignify [Mr. Moyse's] comments with a response".[223] 5. Moreover, as Justice Newbould noted, Mr. Moyse's

222 BM0004968, WF DC, Tab 19; and Moyse Chief, June 13, 2016, at pp. 1375:11-1376:13, WF WC, Tab 52.

223 Affidavit of James Riley sworn July 14, 2014 (CAT000116), at para. 7, WF WC, Tab 56.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		testimony was "not surprising evidence given the evidence of Mr. Glassman as to how he treated everyone at Catalyst…".[224] Indeed, Mr. Moyse's evidence regarding Catalyst's hostile work environment was essentially corroborated by Mr. Glassman's conduct and testimony at trial. Among other remarkable statements, Mr. Glassman testified in open court that he would "kill" his partner Mr. De Alba if he ever took pressure off Catalyst's advisors,[225] that he would "<u>never</u> relieve the tension on <u>any</u> deal member on <u>any</u> deal at <u>any</u> point in time",[226] and that he was "manipulating" his deal team.[227]

224 Trial Reasons, at para. 54, CC, Tab 4.

225 Glassman Cross, June 7, 2016, at pp. 476:20-486:11, especially 481:22-482:1, WF WC, Tab 26.

226 Glassman Cross, June 7, 2016, at pp. 476:20-486:11, especially 482:20-483:2 (emphasis added), WF WC, Tab 26. See also Mr. Glassman's statement that he "would keep the pressure up on Bruce [Drysdale] and any member of the team to the very last second". Glassman Cross, June 7, 2016, at 503:19-504:3, WF WC, Tab 26.

227 Glassman Cross, June 7, 2016, at pp. 524:24-533:15, especially 532:7-533:2, WF WC, Tab 26.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
		6. In short, Justice Newbould's findings were deeply rooted in the evidence at trial, and do not constitute a palpable and overriding error of fact.
The trial judge found that West Face had a "critical need" for an analyst in March 2014 when it interviewed Moyse.	Paragraph 55.	1. This finding of fact was taken directly from the trial evidence of the key witnesses who could speak to West Face's personnel requirements. 2. The evidence at trial was that West Face hired Mr. Moyse in May 2014 to work on prospective debt deals for its Alternative Credit Fund. This was a new fund at West Face, which was launched on December 31, 2013. Mr. Dea – the Partner at West Face who had primary responsibility at the time for hiring an analyst - testified that, at the time, West Face had a "critical need" for additional analytical work to assist West Face

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		in reviewing opportunities for this fund.[228] Mr. Moyse was hired to fill this need. 3. Mr. Dea's evidence was supported by contemporaneous documents. First, in an email Mr. Dea sent to his colleagues on April 30, 2014 (shortly after Mr. Boland had had the opportunity to meet with and interview Mr. Moyse), Mr. Dea referred to the "immediate need … to have someone mostly dedicated to grinding out possible debt deals".[229] In a later email from Mr. Dea to his colleagues on May 16, 2014 (after Mr. Dea had checked Mr. Moyse's references), Mr. Dea recommended that West Face hire Mr. Moyse, in part because "[West Face]

228 Dea Chief, June 10, 2016, at pp. 1229:17-1232:1, especially at 1231:14-1232:1, WF WC, Tab 18.

229 WFC0109161, WF DC, Tab 24.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		need[ed] someone now to help process debt pipeline more effectively".[230] Mr. Dea explained at trial that this comment was in relation to the critical need for more analytical work in relation to the new fund.[231] 4. Mr. Griffin's testimony regarding why West Face was looking to hire someone in the spring of 2014 was consistent with Mr. Dea's evidence. Mr. Griffin testified that West Face had: > [S]tarted a new credit investment fund called the alternative credit fund, and we needed someone who had particular experience in all forms of credit, but we also needed additional analyst resources generally, and so the intention was to hire individuals who would be able to assist with

230 WFC0109181, WF DC, Tab 35.

231 Dea Chief, June 10, 2016, at pp. 1231:14-1232:1, WF WC, Tab 18.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		the analysis of investments for this alternative credit fund.[232] 5. Catalyst argues that Mr. Moyse's evidence "throughout the proceeding" was that "he did not do any work at West Face" during his brief stint of active employment at West Face, and that this evidence is inconsistent with Justice Newbould's finding (based directly on Mr. Dea's evidence) that West Face had a critical need for an analyst. 6. The suggestion that Mr. Moyse's evidence was that he did "no work" while at West Face is inaccurate. While Mr. Moyse testified at a July 31, 2014 cross-examination that he was not assigned work during his first two weeks at West Face, he also testified that by the third week he was involved in a

[232] Griffin Chief, June 8, 2016 at pp. 771:21-772:8, WF WC, Tab 34.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		number of files, including potential investments in public and private equity. At the time, Mr. Moyse did not explain in more detail the work he had performed for West Face because he was rightfully concerned about potentially revealing irrelevant but confidential West Face information to Catalyst. Catalyst's counsel agreed at the time that this was a fair approach.[233] 7. Ultimately, West Face put forward significant evidence regarding the work that Mr. Moyse did while he was employed at West Face, and Catalyst both declined repeated offers to examine, on a counsels' eyes only basis, all work performed by Mr. Moyse while at West Face, and declined to cross-examine Mr. Dea or Mr. Griffin on this issue. The full nature and extent

[233] Cross-Examination of Brandon Moyse held July 31, 2014 (TRAN001237), pp. 170:21-173:23, WF WC, Tab 50.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		of the work that Mr. Moyse performed while at West Face was described in detail by Mr. Griffin in Appendix "A" to his March 7, 2015 Affidavit.[234] 8. Ultimately, and as set out above, Justice Newbould accepted West Face's evidence (and particularly Mr. Dea's testimony) that West Face had a critical need for an analyst. This finding was clearly not a "palpable" and "overriding" error. 9. In light of the positions taken by Catalyst above throughout this proceeding and at trial, as a matter of fairness, Catalyst should be precluded from raising this argument under the rule in *Brown v. Dunn*.

[234] Griffin Affidavit sworn March 7, 2015 (WFC0080746), WF WC, Tab 30.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
The trial judge speculated that Moyse "had to be tired" when he emailed Catalyst's confidential deal sheet and deal memos to West Face in March 2014.	Paragraph 57	1. Justice Newbould did not speculate whatsoever in finding that Mr. Moyse was tired when he sent the March 27 Email to West Face at 1:47 a.m. on March 27, 2014. Rather, Justice Newbould quite simply accepted the testimony of the only witness who could give meaningful evidence about Mr. Moyse's fatigue at that time – namely, Mr. Moyse himself. 2. Contrary to Catalyst's remarkable assertion that "there was no evidence that Mr. Moyse was tired" when he sent the March 27 Email, Mr. Moyse specifically testified that he <u>was</u> tired at the time. At trial, Mr. Moyse explained: > [My] sending them was a serious, serious error in judgment.· <u>I was tired; it was late at night; it was a busy day</u>. I wanted to be responsive to [Mr. Dea's] request [for writing samples]. ·I should have taken more time to think about what I could

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
		do."[235] 3. Given the time at which he sent the email, this was entirely credible evidence, and Catalyst had no absolutely no evidence to the contrary. 4. In short, Justice Newbould made this finding based on the credible testimony of Mr. Moyse, which he accepted. He was entitled to do so. This finding was not an error, let alone a palpable and overriding one.
The trial judge found that Wind was the only telecom investment West	Paragraph 63	1. Catalyst has not identified any error. It simply states: "West Face's witness, Tom Dea, testified at length that any

[235] Moyse Chief, June 13, 2016, at pp 1386:21-1387:4, WF WC, Tab 52 (emphasis added).

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
Face was working on in Spring 2014 and that the confidentiality wall was established in respect of Wind because it was the only telecom investment West Face was working on.		confidentiality wall would include both Wind and Mobilicity because the two were interrelated".[236] This evidence does not contradict Justice Newbould's finding whatsoever. There is no question the Confidentiality Wall applied to WIND – it says so on its face. 2. Moreover, West Face's witnesses made it clear that WIND was the only telecom investment that West Face was working on in the Spring of 2014. Indeed, West Face had fully divested itself of its interest in Mobilicity by the end of February 2013 and had not traded in Mobilicity since that time.[237] 3. Mr. Zhu, the West Face analyst working on the WIND

236 Catalyst's Appeal Factum, Schedule "C", p. 4.
237 Griffin Trial Affidavit, at para. 28, WF WC, Tab 31.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		file, did give evidence that at certain points in the investment process (which spanned a very long period of time), there were periods where West Face considered potentially acquiring Mobilicity as well. However, Mr. Zhu never performed any analysis for that purpose.[238] 4. By the Spring of 2014, the only active telecom deal that West Face was working on was WIND. Mr. Griffin made this clear in cross-examination when he stated that West Face "only had one telecom file ongoing" around May or June of 2014.[239] Mr. Griffin also explicitly testified that the Confidentiality Wall that was put in place in response to concerns raised by counsel for Catalyst was "established… with respect to the only telecom

238 Zhu Cross, June 10, 2016, at pp. 1310:21-1311:14, WF WC, Tab 68.
239 Griffin Cross, June 9, 2016, at pp. 1007:25-1008:16, WF WC, Tab 37.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		investment that we were working on at the time, which was Wind Mobile."[240] 5. Although West Face was only involved with WIND, Mr. Dea testified that when the question came up regarding whether this Confidentiality Wall also included any discussion regarding Mobilicity, the answer was "yes". Furthermore, the employees at West Face were instructed not to talk with Mr. Moyse regarding anything to do with wireless or telecom. 6. Justice Newbould was therefore fully supported in his finding that WIND was the only telecom deal West Face was working on at the relevant time.

[240] Griffin Chief, June 8, 2016, p. 777:11-25, WF WC, Tab 34.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	**Catalyst's Citation of Justice Newbould's Finding**	**Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error**
The trial judge found that Catalyst required the ability to sell spectrum to an incumbent in order for Wind to survive.	Paragraph 122	1. It is difficult to follow Catalyst's argument with respect to how or in what way this finding was allegedly was made in error. Catalyst seems to be arguing that there is a meaningful difference, or "nuance" as Catalyst puts it, between whether Catalyst required the regulatory concessions in order for WIND to be "viable", or whether they were required in order for WIND to "survive". It is unclear to West Face what the distinction is, given that the word "viable" means "capable of surviving". 2. Indeed, at no point throughout the proceedings or during the trial did Catalyst or its witnesses draw the distinction that Catalyst now draws. Mr. Glassman – the "architect" of Catalyst's failed regulatory strategy – used the concepts of "viability" and "survivability" interchangeably throughout his

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		evidence. For example, in his Trial Affidavit, Mr. Glassman stated: …it was Catalyst's opinion an independent fourth wireless carrier could not survive without changes to the existing regulatory structure.[241] ... In the regulatory environment that existed in 2014, the new entrants, like Wind, were therefore not equipped to survive any kind of competitive war with the incumbents…[242] 3. Similarly, during cross-examination at trial, Mr. Glassman agreed as follows: Q. Am I right that as of the time of the meeting with the Government of Canada on March·27th, your belief was that without the regulatory changes that Catalyst had asked for, that the

241 Glassman Trial Affidavit sworn May 27, 2016, at para. 10, WF WC, Tab 20.
242 Glassman Trial Affidavit sworn May 27, 2016, at para. 11, WF WC, Tab 20.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		fourth carrier would only be able to compete in the short term with incumbents on price and then, because of their size, incumbents would quickly squeeze a fourth carrier out of the market? A. It was my view. Q. It was also your view that in the regulatory environment that existed in 2014, new entrants such as Wind <u>were not equipped to survive</u> any kind of competitive war with the incumbents, and that was your view; correct? A. <u>It was</u>. Q. And that is what you told the government? A. Yes, and internally.[243] 4. Finally, Catalyst's written closing submissions stated: "Catalyst's internal opinion was that a fourth wireless carrier

[243] Glassman Cross, June 7, 2016, pp. 420:14-421:6, WF WC, Tab 23 (emphasis added).

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		could not survive in that commercial environmental without changes to the existing regulatory structure".[244] 5. In short, the "nuanced" distinction Catalyst now draws does not exist. This argument amounts to nothing more than Catalyst selectively citing to one paragraph of the Trial Reasons in a last-ditch effort to find any discernible aspect of its "nuanced" regulatory strategy that Justice Newbould allegedly did not understand. The Trial Reasons demonstrate that Justice Newbould had a full appreciation for Catalyst's regulatory strategy. Indeed, in a paragraph of the Trial Reasons that Catalyst chose not to direct this Court's attention to, Justice Newbould explicitly set out Mr. Glassman's

[244] Catalyst's Written Closing Submissions, at para. 51, WF DC, Tab 91 (emphasis added).

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		regulatory strategy, stating – as had Mr. Glassman – that WIND would not be viable nor be able to survive without the regulatory concessions: > Mr. Glassman's view was that an independent fourth wireless carrier would not be viable or be able to survive without Government concessions permitting its spectrum to be sold to an incumbent and would be able only to compete in the short term with the incumbents on price and would be quickly squeezed out by the incumbents.[245] 6. Finally, even if the distinction now drawn by Catalyst could exist, Justice Newbould simply accepted the evidence and submissions of Catalyst that it required the regulatory concessions, and in particular the crucial ability to sell WIND or its spectrum to an incumbent after five years, in order for WIND

[245] Trial Reasons, at para. 78, CC, Tab 4.

Finding of Fact of Justice Newbould Alleged by Catalyst to Have Been Made in Error	Catalyst's Citation of Justice Newbould's Finding	Reasons Why this Finding of Fact is Neither a "Palpable" Nor "Overriding" Error
		to survive. This finding was not made in error. 7. Finally, even if it were made in error, it could not possibly be an overriding one. Regardless of whether Catalyst required the regulatory concessions in order for WIND to "be viable" or "to survive", the material point was that Catalyst required the Government to grant (or agree to grant) Catalyst the regulatory concessions before Catalyst would close the deal for WIND. Justice Newbould understood that material fact, and held that as a finding of fact in his Trial Reasons (a fact which Catalyst has not appealed) that Catalyst would not have purchased WIND without the regulatory concessions.[246]

[246] Trial Reasons at paras. 126-131, CC, Tab 4.

THE CATALYST CAPITAL GROUP INC.
Plaintiff (Appellant)

-and-

BRANDON MOYSE and WEST FACE CAPITAL INC.
Defendants (Respondents)

Court File No. C62655

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

**FACTUM OF THE DEFENDANT (RESPONDENT),
WEST FACE CAPITAL INC.**

Davies Ward Phillips & Vineberg LLP
155 Wellington Street West
Toronto ON M5V 3J7

Kent Thomson (LSUC# 24264J)
Tel: 416.863.5566
kentthomson@dwpv.com

Matthew Milne-Smith (LSUC# 44266P)
Tel: 416.863.5595
mmilne-smith@dwpv.com

Andrew Carlson (LSUC# 58850N)
Tel: 416.367.7437
acarlson@dwpv.com

Fax: 416.863.0871

Lawyers for the Defendant (Respondent),
West Face Capital Inc.