Court File No. CV-16-11595-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

B E T W E E N:

THE CATALYST CAPITAL GROUP INC.

Plaintiff

and

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

Defendants/Moving Party

SUPPLEMENTAL SUBMISSIONS OF THE DEFENDANT/MOVING PARTY, WEST FACE CAPITAL INC.

April 12, 2018

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SUPPLEMENTAL SUBMISSIONS OF THE DEFENDANT/MOVING PARTY, WEST FACE CAPITAL INC.

PART I ~ OVERVIEW

1. The supplemental written submissions that Catalyst has filed in this matter (the "**Supplemental Submissions**") rest on a fundamentally misguided premise: namely, that the Court of Appeal's decision[1] in the Moyse Action rejecting every argument advanced in that Court by Catalyst, both orally and in writing, without even hearing submissions on the merits from counsel to West Face or Moyse, somehow vindicates Catalyst's position before this Court. There is no substance to Catalyst's argument, which seriously distorts and mischaracterizes the Appeal Decision. *To be clear, not one finding that was actually made by the Court of Appeal assists Catalyst in any way in this proceeding. Instead, the opposite is true.*

2. Catalyst's Supplemental Submissions are riddled with misstatements. They ignore what the Court of Appeal actually did and said, invent findings the Court of Appeal did not make, reargue impermissibly issues that were fully canvassed during the argument of the abuse of process motions in August 2017, and represent a further abuse of this Court's process. They should be disregarded in their entirety.

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[1] 2018 ONCA 283 (the "**Appeal Decision**"); West Face Compendium ("WFC"), Tab 12.

3. Remarkably, paragraph of 40 of Catalyst's Supplemental Submissions allude to the "possibility" that Catalyst might bring a motion to adduce fresh evidence before this Court in the Moyse Action under Rule 59.06(2)(a). To the knowledge of West Face, this so-called "evidence" consists of transcripts and recordings obtained illicitly by Catalyst from "stings" conducted against Justice Newbould, and current and former employees of West Face, by former agents of the Israeli Mossad operating unlawfully in Ontario and elsewhere under the name "Black Cube". Catalyst dangles the prospect of such a motion even though:

(a) Catalyst has had the Black Cube "evidence" since at least as early as September 2017;

(b) On September 25, 2017 Catalyst sought and obtained an adjournment of its Appeal in the Moyse Action, which was scheduled to be heard the following day, so that it could determine whether to bring a motion for leave to adduce in the Court of Appeal "fresh evidence". In seeking the adjournment, Catalyst refused to disclose what the proposed "fresh evidence" was, as well as how and when it had been obtained;

(c) Catalyst abandoned its effort to adduce fresh evidence before the Court of Appeal in late November 2017, shortly after West Face brought a motion in that Court to compel the production of the proposed "fresh evidence";

(d) Thereafter, Catalyst made no reference to any proposed fresh evidence, including during the argument of the Moyse Appeal on February 20 and 21, 2018; and

(e) Catalyst made no further effort to adduce fresh evidence, right up to the release by the Court of Appeal of its Appeal Decision on March 22, 2018.

4. Any motion Catalyst might proceed with under Rule 59.06(2)(a) will be resisted vigorously. Catalyst's threat to proceed with such a motion constitutes further evidence of its unrepentant determination to abuse the courts' processes, and amplifies the need for the relief sought on the present motions.

PART II ~ SUBMISSIONS

5. Catalyst's Supplemental Submissions start with a fundamental mischaracterization of West Face's stay motion (and ignore completely the submissions of the other Defendants) by inaccurately narrowing West Face's argument. Catalyst's argument is that "the stay motion brought by West Face was based upon two specific findings" of Justice Newbould:[2] first, that Catalyst lost its bid for WIND because of its refusal to accept VimpelCom's request for a modest break fee, rather than because of anything done by West Face; and second, that in any event Catalyst would not have completed its proposed acquisition of WIND because it was unwilling to do so without first receiving significant regulatory concessions from the Government of Canada that the Government repeatedly refused to grant, and made clear it would never grant.

6. While West Face did make those submissions (which were grounded firmly in the trial evidence, and accepted by Justice Newbould), they were relevant to only one of three bases on which West Face argued that Catalyst's action must be stayed. As summarized in West Face's factum in this matter (the "**West Face Stay Factum**"),[3] Catalyst's claim is also barred for two other reasons that are independent of the above two findings. First, Catalyst's claim arose from the same circumstances that gave rise to the Moyse Action, and therefore constituted litigation by installments (which is a classic abuse of process). Second, allowing Catalyst's claims to proceed would be manifestly unfair to West Face or otherwise bring the administration of justice into disrepute. These two arguments stand independent of the findings of Justice Newbould in the Moyse Action.

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2 Catalyst Supplemental Submissions at para. 5.

3 West Face Stay Factum at para. 68; WFC, Tab 5.

A. Issue One: Scope of Proceedings Before Justice Newbould

7. Catalyst's first argument appears to be that the Moyse Action was confined to the issue of breach of confidence by Mr. Moyse, and so can have no bearing on this case. There is no dispute that a major issue in the Moyse Action was whether Mr. Moyse had transferred confidential information of Catalyst to West Face concerning WIND. Catalyst conceded it had no direct evidence on point, and so expended considerable efforts in an unsuccessful effort to lead evidence giving rise to an inference on this issue.

8. In advancing its submissions on the scope of the Moyse Action, Catalyst seeks to reargue impermissibly one of the very same matters it already argued at the abuse of process motions in August 2017.[4] During a Chambers Appointment before Justice Hainey on the morning of April 3, 2018, His Honour made perfectly clear that he would not tolerate reargument by Catalyst of matters that had previously been dealt with by the parties during the argument of the stay motions in August. For that reason alone, this submission should be rejected summarily.

9. Even if this were not the case, the fact that the principal focus of the Moyse Action concerned the alleged transfer by Moyse to West Face of confidential information of Catalyst concerning WIND does not mean, as Catalyst somehow suggests, that issues of causation and damages were not before Justice Newbould in the Moyse Action. In fact, both of those issues were front and centre throughout the trial, and were dealt with fully in the evidence of various witnesses as well as in the written and oral arguments of Catalyst and West Face. Catalyst lost on these issues, just as it did on every other salient issue.

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4 Catalyst Responding Factum dated August 8, 2017 (the "**Catalyst Stay Factum**") at paras. 130 to 147; WFC, Tab 6.

10. There is no dispute over the test for breach of confidence. The plaintiff must prove that:

(a) there was a conveyance of confidential information;

(b) the information was communicated in confidence; and

(c) the confidential information was misused by the recipient, thereby causing harm to the plaintiff.[5]

11. West Face's position is now, and always has been, that Justice Newbould's findings in respect of causation and damages in the Moyse Action apply equally to the VimpelCom Action. The impact of those findings on the claims advanced by Catalyst in this proceeding was argued fully before Justice Hainey in August 2017. However, Catalyst did not challenge on appeal Justice Newbould's findings concerning damages and causation. For that simple but important reason, those findings were not addressed in the Appeal Decision, other than by way of describing in a general way the decision of Justice Newbould.[6] As a result, the Appeal Decision can have no impact on this issue.

B. Issue Two: Justice Newbould Found that Catalyst Would Not Have Closed a Share Purchase Agreement with VimpelCom

12. Catalyst makes two arguments concerning this issue. Both are impermissible, and do not arise properly, or at all, from the Appeal Decision. Even if that were not the case, both of Catalyst's arguments are devoid of merit.

13. First, Catalyst suggests that "the Appeal Decision makes it clear that the Trial Decision in respect of the break fee demanded by VimpelCom on or about August 11, 2014

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5 Catalyst v. Moyse, 2016 ONSC 5271 at paras. 68-69 (the "**Trial Decision**"); WFC, Tab 2.

6 Appeal Decision at para. 15; WFC, Tab 12.

did not consider" why VimpelCom requested a break fee.[7] This argument concerns paragraphs 126 to 130 of the Trial Decision, in which Justice Newbould held that Catalyst lost the WIND deal because it refused to accept VimpelCom's request for a modest break free, and not because of anything done by West Face. As a preliminary matter, Catalyst is incorrect that the Trial Decision "did not consider" why VimpelCom requested a break fee. Paragraph 127 explicitly notes that there was no evidence the VimpelCom Board was aware of the consortium's offer, meaning West Face could not have caused the request for a break fee.

14. Moreover, Catalyst offers no citation for its assertion concerning what was allegedly made clear in the Appeal Decision, no doubt because the Appeal Decision did no such thing. The Court of Appeal did not address in the Appeal Decision the findings made by Justice Newbould in paragraphs 126 to130 of the Trial Decision for the simple reason that Catalyst did not challenge those findings in its Appeal Factum.[8] In short, the Appeal Decision has no bearing on this issue whatsoever. This issue was, however, addressed thoroughly during the argument of the stay motions in August 2017, including at paragraphs 139 to 147 of the Catalyst Stay Factum, and in paragraphs 78 to 87 of West Face's Stay Factum.

15. Second, Catalyst asserts that because paragraph 131 of the Trial Decision was not addressed in the Appeal Decision, the Court of Appeal must somehow have accepted Catalyst's Supplementary Submission that paragraph 131 did not contain a finding that Catalyst would not have completed its proposed acquisition of WIND without

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7 Catalyst Supplemental Submissions at para. 16 (emphasis added).

8 Catalyst Factum dated February 15, 2017 (the "**Catalyst Appeal Factum**"); WFC, Tab 3.

first obtaining regulatory concessions. Paragraph 131 of the Trial Decision held that Catalyst could not have successfully concluded a deal with VimpelCom because of Catalyst's refusal to agree to a deal without Government concessions that simply were not forthcoming.

16. Once again, the simple but important reason why the Appeal Decision did not address the findings made by Justice Newbould in paragraph 131 of the Trial Decision is that Catalyst did not challenge those findings in its Appeal Factum. Catalyst alleged only three palpable and overriding errors in its Appeal Factum, and lost on each of them. Not one of those alleged errors related to Justice Newbould's findings concerning the issues of causation and harm to Catalyst.[9]

17. Catalyst's submissions in respect of this issue amount to nothing more than a transparent attempt to re-argue yet another issue that was canvassed fully by all parties during the argument of the abuse of process motions in August 2017. Catalyst purports to use the absence of any reference to this issue in the Appeal Decision as its justification for doing so. Its approach again abuses this Court's process.

18. Catalyst somehow claims in paragraph 24 of its Supplemental Submissions that the Court of Appeal "agreed with Catalyst's submissions on the proper interpretation of paragraph 131, and did not agree with the submissions in West Face's Factum about the meaning of that paragraph."[10] There is no substance to that assertion. In reality: (a) West

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[9] Catalyst Appeal Factum, para. 160; WFC, Tab 3.

[10] Catalyst Supplemental Submissions at para. 24.

Face never referred to that paragraph of the Trial Decision in its Appeal Factum[11] because the findings made by Justice Newbould in that paragraph were not challenged by Catalyst in its Appeal Factum; and (b) West Face did not make oral submissions concerning that paragraph because counsel for West Face had no opportunity to so. Catalyst's appeal was dismissed from the bench on February 21, 2018,[12] and Counsel for West Face and for Moyse were not even called upon to make oral submissions. The parties did, however, make comprehensive submissions during the argument of the abuse of process motions in August 2017 concerning the findings made by Justice Newbould in paragraph 131 of the Trial Decision.[13] Catalyst seeks to reargue now the very same point it has already argued. That is also unfair and is itself an abuse of this Court's process.

C. Issue Three: The Findings In Paragraph 131 of the Trial Decision Were Not *Obiter*

19. Once again, Catalyst claims incorrectly that the Court of Appeal made findings concerning an issue that were not, in fact, made. The issue now raised by Catalyst – namely, whether particular findings made by Justice Newbould in paragraph 131 of his Trial Decision were *obiter* – was not the subject of Catalyst's appeal. The Appeal Decision does not refer to particular findings made by Justice Newbould in paragraph 131 of the Trial Decision because it was not raised in Catalyst's Appeal Factum. The Court of Appeal can hardly be expected to have referred in its Decision to findings that were not appealed by Catalyst, and that were therefore not addressed by West Face.

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[11] West Face Appeal Factum; WFC, Tab 4.

[12] The only issue counsel for West Face and for Moyse were asked to address in the Court of Appeal was Catalyst's request for leave to appeal the award of costs made by Justice Newbould following the conclusion of trial. The Court of Appeal refused leave to appeal in the Appeal Decision.

[13] See Catalyst Stay Factum at paras. 148- 162; WFC, Tab 6; West Face Stay Factum at paras. 78-87; WFC, Tab 5.

20. As described above, issues of causation and damage were addressed in paragraph 131 of the Trial Decision because they are constituent elements of the tort of breach of confidence. Catalyst was required to establish all of these elements to obtain findings of liability against West Face, and Justice Newbould properly addressed all elements of this tort in his Trial Decision. Those findings concerned important and dispositive issues, and are the very opposite of *obiter*.

D. Issue Four: Catalyst Was Not Denied an Opportunity to Expand the Trial

21. Catalyst's submissions concerning this issue are also impermissible, and involve yet another attempt by Catalyst to re-argue an issue that was canvassed fully by the parties during the argument of these motions in August 2017.[14]

22. Unlike the other issues that Catalyst now seeks to raise, however, this issue was in fact argued by the parties before the Court of Appeal. Catalyst complained on appeal that Justice Newbould made a series of findings adverse to Catalyst in a "factual vacuum", because he supposedly refused to permit Catalyst to amend its Statement of Claim in the Moyse Action to assert claims for inducing breach of contract.[15] Surprisingly, Catalyst fails to disclose in its Supplemental Submissions that its complaint in this regard was rejected firmly and squarely by the Court of Appeal in the Appeal Decision:

> The appellant argues that the trial judge ... refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of the WIND shares to reach its agreement with the appellant ...

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[14] West Face Stay Factum at paras. 26-33, 45-63, 92, 95-96; WFC, Tab 5; Catalyst Stay Factum at paras. 92-97, 163-168; WFC, Tab 6.

[15] Catalyst Appeal Factum at paras. 147-158; WFC, Tab 3.

> **We do not accept this submission. The appellant did not move in this proceeding to amend its claim to include an allegation that West Face induced the vendor of the WIND shares to breach its contract with the appellant**. The appellant did unsuccessfully seek to make that amendment in a related proceeding. That refusal had no impact on the conduct of this trial.[16] (emphasis added)

23. This is the one and only new finding made by the Court of Appeal,[17] and it eviscerates one of the principal arguments made by Catalyst in response to the present motion. Justice Newbould could hardly have refused a request that was never made (namely, by Catalyst for permission to amend its Claim in the Moyse Action), and the Court of Appeal explicitly held that they had not been barred from doing so.[18]

E. Issue Five: This Is Not a Case to Exercise Discretion in Catalyst's Favour

24. Catalyst argues that in the alternative, the preceding four issues warrant the exercise by this Court of its residual discretion not to stay or dismiss this action. There is no substance to this submission, including because none of Catalyst's contentions concerning any of those issues has merit. On the contrary, the very fact that Catalyst has advanced manifestly impermissible and misleading Supplementary Submissions in this proceeding in the wake of the Appeal Decision demonstrates precisely why Catalyst does not deserve the benefit of the Court's discretion. Notably, issues concerning the Court's residual discretion were also canvassed fully by the parties during the argument of the abuse of process motions in August 2017.

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[16] Appeal Decision at paras. 39-40; WFC, Tab 12.

[17] This issue was not addressed by Justice Newbould in the Trial Decision because the issue of whether Catalyst should have raised its inducing breach claims earlier was not before him. As described above, however, Catalyst raised this issue both in the present motion and before the Court of Appeal.

[18] *Re. Mid-Bowline Group Corp.*, 2016 ONSC 669 at para. 59; WFC, Tab 1.

25. Catalyst's abuse of the Court's process has been consistent and unrepentant:

(a) Justice Newbould held in the Plan of Arrangement proceedings that Catalyst had chosen to "lie in the weeds", was "not acting in good faith", and that Mr. Riley had sworn a false Affidavit in his efforts to justify Catalyst's conduct that "was not true";[19]

(b) Catalyst proceeded to trial in the Moyse Action in the face of overwhelming evidence that disproved its claims and allegations, and was ordered to pay costs to West Face on a substantial indemnity basis after its efforts to impugn the honesty, integrity and conduct of multiple witnesses called by West Face failed utterly;[20]

(c) Catalyst then pursued an appeal from the Trial Decision that was so unmeritorious that it was dismissed from the bench without hearing submissions on the merits from counsel for either of the Respondents;

(d) Before the appeal could be heard, Catalyst obtained a lengthy adjournment of the appeal, including to permit it to pursue a proposed "fresh evidence" application without disclosing to the Court or to West Face what the alleged evidence was, or how and when it was obtained.[21] It was revealed subsequently that the so-called "evidence" Catalyst was contemplating seeking leave to adduce involved an illicit sting perpetrated on Justice Newbould by representatives of Black Cube. To the knowledge of West Face, that sting was (and is) unprecendented. It constitutes a highly regrettable, full frontal assault on the proper administration of justice;

(e) In the face of the foregoing, Catalyst further delayed the resolution of the present motion by insisting on making Supplemental Submissions that are plainly impermissible and manifestly unmeritorious; and

(f) Catalyst has now suggested that it may bring a motion to adduce fresh evidence in the Moyse Action, despite having made the informed, tactical choice <u>not</u> to seek leave to adduce this scandalously obtained evidence before the Court of Appeal in that very same Action.

26. It is respectfully submitted that in the circumstances, Catalyst's persistent and repeated abuses of this Court's processes further justifies this Court's strongest possible

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19 *Ibid*; <u>WFC</u>, Tab 1.

20 Costs endorsement of Justice Newbould, *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285; <u>WFC</u>, Tab 16.

21 Letter from Brian Greenspan dated September 25, 2017; <u>WFC</u>, Tab 7; Endorsement of Rouleau J. dated September 27, 2017; <u>WFC</u>, Tab 8.

condemnation. They certainly do not warrant the exercise of the Court's discretion in favour of Catalyst.

PART III ~ ADDITIONAL MATTERS

27. As stated above, Catalyst refers in paragraph 40 of its Supplementary Submissions to the "possibility" of bringing a motion to this Court under Rule 59.06(2)(a) to adduce fresh evidence in the Moyse Action. Such a motion would be yet another abuse of the Court's process, and warrants dismissal of the present action as a deterrent to such future misconduct.

28. As alluded to above, the appeal of the Moyse Action was originally scheduled to be heard on September 26 and 27, 2017. On the afternoon of September 25, 2017, Catalyst obtained an Order from Justice Rouleau adjourning the appeal on the basis that it had come into possession of "fresh evidence" concerning the matters at issue in the Moyse Action.[22] Counsel for Catalyst represented to Justice Rouleau, in open court, that he had seen the "fresh evidence" and regarded it to be both credible and relevant. He did not disclose, however, what the supposed "evidence" was, or how or when it was obtained. Catalyst asserted that it required an adjournment to determine whether to bring a motion for leave to adduce that evidence, and because its current counsel were no longer willing to act for Catalyst.

29. West Face learned subsequently that this purported fresh evidence consisted of "stings" conducted on current and former West Face employees, as well as on Justice Newbould, by representatives of Black Cube. West Face only learned of these stings

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[22] Letter from Brian Greenspan dated September 25, 2017; <u>WFC</u>, Tab 7; Endorsement of Rouleau J. dated September 27, 2017; <u>WFC</u>, Tab 8.

because of the highly public scandal surrounding Hollywood mogul Harvey Weinstein, who was exposed for having retained Black Cube to perform similar "stings" on women he had harassed and assaulted. An employee of West Face saw an online photograph of a Black Cube operative who had stung victims of Weinstein, and recognized that operative as someone who had approached her weeks before under the guise of interviewing her for what turned out to be a fictitious job with a non-existent company. So began the unravelling of Black Cube's efforts to infiltrate West Face.

30. Catalyst was given every opportunity to bring a motion to adduce this evidence before the Court of Appeal in the Moyse Action. It made the informed, tactical choice not to do so, and formally abandoned its proposed fresh evidence motion in late November 2017, on the eve of a motion in the Court of Appeal on December 1, 2017 West Face for an Order compelling the disclosure by Catalyst of the "fresh evidence" that it and its counsel had in their possession when they obtained an adjournment of the Moyse Appeal.[23] That Catalyst would now purport to reserve to itself the right to bring yet another fresh evidence application in the Moyse Action after its appeal in that Action has been heard, determined and dismissed, demonstrates clearly Catalyst's ongoing determination to abuse the Court's processes. None of the cases cited by Catalyst in paragraph 42 of its Submissions sanctions such an approach.[24]

31. Moreover, Catalyst appears to be relying on the possibility of a future fresh evidence motion for the ulterior purpose of attempting to persuade investors that after

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[23] Correspondence from the Court of Appeal dated November 17, 2017; WFC, Tab 9; West Face Notice of Motion dated November 28, 2017; WFC, Tab 10; Email and attached letter from Brian Greeenspan dated November 30, 2017; WFC, Tab 11.

[24] See *Mehedi v. 2057161 Ontario Inc.* 2015 ONCA 670 at para. 13; WFC, Tab 15, which prohibits fresh evidence applications where the evidence could have been adduced earlier.

some four years of litigation, and after suffering loss after loss at the trial and appellate levels, it still has viable and substantial claims against West Face arising from Moyse's brief period of employment at West Face. Catalyst has represented to its investors that its claims against West Face in respect of the WIND litigation are worth almost $450 million.[25] It will no longer be able to maintain that fiction if the cases it has brought against West Face are finally disposed of. This threatened fresh evidence motion is simply the latest attempt by Catalyst to postpone its day of reckoning. It is respectfully submitted that this Court should condemn such behaviour in the strongest possible terms, including by granting the Defendants' motions and permanently staying or dismissing this proceeding, with costs on a substantial indemnity basis.

April 12, 2018 ALL OF WHICH IS RESPECTFULLY SUBMITTED.

KET per MMS
Kent E. Thomson

Matthew Milne-Smith

ARC per MMS
Andrew Carlson

Of Counsel to the Defendant (Moving Party)
West Face Capital Inc.

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25 Lawrence Delevingne and John Tilak, "A private equity star's picks shine ... until cash-out time", *Reuters*, March 23, 2018; WFC, Tab 13; Bruce Livesey and Roddy Boyd, "Newton Glassman's Legacy of Ashes", *Southern Investigative Reporting Foundation*, April, 2018; WFC, Tab 14.

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