

CITATION: The Catalyst Group Inc. v. Vimpelcom Ltd., et al., 2018 ONSC 6920
COURT FILE NO.: CV-16-1159500CL
DATE: November 19, 2018

SUPERIOR COURT OF JUSTICE – ONTARIO

- COMMERCIAL LIST

RE: THE CATALYST GROUP INC.

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.

BEFORE: Hainey J.

COUNSEL: *David C. Moore, Kenneth G.G. Jones*, for the Plaintiffs

Michael Barrack, Kiran Patel, Daniel Szirmak, for the Defendants, Tennenbaum Capital Partners LLC, 64NM Holdings CP LLC, 64NM Holdings LP and LG Capital Investors LLC

Orestes Pasparakis, Rahool P. Agarwal, Michael Bookman, for the Defendant, Vimpelcom Ltd.

James D.G. Douglas, Caitlin Sainsbury, Graham Splawski, for the Defendant, Globalive Capital Inc.

David Byers, Daniel Murdoch, Vanessa Voakes, for the Defendant, UBS Securities Canada Inc.

Lucas E. Lung, Jameel Madhany, for the Defendant, Serruya Private Equity Inc.

Junior Sirivar, Jacqueline Cole, for the Defendant, Novus Wireless Communications Inc.

Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, for the Defendant, West Face Capital Inc.

Michael D. Schafler, for the Defendant, Mid-Bowline Group Corp.

HEARD: In writing

COSTS ENDORSEMENT

Background

[1] On April 18, 2018 I dismissed Catalyst's action against the defendants as an abuse of process. The action was also dismissed against West Face, the US Investors and Globalive on the grounds of issue estoppel and cause of action estoppel.

[2] The defendants seek costs on a substantial indemnity basis in the total amount of \$2,197,010.

[3] Catalyst submits that costs should be awarded on a partial indemnity basis in the total all-inclusive amount of \$1,024,019.

Issue

[4] I must decide whether substantial indemnity costs are appropriate and whether the amount claimed for costs by each defendant is fair and reasonable.

Analysis

Should Substantial Indemnity Costs be Awarded?

[5] I have concluded that substantial indemnity costs are justified. This action was an abusive attempt by Catalyst to re-litigate the same allegations of serious misconduct by the defendants that were front and centre in the previous action between Catalyst and West Face that was dismissed by Newbould J. in August 2016. His decision was upheld by the Court of Appeal for Ontario on March 22, 2018. The Court of Appeal also upheld Newbould J.'s decision to award costs to West Face on a substantial indemnity basis for the following reasons set out at paras. 48-51 of the court's Reasons for Decision:

[48] The trial judge awarded costs to West Face on a substantial indemnity basis because the appellant had made serious and unfounded allegations impugning the honesty and integrity of West Face and its senior executives. He concluded that the lawsuit was precipitated primarily by Mr. Glassman's frustration over losing out on the acquisition of the WIND shares. The trial judge said, at para. 10:

He [Mr. Glassman] set out to prove his belief that the West Face witnesses were lying and that West Face had obtained confidential Catalyst information from Mr. Moyses 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.

[49] The appellant submits that the trial judge in effect awarded costs on a substantial indemnity basis because the appellant failed to prove its case at trial. The appellant argues that substantial indemnity costs are the exception and not the

rule. To base an award of substantial indemnity costs on a failure to prove one's case is to ignore the exceptional nature of an award of costs on a substantial indemnity basis.

[50] We are satisfied that the trial judge awarded costs on a substantial indemnity basis, not because the appellant failed to prove its case, but rather because the appellant chose to make very serious allegations against West Face, maintain those allegations in the face of substantial evidence refuting the allegations, and in the end "utterly failed" to substantiate any of the claims.

[51] Unfounded allegations like those made by the appellant in this case can warrant the exercise of discretion in favour of costs on a substantial indemnity basis. We see no error in principle in the trial judge's decision to award costs on a substantial indemnity basis to West Face. We would not grant leave to appeal the order as it relates to West Face.

[6] The same can be said about Catalyst's conduct in this action. It advanced the same very serious allegations against the defendants and attempted to re-litigate them before me in an abusive manner. Catalyst utterly failed in this action as well.

[7] Rule 57.01(1) of *The Rules of Civil Procedure* sets out the factors the court may consider when exercising its discretion to award costs. The relevant factors for this proceeding are the following:

- (a) Catalyst claimed \$1.3 billion in damages against the defendants and recovered nothing.
- (b) The proceedings were highly complex. There were 11 defendants. The pleadings totalled close to 250 pages. The record was extremely voluminous and the hearing lasted three days.
- (c) The issues were extremely important to all parties. This was "high stakes" litigation.
- (d) Catalyst should have reasonably expected to pay significant costs to the defendants if its action was dismissed as an abuse of process. In fact, West Face's counsel warned Catalyst's counsel that it would be seeking costs on a full indemnity basis at the outset of the action because it constituted an abuse of process.
- (e) Catalyst should not have taken the position in this proceeding that Newbould J. had banned it from amending its pleading in the Moyse action to advance a claim for inducing breach of its exclusivity agreement with Vimpelcom. The Court of Appeal for Ontario found that this had not occurred.
- (f) Finally, Catalyst commenced separate proceedings for claims that should have been made in one proceeding. Catalyst's re-litigation of the same claims it had

advanced in the Moyse action was an abuse of process and supports an award of costs on a substantial indemnity basis.

Are the Amounts Claimed Fair and Reasonable?

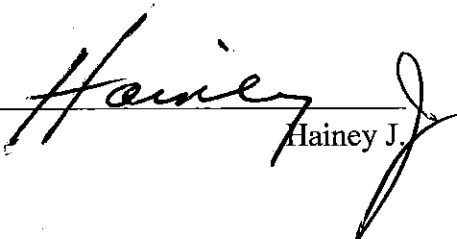
[8] I must determine whether the amount claimed by each defendant on a substantial indemnity basis is fair and reasonable. Although this motion was complex, there were no productions, no examinations for discovery and no cross-examinations. There were three days of oral argument. West Face took the lead in advancing the defendants' arguments on the motion. Under these circumstances I do not regard total costs of \$2,197,010 to be fair and reasonable. This is an excessive amount that could not have been within the reasonable expectation of Catalyst.

[9] It is not appropriate for me to conduct a line-by-line analysis of the defendants' costs outlines. As West Face took the lead on behalf of the defendants it is entitled to the highest cost award. VimpelCom was the focal point of the action and had to undertake its own detailed review of Catalyst's claim. Its claim of over \$750,000 is excessive, however, it is entitled to the second highest cost award because of its extensive involvement on the motion. I have set out below what I consider to be a fair and reasonable all-inclusive cost award for each of the defendants based upon their participation on the motion:

- (a) West Face – \$450,000
- (b) Vimpelcom – \$350,000
- (c) Globalive – \$225,000
- (d) UBS – \$225,000
- (e) US Investors - \$200,000
- (f) Novus - \$100,000
- (g) Serruya - \$50,000

[10] These amounts total \$1,600,000. In my view, this is an overall amount that is fair and reasonable and ought to have been within the reasonable expectation of Catalyst.

[11] These costs are payable by Catalyst to the defendants within 30 days.


Hailey J.

Date: November 19, 2018