Court File No.: CV-16-553800

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

THE CATALYST CAPITAL GROUP INC.

Plaintiff

- and -

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

Defendants

FACTUM OF THE MOVING DEFENDANT VIMPELCOM LTD.
(returnable AUGUST 16, 17, 18, 2017)

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PART I - OVERVIEW

1. The Defendant VimpelCom Ltd. (**VimpelCom**) moves to dismiss the claim of The Catalyst Capital Group Inc. (**Catalyst**) on the basis that:

(a) Catalyst's claim is barred by a Court-ordered release; and

(b) Catalyst's claim is an abuse of process – it seeks to re-litigate and revisit findings of this Court.

2. In February 2016, Justice Newbould approved a plan of arrangement (the **Plan of Arrangement**) which contained a release (the **Release**).[1] Catalyst consented to the implementation of the Plan of Arrangement. The language of the Release makes clear that it captures any claim arising from VimpelCom's sale of WIND Mobile Corp. (**WIND**), and Justice Newbould expressly acknowledged that the Release was intended to apply to such claims. Catalyst's claim against VimpelCom arises out of the sale of WIND and, accordingly, it is covered by the Release and should be dismissed under Rule 21.01(1)(a).

3. This action is also clearly an abuse of process. Catalyst's claim seeks to re-litigate findings made by Justice Newbould in the Plan of Arrangement proceeding and in *Catalyst Capital Group Inc. v. Moyse*[2] (the **Moyse Action**), which concerned the very same facts and circumstances as this action. In fact, Catalyst's claim can only succeed if the trial judge in this action makes findings that directly contradict those made by Justice Newbould in the earlier proceedings.

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[1] Order of Justice Newbould dated February 3, 2016, West Face Motion Record, Vol. 14, Ex. 39, pp. 5155-5167. [Plan of Arrangement Order]

[2] 2016 ONSC 271, West Face Motion Record, Vol. 1, Ex. 1. pp. 85-134. [Moyse Decision]

4. In these circumstances, Catalyst's claim is a waste of judicial resources, risks inconsistent findings, and, if permitted to proceed, would bring the administration of justice into disrepute. It ought to be dismissed pursuant to Rules 21.01(3)(d) and 25.11(c).

PART II - FACTS

A. VimpelCom decides to sell WIND

5. In 2013, VimpelCom decided to sell its stake in WIND and engaged UBS Securities Inc. (**UBS**) to assist it with the sale process.[3]

6. Through the first part of 2014, VimpelCom had discussions with several potential purchasers, including with Catalyst, West Face Capital Inc. (**West Face**), and certain other members of the group of investors who eventually purchased VimpelCom's interest in WIND (the **Consortium**).[4]

7. As part of the diligence process, VimpelCom and Catalyst entered into a Confidentiality Agreement on March 21, 2014.[5]

B. Catalyst commences the Moyse Action

8. In May 2014, a junior analyst working at Catalyst, Brandon Moyse, resigned and joined West Face. Mr. Moyse began working at West Face on June 23, 2014.[6]

9. Two days later, Catalyst commenced the Moyse Action against West Face and Mr. Moyse alleging, among other things, that Moyse had breached certain restrictive covenants and

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[3] Moyse Decision, para. 23, West Face Motion Record, Vol. 1, Ex. 1, p. 92.
[4] Moyse Decision, paras. 24, 30, West Face Motion Record, Vol. 1, Ex. 1, pp. 92-93.
[5] Moyse Decision, para. 29, West Face Motion Record, Vol. 1, Ex. 1, p. 93.
[6] Moyse Decision, paras. 61, 66, West Face Motion Record, Vol. 1, Ex. 1, pp. 103-104.

his duty of confidentiality and that West Face benefited from this breach in its ongoing negotiations with VimpelCom.[7]

C. VimpelCom pursues exclusive negotiations with Catalyst but they fail to reach terms

10. In the summer of 2014, discussions between VimpelCom and Catalyst had progressed. On July 23, 2014, VimpelCom agreed to negotiate exclusively with Catalyst (the **Exclusivity Agreement**). The Exclusivity Agreement covered the period from July 23, 2014 until August 18, 2014.[8]

11. On August 7, 2014, during the exclusivity period, the Consortium made an unsolicited bid to acquire VimpelCom's interest in WIND.[9] Justice Newbould has found as a fact that VimpelCom did not negotiate with the Consortium members during the exclusivity period.[10]

12. VimpelCom continued to negotiate with Catalyst but the parties were ultimately unable to finalize a deal for the sale of WIND.[11] During the discussions, VimpelCom proposed a $5-20 million break fee if regulatory approval for the transaction was not granted. Catalyst rejected this term and walked away from the deal.[12] The Exclusivity Agreement then expired on August 18, 2014.

D. VimpelCom agrees to sell WIND to the Consortium

13. After the expiry of the Exclusivity Agreement with Catalyst, VimpelCom commenced negotiations with members of the Consortium. On September 16, 2014, the Consortium

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[7] Moyse Decision, paras. 1, 76, West Face Motion Record, Vol. 1, Ex. 1, pp. 86, 106-107 .
[8] Moyse Decision, para. 30, West Face Motion Record, Vol. 1, Ex. 1, p. 93.
[9] Moyse Decision, para. 31, West Face Motion Record, Vol. 1, Ex. 1, p. 94.
[10] Moyse Decision, paras. 104-105, West Face Motion Record, Vol. 1, Ex. 1, pp. 115-116.
[11] Moyse Decision, para. 30, West Face Motion Record, Vol. 1, Ex. 1, p. 93.
[12] Moyse Decision, para. 129, West Face Motion Record, Vol. 1. Ex. 1, p. 123.

acquired VimpelCom's interest in WIND using a special-purpose vehicle, Mid-Bowline Group Corp. (**Mid-Bowline**).[13]

E. Catalyst's continued attack on the VimpelCom-Consortium transaction

14. In the fall of 2014, following the announcement of the Consortium's acquisition of WIND, Catalyst amended its claim in the Moyse Action to: (a) allege that West Face had misused Catalyst's confidential information to gain an improper advantage in the negotiations for VimpelCom's interest in WIND and (b) claim a constructive trust over West Face's interest in WIND as well as an accounting of profits.[14]

15. In mid-January 2015, Catalyst brought a motion in the Moyse Action for certain injunctive relief.[15] As part of Catalyst's motion record, it filed an affidavit from its Managing Director and Chief Operating Officer, James Riley.[16]

16. During his cross-examination, Mr. Riley admitted that Catalyst was aware that it had a potential claim against VimpelCom for breach of the Exclusivity Agreement:

> Q. That's fine. I take it I'm right that Catalyst has not commenced proceedings against VimpelCom for breach of that exclusivity obligation?
>
> A. No, we have not.
>
> Q. There is no suggestion here that VimpelCom breached exclusivity?
>
> A. I wouldn't say that.

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[13] Moyse Decision, para. 31, West Face Motion Record, Vol. 1, Ex. 1, p. 94; *Re: Mid-Bowline Group Corp.*, 2016 ONSC 669, paras. 1, 3, 18, West Face Motion Record, Vol. 1, Ex. 2, pp. 135-136,139. [Plan of Arrangement Decision]

[14] Affidavit of Andrew Carlson sworn December 7, 2016, para. 8, West Face Motion Record, Vol. 1, Tab B, p. 33.

[15] Plan of Arrangement Decision, para. 27, West Face Motion Record, Vol. 1, Ex. 2, pp. 141-142.

[16] Plan of Arrangement Decision, para. 30, West Face Motion Record, Vol. 1, Ex. 2, pp. 142-143.

> Q. You haven't sent a demand letter to VimpelCom?
>
> A. We have not at this time.
>
> Q. You haven't made any allegation to VimpelCom in that regard?
>
> A. Not to my knowledge. However, when a contract is breached, as I recall, there's two -- you can -- under the theory of Lumly and Guy, and I'm not trying to play lawyer, you can go after one of two parties, the party breaching or the party inducing a breach.[17]

F. The sale of WIND to Shaw

17. In December 2015, Mid-Bowline commenced an application to sell its interest in WIND to Shaw Communications Inc. (**Shaw**) by way of the Plan of Arrangement.[18]

18. Shaw was concerned that it would not be able to take clear title to Mid-Bowline given Catalyst's claim in the Moyse Action.[19] Accordingly, the parties decided that they would close the transaction using a plan of arrangement structure that included a release (the **Proposed Release**) of the Catalyst claim in the Moyse Action.[20]

19. Catalyst raised three objections to the Plan of Arrangement, all specifically relating to the Proposed Release.[21]

20. First, it argued that the Court did not have jurisdiction to affect the rights of Catalyst because it was not a party to the Plan of Arrangement.[22]

21. As Justice Newbould explained in his January 26, 2016 reasons, the very purpose of the Plan of Arrangement was to extinguish Catalyst's claims:

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[17] Transcript of Cross-Examination of James Riley held May 13, 2015, at qq. 510-514, West Face Motion Record, Vol. 8, Ex.11, p. 2642.
[18] Affidavit of Andrew Carlson sworn December 7, 2016, para. 35, West Face Motion Record, Vol. 1, Tab B, p. 48.
[19] Plan of Arrangement Decision, para. 6, West Face Motion Record, Vol. 1, Ex. 2, pp. 136-137.
[20] Plan of Arrangement Decision, para. 5, West Face Motion Record, Vol. 1, Ex. 2, p. 136.
[21] Plan of Arrangement Decision, para. 4, West Face Motion Record, Vol. 1, Ex. 2, p. 136.
[22] Plan of Arrangement Decision, para. 39, West Face Motion Record, Vol. 1, Ex. 2, p. 145.

> The only reason that this transaction is proceeding by way of plan of arrangement is to provide Shaw with clear title to the shares of WIND. Had this not been required because of the Catalyst claim, the shareholders of Mid-Bowline were prepared to proceed by a share purchase agreement without any requirement of Court approval. During negotiations with Shaw, Mid-Bowline disclosed the claim of Catalyst to a constructive trust over the shares of Mid-Bowline owned by West Face. Shaw made clear that it would not acquire WIND unless it acquired the shares free and clear of any claim to them.[23]

22. Justice Newbould dismissed Catalyst's jurisdictional objection and held that the Court had the authority to compromise Catalyst's claims, even if it was not a party to the Plan of Arrangement:

> I do not agree with Catalyst that there is no jurisdiction under section 192 [sic] to compromise the rights of Catalyst. Section 192 [sic] is a flexible provision that has been broadly interpreted.[24]

23. Second, Catalyst argued that the Proposed Release prejudiced Catalyst's existing claim in the Moyse Action.[25] Justice Newbould addressed Catalyst's concerns by ordering a trial in the Moyse Action:

> This issue raised by Catalyst must be decided quickly. In light of all that has gone on in the past year and a half in its case against West Face and Mr. Moyse, that can be accomplished while protecting the rights of the parties. Taking into account appeal periods, a further hearing involving this application and the claim of Catalyst against West Face and Mr. Moyse should proceed quickly, and I set four days from February 22 to 26, 2016 [...][26]

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[23] Plan of Arrangement Decision, para. 6, West Face Motion Record, Vol. 1, Ex. 2, pp. 136-137.
[24] Plan of Arrangement Decision, para. 39, West Face Motion Record, Vol. 1, Ex. 2, p. 145.
[25] Plan of Arrangement Decision, para. 41, West Face Motion Record, Vol. 1, Ex. 2, pp. 145-146.
[26] Plan of Arrangement Decision, paras. 49, 50, West Face Motion Record, Vol. 1, Ex. 2, p. 148.

24. Third, Catalyst objected that the Proposed Release appeared to extinguish its claim for breach of the Exclusivity Agreement.[27] This was the claim that Mr. Riley had identified during cross-examination in May 2015.

25. Justice Newbould found that Catalyst had sat on its claims relating to the breach of the Exclusivity Agreement:

> Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now asserts he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on his cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that.
>
> [...]
>
> This intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of the application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Waiting and seeing how things are going in the litigation process before springing a new theory at the last moment is not to be encouraged.[28]

26. Justice Newbould dismissed Catalyst's objections and determined that the Plan of Arrangement, including the Proposed Release preventing Catalyst from bringing a claim relating to breach of the Exclusivity Agreement, was fair and reasonable:

> In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.[29]

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[27] Plan of Arrangement Decision, para. 51, West Face Motion Record, Vol. 1, Ex. 2, p. 149.
[28] Plan of Arrangement Decision, paras. 56, 59, West Face Motion Record, Vol. 1, Ex. 2, pp. 150, 151.
[29] Plan of Arrangement Decision, para. 61, West Face Motion Record, Vol. 1, Ex. 2, p. 151.

27. Thus, in stark contrast to the claims in the Moyse Action which were ordered to proceed to an expedited trial, Justice Newbould held that the Plan of Arrangement would bar Catalyst's claims in connection with the Exclusivity Agreement.

G. Catalyst consents to the Order of Justice Newbould

28. In the days that followed the release of Justice Newbould's reasons, Catalyst settled its objections to the Plan of Arrangement.[30] Catalyst agreed to the revisions to the Proposed Release that included a carve-out allowing Catalyst to pursue certain specified claims.

29. On February 3, 2016, the Court approved the Plan of Arrangement, including the Release, which reads as follows:

> 4.5 Paramountcy
>
> From and after the Effective Time [...] all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability except as set forth herein; provided, however, that nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:
>
> (a) Its existing claims as asserted in the Amended Amended Statement of Claim as amended December 16, 2014 in the proceeding bearing Court File No. CV-14-507120 in the Ontario Superior Court of Justice, against West Face Capital Inc. and Brandon Moyse;
>
> (b) As against any person (as defined in the OBCA), any potential claim for a tracing of the money received by West

[30] Affidavit of Andrew Carlson sworn December 7, 2016, paras. 53, 54, West Face Motion Record, Vol. 1, Tab B, p. 55.

Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or

(c) As against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.[31]

30. The Release specifically speaks to and addresses claims by Catalyst. Catalyst consented to the Order giving effect to the Release.[32]

H. Catalyst sues VimpelCom, UBS, and the Consortium

31. On May 31, 2016, just days before the trial of the Moyse Action was set to begin, Catalyst commenced this action against VimpelCom, UBS, and the Consortium.

32. Catalyst's claim against VimpelCom is based on VimpelCom's alleged breach of the Exclusivity Agreement in order to sell WIND to the Consortium. Catalyst alleges that its damages were crystalized in the form of profits realized by the Consortium from the sale of WIND to Shaw.[33]

I. The trial of the Moyse Action

33. The trial of the Moyse Action was held in early June 2016 over seven days. The parties called 13 witnesses, including the principals of Catalyst, West Face, LG Capital Investors, Tennenbaum Capital Partners, and Globalive Capital Inc.[34] The parties' documentary

[31] Plan of Arrangement Order, section 4.5, West Face Motion Record, Volume 14, Ex. 39, pp. 5165-5166.
[32] Affidavit of Andrew Carlson sworn December 7, 2016, para. 54, West Face Motion Record, Vol. 1, Tab B, p. 55.
[33] Catalyst's Amended Amended Amended Statement of Claim, paras. 127, 133.
[34] Affidavit of Andrew Carlson sworn December 7, 2016, para. 99, West Face Motion Record, Vol. 1, Tab B, p. 73.

productions totaled more than 7,300 documents.[35] The closing submissions were in excess of 500 pages.[36]

34. In his decision of August 18, 2016, Justice Newbould dismissed Catalyst's claims in their entirety.[37] In his decision in the Moyse Action, his Honour made two notable findings of fact directly relevant to Catalyst's claims in this action.

35. First, Justice Newbould found as a fact that VimpelCom did not communicate with the Consortium during the period of the Exclusivity Agreement:

> [...] neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.[38]

36. This finding directly addresses any claim by Catalyst that VimpelCom communicated or negotiated with the Consortium in breach of its obligations under the Exclusivity Agreement.

37. Second, Justice Newbould held that Catalyst would never have concluded a deal with VimpelCom and would never have acquired an interest in WIND:

> It is clear that VimpelCom would not agree to any deal that carried any risk of the Government not approving the deal. Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such

[35] Affidavit of Andrew Carlson sworn December 7, 2016, para. 112, West Face Motion Record, Vol. 1, Tab B, p. 83.
[36] Affidavit of Andrew Carlson sworn December 7, 2016, para. 103 , West Face Motion Record, Vol. 1, Tab B, p. 74.
[37] Moyse Decision, para. 8, West Face Motion Record, Vol. 1, Ex. 1, p. 87.
[38] Moyse Decision, para. 105, West Face Motion Record, Vol. 1, Ex. 1, pp. 115-116.

condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.[39]

38. This finding precludes Catalyst's claim for damages in this action. It was found as a fact that there was "no chance" Catalyst and VimpelCom would conclude a transaction.[40]

39. Catalyst appealed the decision of Justice Newbould to the Court of Appeal. The appeal is scheduled to be heard in September.[41]

PART III - ISSUES

40. On this motion, VimpelCom seeks the dismissal of Catalyst's claim on two grounds:

(a) Catalyst's action against VimpelCom is barred by the Release; and

(b) Catalyst's action is an abuse of process.

PART IV - LAW AND ARGUMENT

A. Catalyst's claim against VimpelCom has been released

41. By operation of the Release, Catalyst's claim against VimpelCom has been "settled, compromised, released and determined without liability". Accordingly, Catalyst's claim against VimpelCom should be dismissed pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*.[42]

i. Rule 21.01(1)(a)

42. Rule 21.01(1)(a) gives the Court the power to determine a question of law before trial:

> **21.01** (1) A party may move before a judge,

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[39] Moyse Decision, para. 131, West Face Motion Record, Vol. 1, Ex. 1 pp. 123-124. [emphasis added].
[40] Moyse Decision, para. 131, West Face Motion Record, Vol. 1, Ex. 1, p. 124.
[41] Affidavit of Andrew Carlson sworn December 7, 2016, para. 113, West Face Motion Record, Vol. 1, Tab B, p. 83.
[42] R.R.O. 1990, Reg. 194.

> (a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs

43. On a motion brought under Rule 21.01(1)(a), the moving party must show that there is a question of law that can be determined without the adjudication of any factual issues.[43]

44. The Court is to accept the facts in the statement of claim as proven for the purposes of the motion and is to consider any documents specifically referred to and relied on in the pleading.[44] Additional evidence may be admitted with leave of the Court.[45]

45. VimpelCom's motion fits squarely within the requirements of Rule 21.01(1)(a).[46] The Court is being asked to apply the Order and, in particular, the Release which serves to bar Catalyst's claim against VimpelCom.

ii. The broad scope of the Release language

46. There can be no doubt that the language of the Release captures Catalyst's claim for breach of the Exclusivity Agreement.

47. The operative language of the Release is broad and encompassing:

> ...all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted) based on or in any way relating to any Purchased Shares or Options shall be deemed to have been settled, compromised, released and determined without liability [...].[47]

48. Unpacking the words of the Release:

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[43] *Geo. A. Kelson Co. v. Ellis-Don Construction Ltd.*, 1998 O.J. No. 1172, para. 44, VimpelCom Book of Authorities (VBOA) Tab 1.
[44] *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80, paras. 23, 24, VBOA Tab 2.
[45] See Rule 21.01(2).
[46] *Holley v. The Northern Trust Company, Canada*, 2014 ONSC 889, VBOA Tab 3.
[47] Plan of Arrangement Order, section 4.5, West Face Motion Record, Volume 14, Ex. 39, pp. 5165-5166.

(a) the Release applies widely to "all actions, causes of action, claims or proceedings (actual or contingent and whether or not previously asserted)";

(b) the subject matter of the Release is framed expansively: "based on or in any way related to"; and

(c) the Release speaks to all claims in any way related to the "Purchased Shares". "Purchased Shares" is defined in the Plan of Arrangement as the shares of Mid-Bowline.

49. The Release captures Catalyst's claim against VimpelCom if those claims can be said to be "based on" or "in any way related to" the shares of Mid-Bowline.

50. Ontario courts have variously found that:

(a) the words "based on" mean "as referring to a starting point - a foundation" or "taking into account";[48]

(b) the term "relating to" should be given a "plain but expansive meaning";[49]

(c) the term "in any way related to" is "very broad";[50] and

(d) "[t]he words 'relating to' enjoy a wide compass".[51]

51. In *Ontario (Attorney General) v. Toronto Star*, the Divisional Court recently discussed the proper interpretation of the term "relating to". The Court noted that the words do not require a "sufficient" connection but rather should be understood in their ordinary sense:

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[48] *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, [2008] O.J. No. 3722, para. 113, rev'd in 2010 ONCA 467 on other grounds, VBOA Tab 4; citing *P. (J.) v. Sinclair* (1997), 93 B.C.A.C. 175, para. 17, VBOA Tab 5 and *Moreau-Bérubé v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249, para. 65, VBOA Tab 6.
[49] *725410 Ontario Inc. v. Gertner*, 2011 ONSC 6121, para. 32, VBOA Tab 7.
[50] *Juroviesky and Ricci LLP v Lawyers Professional Indemnity Co.*, 2014 ONSC 43, paras. 31-33, VBOA Tab 8.
[51] *Woolcock v. Bushert (2004)*, 2004 CanLII 35081 (ON CA), para. 23, VBOA Tab 9.

> The Adjudicator erred when he interpreted the words "relating to" in s. 65(5.2) to mean "for the purpose of, as the result of, or substantially connected to". The Adjudicator erred when he read-in a "substantial connection" requirement between the record and the prosecution. The Adjudicator further erred when he relied upon a restricted purpose for the provision in deciding whether the connection is sufficient to justify the application of this exclusion.
>
> The meaning of the statutory words "relating to" is clear when the words are read in their grammatical and ordinary sense. There is no need to incorporate complex requirements for its application, which are inconsistent with the plain, unambiguous meaning of the words of the statute.[52]

52. Following the guidance of the Divisional Court, the issue is whether this proceeding is "in any way related to" the Purchased Shares. It is plain and obvious that it is. Indeed, as described above, the Release captures the very transaction in issue in this action — the purchase of WIND from VimpelCom.

53. It is also clear that the allegations contained in Catalyst's Statement of Claim are, on their face, directly related to the Purchased Shares.

54. First, Catalyst pleads that it only discovered its claim as a result of the Plan of Arrangement for the Purchased Shares:

> In January 2015, Catalyst brought a motion to oppose the Arrangement Proceeding. In the course of those proceedings, Griffin filed an affidavit in support of the plan of arrangement. In it, Griffin described in detail the Consortium's efforts to purchase Wind.
>
> Simon Lockie (Chief Legal Officer of Globalive) ("Lockie"), Leitner and Burt also filed detailed affidavits in support of the plan of arrangement. In each affidavit, the respective affiant described the Consortium's efforts to purchase Wind and Globalive's role in assisting the Consortium members.

[52] *Ontario (Attorney General) v. Toronto Star*, 101 O.R. (3d) 142 (Div. Ct.), para. 44, (ONCA), VBOA Tab 10.

> Catalyst carefully reviewed the affidavits of Griffin, Lockie, Leitner and Burt after they were filed in the public record. This new evidence, when considered in the context of the timing of the Exclusivity Agreement and VimpelCom's change in negotiation posture with Catalyst in August 2014, as detailed above, revealed the details of the Conspiracy, including the common intent of the Conspiracy, Consortium's efforts to induce VimpelCom to breach the Exclusivity Agreement and the Consortium's misuse of Confidential Information.
>
> The affidavits revealed to Catalyst for the first time that VimpelCom did, in fact, breach the Exclusivity Agreement and had failed to negotiate with Catalyst in good faith through the exclusivity period.[53]

55. In short, Catalyst pleads that its claim arose directly from the Consortium's acquisition of the Purchased Shares, and Catalyst purports (falsely) to have been made aware of this claim by the Plan of Arrangement. Based on the language of the Release itself, Catalyst's claim is thus necessarily "based on" and "related to" the Purchased Shares.

56. Second, Catalyst pleads that the Purchased Shares were the means through which the Consortium wrongfully acquired WIND from VimpelCom.

57. The foundation of Catalyst's claim is that VimpelCom's alleged breach of the Exclusivity Agreement allowed the Consortium to acquire WIND to Catalyst's detriment. Paragraph 126 of Catalyst's Statement of Claim reads:

> As a result of the misconduct of the Conspirators, VimpelCom and UBS breached the Exclusivity Agreement and breached their duty of good faith during its negotiations with Catalyst. As a result, the Consortium was able to purchase Wind to Catalyst's detriment.[54]

58. At paragraph 124 of its claim, Catalyst pleads that Mid-Bowline was the vehicle used by the Consortium to unlawfully acquire WIND:

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[53] Catalyst's Amended Amended Amended Statement of Claim, paras. 129-132. [Emphasis added]
[54] Catalyst's Amended Amended Amended Statement of Claim, para. 126. [Emphasis deleted]

> On September 15, 2014, the Consortium and VimpelCom announced an agreement by which the Consortium, through Mid-Bowline Group Corp., purchased VimpelCom's stake in Wind.[55]

59. The Purchased Shares were the fruits of what is pleaded to be the wrongful act: VimpelCom improperly sold WIND to the Consortium and the Consortium received the Purchased Shares.

60. Third, at paragraphs 127 and 133 of its Statement of Claim, Catalyst specifically pleads that its damages "crystalized" when "Shaw [...] acquired Mid-Bowline" – *i.e.*, when Shaw acquired the Purchased Shares:

> On or about January 2016, Shaw Communications ("Shaw") acquired Mid-Bowline, the corporation formed after the Consortium's acquisition of VimpelCom's interest in Wind, for $1.6 billion. As a result, the Consortium received a profit of over $1,300,000,000, thereby crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above.
>
> [...]
>
> As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst suffered damages, which are crystalized in the form of profits realized by the Conspirators from the sale of Wind to Shaw, which Catalyst estimates to be $1,300,000,000 (the "Proceeds").[56]

61. The substance of Catalyst's claim is that it lost the opportunity to sell WIND to Shaw at a substantial profit. Catalyst claims as damages the profits that the Consortium realized on Shaw's acquisition of the Purchased Shares. Accordingly, for this reason as well, Catalyst's claim is necessarily "based on" or "related to" the Purchased Shares.

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[55] Catalyst's Amended Amended Amended Statement of Claim, para. 124.
[56] Catalyst's Amended Amended Amended Statement of Claim, paras. 127, 133. [Emphasis deleted]

iii. The carve-out in the Release

62. The manner in which the carve-out is drafted further supports the conclusion that the Release bars Catalyst's claim against VimpelCom in this action.

63. The carve-out found in Section 4.5 reads as follows:

> ...nothing in this section 4.5 shall be construed to extinguish any right of The Catalyst Capital Group Inc. to assert any of the following matters, with the exception of any constructive trust or equivalent remedy over the Purchased Shares, which shall be deemed to have been settled, compromised, released and determined without liability, along with all other claims in this section 4.5:
>
> (a) Its existing claims as asserted in the Amended Amended Statement of Claim as amended December 16, 2014 in the proceeding bearing Court File No. CV-14-507120 in the Ontario Superior Court of Justice, against West Face Capital Inc. and Brandon Moyse;
>
> (b) As against any person (as defined in the OBCA), any potential claim for a tracing of the money received by West Face Capital Inc. from the disposition of its interest in the Corporation pursuant to the Arrangement; or
>
> (c) As against the Former Shareholders, any potential claim relating to their acquisition from VimpelCom Ltd. of their interest directly or indirectly in WIND Mobile Corp., including, to the extent permitted by law, for a tracing of the money received by them pursuant to the Arrangement.[57]

64. It is important to note:

(a) the carve-out only applies to specific claims by Catalyst. In other words, the Release is meant to bind Catalyst in respect of all claims relating to the

[57] Plan of Arrangement Order, section 4.5, West Face Motion Record, Volume 14, Ex. 39, pp. 5165-5166. [Emphasis added].

Purchased Shares, except those specifically enumerated exceptions found in subparagraphs (a) – (c);

(b) each of subparagraphs (a) – (c) speaks to Catalyst's claims against specific parties:

(i) subparagraph (a) allows Catalyst to pursue a claim against West Face and Moyse in the Moyse Action;

(ii) subparagraph (b) allows Catalyst to pursue a claim against any person who receives certain proceeds from the sale to Shaw; and importantly,

(iii) subparagraph (c) allows Catalyst only to pursue a claim against the Consortium in connection with the purchase from VimpelCom.

65. The carve-out at subparagraph (c) is particularly relevant. That carve-out allows Catalyst to pursue any potential claim relating to the Consortium's acquisition from VimpelCom of their interest in WIND (*i.e.*, this action), but only against the Consortium. The carve-out does not allow Catalyst to pursue any related claim against VimpelCom.

66. Subparagraph (c) of the Release could have been drafted to allow Catalyst to make claims against "any person". For example, subparagraph (b) is broadly drafted to allow Catalyst to pursue a claim against "any person" who receives proceeds from West Face's sale of WIND. Subparagraph (c) is far more narrow; it only allows Catalyst to make a claim against members of the Consortium.

67. Ultimately, the inclusion of the carve-out in subparagraph (c) reinforces the conclusion that all other claims relating to VimpelCom's sale of WIND are caught by the Release – including the claim against VimpelCom in this action.

iv. The scope of the Release is not limited to specific parties

68. The fact that VimpelCom is not a party to the Plan of Arrangement or expressly a beneficiary of the Release does not affect the application of the Release to Catalyst's claim against VimpelCom.

69. The Release is not a contractual release in which one party releases a specific counterparty from claims. Rather, the Release is part of a Court Order that extinguishes "all actions... related to or in any way based on any Purchased Shares". It is a subject matter release of general application and is not limited to claims that could be have been asserted against specified parties.

70. There is no dispute that Catalyst is bound by the Release. The Release expressly contemplates claims by Catalyst; Justice Newbould specifically found that the Court had jurisdiction to compromise Catalyst's claims through the Plan of Arrangement and Catalyst expressly consented to the Order giving effect to the Release.

71. The language of the Release approved by the Court thus clearly operates to compromise claims that are: (i) made by Catalyst; (ii) based on or in any way related to the Purchased Shares; and (iii) made against any person. Catalyst's claim against VimpelCom in this proceeding is such a claim and is therefore released and should be dismissed.

72. The carve-outs confirm this interpretation, specifically subparagraph (b). That clause provides that Catalyst, as an exception to the broad scope of the Release, is permitted to pursue "any person" for a tracing of the money received by West Face from the WIND transaction. That language makes clear that the Release is of general application and includes within its scope claims against unspecified parties.

v. The prior finding of this Court

73. Moreover and importantly, Justice Newbould approved the Plan of Arrangement with the express intention that it would release any claim by Catalyst for breach of the Exclusivity Agreement.

74. In his reasons, Justice Newbould referred specifically to the cross-examination of Mr. Riley. Justice Newbould noted that Catalyst was, as early as March 2015, considering claims against both the Consortium and VimpelCom with respect to the breach of the Exclusivity Agreement:

> On his cross-examination on May 13, 2015 Mr. Riley, the chief operating officer of Catalyst, discussed the notion of inducing a breach of contract when it was put to him that Catalyst had not sued VimpelCom for breach of the exclusivity terms between VimpelCom and Catalyst. He would not agree that VimpelCom had not breached its exclusivity clause and said further:
>
> > However, when a contract is breached, as I recall, there's two - you can - under the theory of Lumley and Guy, and I'm not trying to play lawyer, you can go after one of the two parties, the party breaching or the party inducing a breach.
>
> [...]
>
> Although Catalyst was aware on March 13, 2015 of the facts that Mr. Riley now assert he wants to use in this intended inducing breach of contract action, and was aware of the nature of a breach of contract action as disclosed on cross-examination, it was only on Monday of this week that anything was first said by Catalyst about that.[58]

75. One of the principal objections raised by Catalyst to the Plan of Arrangement was that the Proposed Release would compromise its potential claim in connection with the Exclusivity Agreement - the very claim Catalyst now seeks to advance in this action. The critical issue for

[58] Plan of Arrangement Decision, paras. 54, 56, West Face's Motion Record, Vol. 1, Exhibit 2, p. 150. [Emphasis added]

Justice Newbould was whether it was appropriate to approve the Plan of Arrangement in circumstances in which the Proposed Release would prevent Catalyst from pursuing this claim.

76. After careful consideration, Justice Newbould dismissed Catalyst's objections and determined that the Plan of Arrangement was fair and reasonable even though it "would prevent such a claim being made":

> In the circumstances, I disregard the statement of Mr. Riley as to the intended claim Catalyst says it will bring. It is too late in the process and the provision in the amended plan of arrangement that would prevent such a claim being made is fair and reasonable. The trial of the issue I have ordered is not to consider any such claim.[59]

77. In other words, Justice Newbould approved the Plan of Arrangement, and specifically the Release, knowing that it "would prevent" Catalyst from pursuing a claim in relation to the Exclusivity Agreement - *i.e.*, this very action.

78. Catalyst then went on to consent to the Order which has the effect of barring this claim. In these circumstances, it does not lie in Catalyst's mouth to attempt to circumvent Justice Newbould's finding by arguing that its claim is not captured by the Release.

vi. Conclusions regarding the application of the Release

79. In summary:

(a) Justice Newbould held that claims for breach of the Exclusivity Agreement were prevented by the language of the Release;

(b) the Release clearly covers claims relating to the breach of the Exclusivity Agreement; and

[59] Plan of Arrangement Decision, para. 61, West Face's Motion Record, Vol. 1, Exhibit 2, p. 151. [Emphasis added]

(c) while the carve-out allows Catalyst to pursue such claims against the Consortium, Catalyst cannot advance a claim against VimpelCom. As a result, VimpelCom is entitled to the benefit of the Release.

80. Catalyst's claim against VimpelCom is caught by the Release and is not carved-out of the Release, and is therefore barred.

B. Catalyst's claim is an abuse of process

81. This action is plainly an abuse of process: Catalyst seeks to re-litigate findings made by Justice Newbould in the Moyse Action and the Plan of Arrangement proceeding. In such circumstances, this claim is inherently abusive. As the Supreme Court has stated:

> [I]f the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resource as well as an unnecessary expense for the parties and possibly an additional hardship for some witnesses. Finally, if the result in the subsequent proceeding is different from the conclusion reached in the first on the very same issue, the inconsistency, in and of itself, will undermine the credibility of the entire judicial process thereby diminishing its authority, its credibility and its aim of finality.[60]

82. As an abuse of process, this action ought to be dismissed under Rules 21.01(3)(d) and 25.11(c).

83. Moreover, dismissing Catalyst's claim is also the only appropriate remedy in circumstances in which Catalyst has been found to have tendered false affidavit evidence, laid in the weeds, and acted in bad faith, all with respect to this specific claim.

i. Rules 21.01(3)(d) and 25.11 (c)

84. Rules 21.01(3)(d) and 25.11(c) permit the Court to dismiss an action that abuses the Court's process.

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[60] *Toronto (City) v. C.U.P.E. Local 79 (2003)*, 2003 SCC 63, para. 51, [Toronto (City)], VBOA Tab 11.

> 21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,
>
> [...]
>
> (d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.
>
> [...]
>
> 25.11 The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document,
>
> [...]
>
> (c) is an abuse of the process of the court.

85. This power is discretionary and rooted in the Court's inherent jurisdiction to "prevent the misuse of its procedure, in a way that would [...] bring the administration of justice into disrepute".[61] More specifically, Rules 21.01(3)(d) and 25.11(c) operate to prevent litigation that would undermine the principles of judicial economy, consistency and finality.[62]

86. The doctrine of abuse of process has been consistently applied to prevent a multiplicity of proceedings that waste judicial resources and give rise to the risk of inconsistent findings:[63]

> [...] from the system's point of view, relitigation carries serious detrimental effects and should be avoided unless the circumstances dictate that relitigation is in fact necessary to enhance the credibility and the effectiveness of the adjudicative process as a whole.[64]

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[61] *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, para. 40 [Behn], VBOA Tab 12, citing with approval Goudge JA (dissenting) in *Canam Enterprises Inc. v. Coles (2000)*, 51 O.R. (3d) 481 at paras. 55-56, VBOA Tab 13; *Toronto (City)*, VBOA Tab 11.

[62] *Toronto (City)*, para. 37, VBOA Tab 11.

[63] *DeFaveri v.Toronto-Dominion Bank*, 1998 O.J. No. 2741, para. 16, VBOA Tab 14. [DeFaveri]

[64] *Toronto (City)*, para. 52, VBOA Tab 11. See also *DeFaveri supra,* VBOA Tab 14 and *Emst & Young Inc. v. Central Guaranty Trust Co. (2006)*, 2006 ABCA 337, VBOA Tab 15.

87. Importantly, the doctrine of abuse of process is broader and more flexible than the doctrines of *res judicata*, issue estoppel, or cause of action estoppel.[65] For example, there is no mutuality or privity requirement and the abuse of process doctrine is available to dismiss a claim made against a party who was not named in the previous proceeding[66]:

> The doctrine of abuse of process is characterized by its flexibility. Unlike concepts of res judicata and issue estoppel, abuse of process is unencumbered by such requirements.[67]

88. This action is the latest installment in Catalyst's serial litigation arising from its failed acquisition of WIND from VimpelCom. This Court should not permit Catalyst to have a second "bite at the cherry."[68]

ii. Re-litigation of the Moyse Action

a. *Waste of judicial resources*

89. It would be a waste of the Court's resources to allow this action to continue given the significant overlap with the Moyse Action – an action that was fully litigated at trial and in which a decision has already been rendered.

90. Like the Moyse Action, this claim arises from the negotiations for the acquisition of WIND in the summer of 2014 and the specific discussions between VimpelCom and Catalyst on the one hand and VimpelCom and the Consortium on the other.

91. In each case, Catalyst claims that the Consortium had an improper advantage in these negotiations:

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[65] *X. v. Y.*, [2016] O.J. No. 3542, para. 36, VBOA Tab 16.
[66] *Behn*, paras. 39-41, VBOA Tab 12. See also *House of Spring Gardens Ltd. v. Waite*, [1990] 2 All E.R. 990 (C.A.), VBOA Tab 17.
[67] *Behn*, para. 40, VBOA Tab 12.
[68] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, para.18, VBOA Tab 18.

(a) in the Moyse Action, the alleged advantage arose from the Consortium's supposed access to Catalyst's confidential information through Moyse;[69] and

(b) in this action, the alleged advantage arises from the Consortium's supposed access to VimpelCom and UBS during the term of the Exclusivity Agreement.[70]

92. Catalyst also claims identical damages in both actions: Catalyst asserts that it is entitled to the difference between the price for which it hoped to acquire WIND and the price for which the Consortium later sold WIND to Shaw. Catalyst's damages theory in both cases is premised on its belief that it lost the opportunity to acquire WIND itself and sell it to Shaw for a substantial profit.[71]

93. Ultimately, both actions arise from the same factual matrix involving:

(a) the negotiations for the sale of WIND between VimpelCom and Catalyst;

(b) the breakdown in those negotiations, including Catalyst's refusal to agree to the break fee requested by VimpelCom;

(c) the unsolicited bid advanced by the Consortium during the exclusivity period;

(d) the successful sale of WIND to the Consortium;

(e) the subsequent sale of WIND to Shaw;

(f) whether Catalyst ever could have acquired WIND; and

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[69] Catalyst's Amended Amended Amended Statement of Claim (in the Moyse Action), para. 1, West Face Motion Record, Vol. 14, Ex. 36, pp. 5191-5192.
[70] Catalyst's Amended Amended Amended Statement of Claim, paras. 110-122.
[71] Catalyst's Amended Amended Amended Statement of Claim, paras. 1, 103-109, 114-122, 126, 127.

(g) the damages Catalyst seeks, being the difference between what it hoped to purchase WIND for and what Shaw ultimately paid for WIND.

94. As recognized by the leading authority on *res judicata* and abuse of process: "Not bringing forward all claims, or counterclaims, arising out of one set of circumstances in one action is an abuse of process."[72] The reason is clear: given the significant overlap between the claims, many of the same witnesses and documents in the Moyse Action will be required for the present proceeding.

95. For example, Catalyst witnesses Messrs. Glassman, De Alba, and Riley, who testified in the Moyse Action,[73] will once again need to answer questions about their negotiations with VimpelCom and why a deal with VimpelCom was never completed. Many of the seven witnesses called by West Face,[74] including Messrs. Leitner, Griffin and Lockie, will also be required for the present proceeding.

96. Moreover, a significant portion of the trial record from the Moyse Action would be required to be entered into evidence again, including hundreds of pages of affidavit evidence, documents, emails, and transcripts, all of which were already before Justice Newbould.

97. There can be no question that it would be a waste of judicial resources to conduct a second trial on the very same fact pattern and many of the very same issues.

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[72] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham: LexisNexis, 2015) at p. 217, VBOA Tab 19.
[73] Affidavit of Andrew Carlson sworn December 7, 2016, para. 99, West Face Motion Record, Vol. 1, Tab B, p. 71.
[74] Affidavit of Andrew Carlson sworn December 7, 2016, para. 99, West Face Motion Record, Vol. 1, Tab B, pp. 71, 72.

b. Risk of inconsistent findings

98. It is also well recognized that: "Bringing new causes of action which would contradict previous findings of fact in the first action is an abuse of process."[75] Catalyst's claim falls squarely within this description: in order to succeed, the trial judge must make findings that directly contradict those made by Justice Newbould in the Moyse Action.

99. In order to succeed in its claim that VimpelCom breached the Exclusivity Agreement by negotiating with the Consortium and in order to prove that Catalyst suffered the damages alleged, the trial judge will need to find that negotiations with the Consortium did take place during the exclusivity period and that VimpelCom and Catalyst would have closed the sale of WIND.

100. However, and as described in detail above, Justice Newbould has already found that:

(a) VimpelCom did not communicate with any members of the Consortium during the term of the Exclusivity Agreement:

> [...] neither VimpelCom nor Globalive had any discussion with any of the consortium members who had made the proposal before the exclusivity period that VimpelCom had with Catalyst expired on August 18, 2014.[76]

(b) Catalyst could not have successfully closed a deal with VimpelCom for the acquisition of WIND:

> Catalyst then told VimpelCom that the request for a break fee was unacceptable and it shut down communications and let the period of exclusivity expire. It was after that that VimpelCom and the consortium, including West Face, concluded a deal. Mr. Glassman acknowledged in his

[75] Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed (Markham: LexisNexis, 2015) at p. 217, VBOA Tab 19.
[76] Moyse Decision, para. 105, West Face Motion Record, Vol. 1, Ex. 1, pp. 115-116.

> evidence that the reason the deal between Catalyst and VimpelCom fell through was because of the break fee that VimpelCom requested that Catalyst would not agree to.[77]
>
> [...]
>
> Mr. Glassman's evidence throughout was that Catalyst would not agree to a deal without Government concessions permitting the sale of spectrum to an incumbent in five years. Mr. Riley in his affidavit of February 18, 2015 stated that during the exclusivity period, the only point over which VimpelCom and Catalyst could not agree was regulatory approval risk. Catalyst wanted to ensure that its purchase was conditional on receiving regulatory concessions from Industry Canada, but VimpelCom would not agree to the conditions Catalyst sought. Given that evidence, and VimpelCom's refusal to agree to a deal that contained any such condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.[78]

101. Catalyst's attempt to re-try these issues in hopes of achieving a different outcome is clearly abusive. This is particularly so given the abundance of evidence before Justice Newbould in support of his findings: Justice Newbould had before him more than 30 affidavits, including affidavits sworn as evidence-in-chief, oral evidence from Catalyst's principals, Messrs. Glassman, de Alba, and Riley (all of whom were involved in and had direct knowledge of the negotiations with VimpelCom), hundreds of documents tendered as evidence, and lengthy written submissions from the parties.[79]

102. Crucially, and as explained by Justice Newbould in the passage cited above, his finding that "there was no chance that Catalyst could have successfully concluded a deal with VimpelCom" was based primarily on Catalyst's own evidence.[80] Unless this finding is overturned

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[77] Moyse Decision, para. 129, West Face Motion Record, Vol. 1, Ex. 1, p. 123.
[78] Moyse Decision, para. 131, West Face Motion Record, Vol. 1, Ex. 1, pp. 123-124.
[79] Moyse Decision, paras. 11-14, West Face Motion Record, Vol. 1, Ex. 1, pp. 88- 90.
[80] Moyse Decision, para. 131, West Face Motion Record, Vol. 1, Ex. 1, pp. 123-124.

(which can only happen on the appeal of the Moyse Action itself), Catalyst's claim is doomed to failure.

iii. Re-litigating the Plan of Arrangement proceeding

103. Catalyst's action also seeks to re-litigate the issues raised in the Plan of Arrangement proceeding.

104. As described above, Catalyst objected to the Proposed Release during the Plan of Arrangement proceeding, in part on grounds that it would have barred its claims relating to the breach of the Exclusivity Agreement. Justice Newbould considered and dismissed Catalyst's objection, finding that this claim was properly barred pursuant to the Plan of Arrangement.

105. Catalyst ultimately consented to the Order of Justice Newbould which approved the Release barring this claim. Catalyst's decision to bring this claim now is a clear abuse of process; it is an attempt to circumvent both Justice Newbould's decision in the Plan of Arrangement proceeding and the Release to which Catalyst itself consented.

iv. The Court should protect its own process

106. This action is precisely the type of proceeding that Rules 21.01(3)(d) and 25.11(c) protect against. Allowing Catalyst to re-litigate issues that have already been determined in the Moyse Action and the Plan of Arrangement proceeding would significantly undermine the principles of judicial economy, consistency, and finality.

107. Catalyst's actions in this case are particularly concerning given its history of abusive conduct in the litigation arising from its failure to acquire WIND. In fact, this Court has repeatedly reprimanded Catalyst for its abusive tactics with respect to this claim.

a. False affidavit evidence

108. Catalyst's representative tendered false affidavit evidence in an attempt to explain away the abusive nature of this claim. Mr. Riley swore in his January 25, 2016 affidavit that he learned of the claims related to the Exclusivity Agreement "for the first time through the materials filed on" the Plan of Arrangement application.[81]

109. Justice Newbould explicitly found that Mr. Riley's evidence was "not true"[82] and noted that "it is quite clear that the information regarding the [Consortium's] bid was known by Mr. Riley in early 2015. It was contained in Mr. Griffin's affidavit sworn March 7, 2015 and in response to Catalyst's motion seeking interlocutory relief against West Face."[83]

b. Bad faith by Catalyst

110. Justice Newbould further found that Catalyst had acted in bad faith by lying in the weeds until the Plan of Arrangement hearing to assert its claim against VimpelCom. When the possibility of bringing this action was raised by Catalyst at the Plan of Arrangement hearing, Justice Newbould remarked:

> The intended action has not been started. It could have been started in March, 2015 when the facts were disclosed and known to Catalyst. To lie in the weeds until the hearing of this application and assert such a right to stop the plan of arrangement is troubling indeed and not acting in good faith. Apart from the statement of Mr. Riley that the information was first learned in the material in this application, which was not true, no evidence has been given by Catalyst to explain why this new intended claim was not brought sooner.[84]

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[81] Affidavit of James Riley sworn January 25, 2016, para. 21, West Face Motion Record, Vol. 14, Exhibit 26, p. 5078.
[82] Plan of Arrangement Decision, para. 59, West Face Motion Record, Vol. 1, Ex. 2, p. 151.
[83] Plan of Arrangement Decision, para. 53, West Face Motion Record, Vol. 1, Ex. 2, p. 149.
[84] Plan of Arrangement Decision, para. 59, West Face Motion Record, Vol. 1, Ex. 2, p. 151.

111. Despite Justice Newbould's reprimand, Catalyst did not take any timely steps to bring this claim, either by amending its claim in the Moyse Action or by commencing a new claim. Catalyst once again chose to "lie in the weeds" until a week before the trial Moyse Action was set to commence.

112. Catalyst's tactical delays and bad faith should not be rewarded with a "second kick at the can" at the expense of scarce judicial resources.

c. Unfounded allegations of improper conduct

113. In addition to Catalyst's abusive tactics with respect to this claim specifically, Justice Newbould also admonished Catalyst for basing the Moyse Action on unfounded allegations of improper conduct by Moyse and West Face.

114. Justice Newbould accordingly ordered Catalyst to pay substantial indemnity costs of over $1.2 million in the Moyse Action, holding that the case was driven by Mr. Glassman's failure to accept "being outsmarted by someone else", that Mr. Glassman "played hardball attacking the reputation and honesty of West Face" and that he "utterly failed":

> This law suit was driven by Mr. Glassman. He was not able to accept that he lost his chance to acquire Wind by being outsmarted by someone else. He set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyse that they used to defeat Catalyst's bid to acquire Wind. He was certainly playing hardball attacking the reputation and honesty of West Face. However, in spite of the best efforts of Catalyst's very able and skilled lawyers, he utterly failed.[85]

115. The action before this Court is yet another example of Catalyst's inability to accept the results of the WIND acquisition and its determination to "win" at any cost. Catalyst's claim is

[85] *Catalyst Capital Group Inc. v Moyse*, 2016 ONSC 6285., para. 10, West Face Motion Record, Vol. 19, Ex. 84, p. 8204.

abusive in all respects and should accordingly be dismissed under Rule 21.01(3)(d) and Rule 25.11(c).

PART V - ORDER REQUESTED

116. For all of the foregoing reasons, VimpelCom respectfully requests that this Court:

(a) an Order dismissing or permanently staying the action against VimpelCom on the grounds that it is barred by the Release;

(b) an Order dismissing or permanently staying the action against VimpelCom on the grounds that it is an abuse of process;

(c) costs of this motion to VimpelCom on a substantial indemnity basis; and

(d) such further and other Order as this Court deems just.

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

Orestes Pasparakis
Rahool Agarwal
Michael Bookman

NORTON ROSE FULBRIGHT CANADA LLP
Lawyers for the Defendant VimpelCom Ltd.

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Geo. A. Kelson Co. v. Ellis-Don Construction Ltd.*, 1998 OJ No. 1172.
2. *Tender Choice Foods Inc. v. Versacold Logistics Canada Inc.*, 2013 ONSC 80.
3. *Holley v. The Northern Trust Company, Canada,* 2014 ONSC 889.
4. *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, [2008] O.J. No. 3722.
5. *P. (J.) v. Sinclair (1997)*, 93 B.C.A.C. 175.
6. *Moreau-Bérubé v. Nouveau-Brunswick*, [2002] 1 S.C.R. 249.
7. *725410 Ontario Inc. v. Gertner*, 2011 ONSC 6121.
8. *Juroviesky and Ricci LLP v Lawyers Professional Indemnity Co.*, 2014 ONSC 43.
9. *Woolcock v. Bushert (2004)*, 2004 CanLII 35081 (ON CA).
10. *Ontario (Attorney General) v. Toronto Star*, 101 O.R. (3d) 142 (Div. Ct.).
11. *Toronto (City) v. C.U.P.E. Local 79 (2003)*, 2003 SCC 63.
12. *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26.
13. *Canam Enterprises Inc. v. Coles (2000)*, 51 O.R. (3d) 481.
14. *DeFaveri v. Toronto-Dominion Bank*, 1998 OJ No. 2741.
15. *Ernst & Young Inc. v. Central Guaranty Trust Co. (2006)*, 2006 ABCA 337.
16. *X. v. Y.*, [2016] O.J. No. 3542.
17. *House of Spring Gardens Ltd. v. Waite*, [1990] 2 All E.R. 990 (C.A.).
18. *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.
19. Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 4th ed. (Markham: LexisNexis, 2015) .

SCHEDULE "B"
RELEVANT STATUTES

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

Rule 21.01(1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs.

Rule 21.01(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b).

Rule 21.01(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that, ...

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly.

Rule 25.11

The court may strike out or expunge all or part of a pleading or other document, with or without leave to amend, on the ground that the pleading or other document, ...

(c) is an abuse of the process of the court.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at TORONTO

FACTUM OF THE MOVING DEFENDANT VIMPELCOM LTD.
(returnable August 16, 17, 18, 2017)

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