Court File No.: CV-16-1159500CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

COSTS SUBMISSIONS OF THE DEFENDANT/MOVING PARTY GLOBALIVE CAPITAL INC.

May 30, 2018

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INDEX

INDEX

TAB

1

COST SUBMISSIONS

A. Overview

1. The defendant/moving party, Globalive Capital Inc. ("Globalive") seeks its costs of the motion and the action on a substantial indemnity basis, which, including taxes and disbursements, amounts to $320,009.28.

2. Globalive was entirely successful in moving to dismiss the claim of the plaintiff, Catalyst Capital Group Inc. ("Catalyst").[1] Globalive submits an award of substantial indemnity costs is appropriate for two primary reasons:

(a) Catalyst made scandalous allegations of conspiracy and dishonesty against Globalive, and against its Chairman (and principal shareholder), Anthony Lacavera, personally. It made these allegations after already having been aware of directly contradictory evidence - and final determinations of fact - in another proceeding; and

(b) the Court dismissed Catalyst's claim on the basis that it was an attempt to re-litigate findings of fact that were made in another proceeding, and that it was barred on the basis of issue estoppel, cause of action estoppel and abuse of process.

3. These are circumstances in which Courts have consistently awarded substantial indemnity costs, both to censure the unsuccessful party, and to protect the public interest in discouraging unfounded scandalous allegations and re-litigation of claims. Each of these reasons will be discussed in turn.

[1] *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471 ("Motion Decision"), Tab 4.

B. Catalyst's Scandalous Allegations Warrant Substantial Indemnity Costs

4. Catalyst made serious allegations of dishonesty in respect of Globalive and its Chairman, and it made these allegations in the face of existing evidence from another of Globalive's executives that directly contradicted these allegations.

5. The Court of Appeal recognized in its recent decision in *Catalyst Capital Group v. Moyse* that where, in that action (the "Moyse Action"), Catalyst made "serious allegations impugning the honesty and integrity" of a party and its senior executives, substantial indemnity costs were appropriate.[2]

6. In the Moyse Action, the Court of Appeal upheld Justice Newbould's costs award, where he recognized that substantial indemnity costs were particularly appropriate because Catalyst amended its claim to impugn the defendant West Face and its executives' integrity in the face of evidence that had already been filed that refuted those allegations. Therefore, even before trial, Catalyst knew that, to prove its allegations, it would need to prove that West Face's witnesses were lying in evidence they had already given in that proceeding and the plan of arrangement in January 2016. This merited an award of substantial indemnity costs.[3]

7. The circumstances were same in this case. Without any evidence to support its allegations, and directly contrary to evidence given by Simon Lockie, Chief Legal Officer of Globalive (which evidence Catalyst had already heard four months earlier), Catalyst accused Globalive of sabotaging its negotiations with VimpelCom Inc. ("VimpelCom") to purchase VimpelCom's interest in WIND Mobile Corp. ("WIND"). Catalyst also alleged that Globalive and its Chairman Anthony Lacavera ("Lacavera") obtained Catalyst's confidential information in respect of its negotiations with VimpelCom and dishonourably passed that information to certain other defendants knowing they planned to use that information to induce VimpelCom to breach its Exclusivity Agreement with Catalyst.

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[2] *Catalyst Capital Group v. Moyse*, 2018 ONCA 283 at paras. 48 – 51, Tab 5.
[3] *Catalyst Capital Group v. Moyse*, 2016 ONSC 6285 at paras. 6 – 11, Tab 6.

8. Specifically, contrary to evidence given by Simon Lockie and others in earlier proceedings involving WIND and Catalyst, Catalyst alleged that Lacavera and Globalive intentionally and deliberately acted to harm Catalyst through discreditable means, including as follows:

(a) "On July 29, 2014, UBS and Globalive communicated Catalyst's confidential information to Tennenbaum, the specified date on which the term of the Exclusivity Agreement expired, Tennenbaum communicated this confidential information to West Face";[4]

(b) "Together with Lacavera and Globalive, the Consortium began discussing how they might cause VimpelCom to breach the Exclusivity Agreement so as to prevent Catalyst from successfully acquiring Wind";[5]

(c) "On August 1, 2014, the members of the Consortium, Globalive, Lacavera and UBS (together, the "Conspirators") entered into a conspiracy …"[6]

(d) Lacavera and others attended on a call on that date, and met again on August 4, 2014, to discuss how they could induce VimpelCom to breach the Exclusivity Agreement, and Globalive communicated confidential information on that date;[7]

(e) "Lacavera knew that the proposed offer that all the conspirators crafted would have the effect of causing VimpelCom to breach the Exclusivity Agreement and cause damage to Catalyst";[8]

(f) "Lacavera agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy. Additionally, Lacavera agreed that Globalive would join the Conspiracy";[9]

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[4] Amended Amended Amended Statement of Claim, dated May 17, 2018 ("Statement of Claim"), at para. 58, Tab 3.
[5] Statement of Claim, *supra*, at para. 66, Tab 3.
[6] Statement of Claim, *supra*, at para. 67, Tab 3.
[7] Statement of Claim, *supra*, at para. 68 – 69, Tab 3.
[8] Statement of Claim, *supra*, at para. 78, Tab 3.

(g) "Lacavera knew that if Catalyst was the successful bidder, it intended to terminate his position as CEO of Wind and to eliminate his equity position in the company. In order to prevent this from occurring, and contrary to his contractual obligations to Catalyst under the Confidentiality Agreement, Lacavera shared Catalyst's Confidential Information with West Face and Tennenbaum, including the fact that Catalyst was negotiating with VimpelCom with regard to Wind";[10] and

(h) "By wrongly transmitting Catalyst's Confidential Information to the Consortium, Lacavera, acting on behalf of Globalive, and, separate and apart from the interests of Wind and VimpelCom, knew that the transmission would (and did) cause damage to Catalyst".[11]

9. These allegations were uniquely damaging to Globalive. Globalive, and Lacavera *via* his control of Globalive and his long-time role as WIND's Chairman and Chief Executive Officer (with Globalive's only other shareholders and officers, Simon Lockie and Brice Scheschuk, WIND's long-time Chief Regulatory Officer and Chief Financial Officer, respectively), was well-known to have founded WIND and to have led the acquisition of the balance of WIND from Vimpelcom. Globalive is a closely-held private investment company operated by its only shareholders. The allegations of dishonesty and illegal sharing of confidential information in the context of a contemplated transaction made by Catalyst strike at the heart of Globalive's business reputation and integrity, and of Lacavera's reputation personally. Moreover, the allegations were widely publicized and reported on, with news reports making reference in headlines and elsewhere to the serious allegations made specifically against Globalive and Lacavera.[12] In the face of such coverage, and given the nature of the allegations, Globalive and

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[9] Statement of Claim, *supra*, at para. 81, Tab 3.
[10] Statement of Claim, *supra*, at para. 97, Tab 3.
[11] Statement of Claim, *supra*, at para. 102, Tab 3.
[12] See, e.g. the following news articles where specific reference is made to Globalive and Lacavera: "Globalive being sued for $750 million by Catalyst over 'sabotaged" Wind acquisition", Betakit (June 6, 2016), online; "Catalyst Capital sues former Wind Mobile owners for $750M over alleged conspiracy, breach of contract", National Post (June 1, 2016), online.

Lacavera were required to vigorously defend themselves and their integrity in the conduct of their business.

10. Globalive has now successfully moved to have these scurrilous allegations dismissed in their entirety. Given the serious nature of these allegations, and the circumstances in which Catalyst made them, Globalive submits that it is entitled to costs on a substantial indemnity basis.

11. That Globalive's costs are significant should have been within Catalyst's contemplation when it commenced its claims. As this Court has held, where a plaintiff makes serious allegations, including allegations of dishonesty, it can expect a defendant to expend significant cost defending those claims.[13]

C. The Court's Findings of Abuse of Process Warrant Substantial Indemnity Costs

12. The finding that Catalyst's serious claims were barred by the doctrines of issue estoppel, cause of action estoppel and abuse of process is a further independent basis for an award of substantial indemnity costs.

13. Courts have consistently held that where a plaintiff's claim has been dismissed on the basis of issue estoppel and abuse of process, the successful defendant is entitled to substantial indemnity costs. For example, in *Best v. Lancaster*, the Court recognized that it was appropriate to award substantial indemnity costs "where a claim has been dismissed as an abuse of process, in particular where a defendant has been forced to respond to a plaintiff's attempts to re-litigate claims".[14]

14. Similarly, in *Rousseau v. Scotia Mortgage Corp.*, the Court held it was appropriate to award costs on a substantial indemnity scale where the action had been dismissed on the basis of issue estoppel and abuse of process, even where the parties to the previous proceeding were different. The Court held:

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[13] *Rousseau v. Scotia Mortgage Corp.*, 2013 ONSC 677 ("*Rousseau*") at para. 24, Tab 7.
[14] *Best v. Ranking*, 2015 ONSC 6269 at para 142, Tab 8; see also *Said v. University of Ottawa*, 2014 ONSC 771 ("*Said*") at para. 16, Tab 9.

> My conclusion that the action was an abuse of process and that the issues were *res judicata*, since it was based on the same facts as were alleged in the 2007 action which were dealt with by Justice Ramsay, is relevant to the scale of costs issue. As I noted, the re-litigation of claims is not in the public interest and is to be discouraged. Defendants are entitled to protection as to their own costs and plaintiffs must expect to pay accordingly.
>
> Based on the foregoing, it is appropriate to award costs on a substantial indemnity scale.[15]

15. In this case, the Court held that this action was an abuse of process as against all the defendants, and in addition was also barred against Globalive, West Face and the US Investors by the doctrines of issue estoppel and cause of action estoppel. This holding was based, as in *Best* and *Rousseau*, on the finding that Catalyst's claim was an attempt to re-litigate issues that had already been determined in the Moyse Action. In its decision, the Court held in respect of the principles of abuse of process:

> In my view, these principles apply in this case for many of the same reasons that I have relied upon to conclude that issue estoppel and cause of action estoppel applies to Catalyst's Current Action. Catalyst unsuccessfully litigated its failure to acquire Wind in the Moyse/West Face Action. Justice Newbould made findings at trial that are determinative of its claims against the defendants in this proceeding. Catalyst's Current Action advances claims that it chose not to allege in the previous action. It also seeks findings that are entirely inconsistent with Justice Newbould's findings in the Moyse/West Face Action. In my view, this constitutes an abuse of process because it would result in the relitigation of the reason why Catalyst's bid to acquire Wind failed.[16]

16. These findings engage the public interest in discouraging re-litigation and abusive proceedings, and support Globalive's claim for costs on a substantial indemnity scale.

D. The Quantum of Costs Claimed is Reasonable

17. The quantum of costs Globalive has claimed for the motion and the action, being $320,009.28 on a substantial indemnity basis (including taxes and disbursements), is reasonable in the circumstances. This is 90% of Globalive's full indemnity costs, and parties in commercial

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[15] *Rousseau*, *supra*, at paras. 26 – 27, Tab 7.
[16] Motion Decision, *supra*, at para. 86, Tab 4.

cases can expect to pay substantial indemnity costs at this rate.[17] Because the Court dismissed the action in its entirety, Globalive was successful in the action and is therefore entitled to its costs of both the motion and the action.[18]

18. The amount of time expended should have been within Catalyst's contemplation. As discussed above, courts have held that a plaintiff that has unsuccessfully made serious allegations of dishonesty can expect that parties will expend significant cost to defend against the allegations.[19]

19. Not only did Catalyst make serious allegations of dishonesty, but the stakes could not have been higher. Catalyst's original claim was for $750,000,000, and it amended this claim shortly before the hearing of this motion to claim $1,300,000,000. Given the amount at stake, it was reasonable for Globalive to engage in significant research and to employ a team of experienced counsel and research lawyers to attempt to dismiss the claim.

20. There were also unique allegations made against Globalive, which required significant work to be expended on its part. Not only was Globalive named as one of the alleged conspirators in making the unsolicited offer, and as the source for the alleged passing of confidential information, but Catalyst also claimed against Globalive for breach of contract, despite having not entered into any contracts with Globalive. Globalive made a request to inspect with respect to the breach of contract claims, and was ultimately wholly successful in having those claims struck.

21. Junior counsel, law clerks and students were used wherever possible. As the breakdown of hours spent indicates, the majority of time preparing written materials and documentary evidence was spent by junior associates under three years of call, and law clerks.

22. Finally, Catalyst's conduct in the Moyse Action since the hearing of this motion should be considered. While Globalive is not claiming those costs here (and does not claim that it

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[17] *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.*, 2013 ONSC 5213 at paras. 22 – 25, Tab 10.
[18] *Said*, *supra*, at paras. 3, 17, Tab 9.
[19] *Rousseau*, *supra*, at para. 24, Tab 7.

could), we note that, for the same reasons that Globalive was found by this Court to be privy to West Face in respect of the Moyse Action, Globalive spent a significant amount on legal fees (i.e., over $65,000) in connection with Globalive's attention to that action, including in respect of Lockie's testimony given at trial (at a time when Catalyst had already issued its statement of claim in the within action).

23. However, Globalive is entitled to claim, and is claiming, for the costs it incurred in relation to the appeal of the decision in the Moyse Action (the "Moyse Appeal") and the subsequent steps taken in that action. At the hearing of this motion, the Court indicated that it would reserve its decision until after the decision on the appeal in the Moyse Action had been released, at which time the Court would receive further submissions from the parties as necessary.[20] It was therefore necessary for Globalive to follow the Moyse Appeal closely, and, following Catalyst's request for the opportunity to make further argument in the within motion on the basis of the Court of Appeal's decision, to review and attend in court to respond to Catalyst's further submissions. As the Court of Appeal held, Catalyst attempted to use the appeal in the Moyse Action to attempt to "re-litigate most of the crucial findings of fact", and it generated voluminous material.[21]

24. Catalyst also sought to adjourn the hearing of the Moyse Appeal to bring a Rule 59 "fresh evidence" motion, which it ultimately chose not to bring. The alleged fresh evidence related to a "sting" operation targeted at Justice Newbould.[22] In its supplementary submissions in this motion after the appeal decision in the Moyse Action was released, Catalyst for the first time even suggested that it may reopen the trial decision in the Moyse Action pursuant to Rule 59.[23]

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[20] Motion Decision, para. 43, Tab 4.
[21] *Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 447 at para. 5, Tab 11.
[22] See paragraph 3 and 27 – 31 of West Face's supplementary submissions on this motion, dated April 12, 2018, for a more fulsome explanation of Catalyst's potential fresh evidence motion.
[23] Catalyst's supplementary submissions on this motion, dated April 9, 2018, at paras. 40 – 42.

25. The above actions taken by Catalyst had a direct bearing on this action. Catalyst therefore could have expected to bear the costs of the defendants in this action to the extent they were required to follow developments in the Moyse Appeal.

26. In these circumstances, Globalive submits that the quantum of its substantial indemnity costs, of $320,009.28 (including disbursements and taxes) for the motion and the action, is reasonable and well within what Catalyst should have expected to pay.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 30, 2018

James D.G. Douglas/Caitlin Sainsbury/
Graham Splawski

Lawyers for the defendant/moving party,
Globalive Capital Inc.

Schedule "A" – Authorities Cited

1. *The Catalyst Capital Group Inc. v. VimpelCom Ltd.*, 2018 ONSC 2471
2. *Catalyst Capital Group v. Moyse*, 2018 ONCA 283
3. *Catalyst Capital Group v. Moyse*, 2016 ONSC 6285
4. *Rousseau v. Scotia Mortgage Corp*., 2013 ONSC 677
5. *Best v. Lancaster*, 2015 ONSC 6269
6. *Said v. University of Ottawa*, 2014 ONSC 771
7. *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.*, 2013 ONSC 5213
8. *Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 447

TAB
2

Court File No.: CV-16-1159500CL

ONTARIO
SUPERIOR COURT OF JUSTICE
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BETWEEN:

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

COSTS OUTLINE OF DEFENDANT/MOVING PARTY, GLOBALIVE CAPITAL INC.

The Moving Party (Defendant), Globalive Capital Inc., incurred the following costs in the action and on this motion:

	Actual Rates	**Substantial Rates (90% of Actual Rate)**	**Partial Rates (60% of Actual Rate)**
Legal Fees:			
Legal Fees incurred as detailed below (excluding Counsel Fees)	$282,464.44	$254,217.99	$169,478.66
Counsel Fees:			
Attendance at Motion(August 16-18, 2017):			
Douglas, James			
17 hours @ Hourly Rates $862.35/$776.12/$517.41	$14,659.95	$13,193.96	$8,795.97
Sainsbury, Caitlin			
17 hours @ Hourly Rates $430.00/$387.00/$258.00	$9,009.15	$8,108.24	$5,405.49
Attendance at Supplementary Submission (April 16, 2018)			
Douglas, James			
2 hours @ Hourly Rates $925/$832.50/$555	$1,850.00	$1,665.00	$1,110.00
Sainsbury, Caitlin			
2 hours @ Hourly Rates $580/$522/$348	$1,160.00	$1,044.00	$696.00
Total of Legal and Counsel Fees Incurred	$309,143.54	$278,229.19	$185,486.12
HST on fees incurred @ 13%	$40,188.66	$36,169.80	$24,113.20
Disbursements & Taxes: (detailed in Appendix "A")	$5,610.29	$5,610.29	$5,610.29
TOTAL	**$354,942.49**	**$320,009.28**	**$215,209.61**

The experience of the party's lawyers:

Lawyers	Year of Call
James D.G. Douglas	1981 (36 years)
Caitlin Sainsbury	2007 (10 years)
Graham Splawski	2015 (2 years)

FEE ITEM: PLEADINGS The hours spent, the rates sought for costs and the rate actually charged by the party's lawyer, including: initial review of statement of claim; ongoing communication with all counsel and the courts as required; legal research; drafting statement of defence; review of statements of defences of other parties; continue drafting statement of defence; review documents; continue legal research; drafting of request to inspect; review amended statement of claim; drafting amended statement of defence.

PLEADINGS							
Person	**Hours**	**Actual Rate**	**Actual Total/HR**	**Subst. Rate (90% of Actual Rate)/HR**	**Subst. Total (90% of Actual Total)/HR**	**Partial Rate (60% of Actual Rate)/HR**	**Partial Total (60% of Actual Rate)/HR**
Douglas, James 2016	26.3	$869.07	$22,856.54	$782.16	$20,570.89	$521.44	$13,713.92
Douglas, James 2017	0.7	$895.00	$626.50	$805.50	$563.85	$537.00	$375.90
Sainsbury, Caitlin 2016	50	$515.00	$25,750.00	$463.50	$23,175.00	$309.00	$15,450.00
Sainsbury, Caitlin 2017	3.4	$550.00	$1,870.00	$495.00	$1,683.00	$330.00	$1,122.00
Splawski, Graham 2016	21.7	$335.00	$7,269.50	$301.50	$6,542.55	$201.00	$4,361.70
Splawski, Graham 2017	0.9	$375.00	$337.50	$337.50	$303.75	$225.00	$202.50
Smith, Sandra 2016	3.8	$285.00	$1,083.00	$256.50	$974.70	$171.00	$649.80
Smith, Sandra 2017	0.5	$300.00	$150.00	$270.00	$135.00	$180.00	$90.00
Basdeo-Kishore, Tricia 2016	0.3	$155.00	$46.50	$139.50	$41.85	$93.00	$27.90
TOTAL			**$59,989.54**		**$53,990.59**		**$35,993.72**

FEE ITEM: STAY MOTION The hours spent, the rates sought for costs and the rate actually charged by the party's lawyer, including: Legal research; ongoing communication with all counsel and the court including scheduling of the motion, timetable for delivery of materials and various other matters; review of statement of claim; drafting notice of motion; serving and filing notice of motion; reviewing various documents; review of cross-examination transcripts; detailed review of notices of motions and motion records of all other parties; drafting amended notice of motion and preparing motion record; finalizing and serving motion record; review of amended notices of motion and amended motion records of all other parties; initial drafting of factum and ongoing legal research; detailed review of responding motion record; attendance at various cross-examinations; continue drafting factum and legal research re various issues; review of cross-examination transcripts; preparation of book of authorities; gathering of all excerpts for joint compendium; finalizing factum and book of authorities; serve and file factum and book of authorities; review of all other parties facta and authorities; review of joint book of authorities and joint compendium; review of responding factum and authorities; extensive preparation for attendance at the motion; preparing cost outline.

MOTION							
Person	**Hours**	**Actual Rate**	**Actual Total/HR**	**Subst. Rate (90% of Actual Rate)/HR**	**Subst. Total (90% of Actual Total)/HR**	**Partial Rate (60% of Actual Rate)/HR**	**Partial Total (60% of Actual Rate)/HR**
Douglas, James 2016	34.9	$865.01	$30,188.85	$778.51	$27,169.96	$519.01	$18,113.31
Douglas, James 2017	52.9	$834.16	$44,127.06	$750.74	$39,714.36	$500.50	$26,476.24
Sainsbury, Caitlin 2016	23.6	$531.77	$12,549.77	$478.59	$11,294.79	$319.06	$7,529.86
Sainsbury, Caitlin 2017	51.1	$532.25	$27,197.98	$479.03	$24,478.18	$319.35	$16,318.79
Splawski, Graham 2016	57	$334.99	$19,094.43	$301.49	$17,184.99	$200.99	$11,456.66
Splawski, Graham 2017	91.9	$387.86	$35,644.33	$349.07	$32,079.90	$232.72	$21,386.60
Smith, Sandra 2016	1.2	$285.00	$342.00	$256.50	$307.80	$171.00	$205.20
Smith, Sandra 2017	54.9	$258.36	$14,183.96	$232.52	$12,765.57	$155.02	$8,510.38
Basdeo-Kishore, Tricia 2017	33.3	$144.93	$4,826.17	$130.44	$4,343.55	$86.96	$2,895.70
TOTAL			**$188,154.56**		**$169,339.10**		**$112,892.73**

FEE ITEM: SUPPLEMENTARY SUBMISSIONS AND ATTENDANCES The hours spent, the rates sought for costs and the rate actually charged by the party's lawyer, including: ongoing communication with all counsel and the court as required; reviewing appeal facta of various parties; review of correspondence to Justice Hainey; attendance at in chambers appointment re release of decision; consider fresh evidence issues; review of various articles; attendance at Catalyst appeal of trial decision; review reasons of the Court of Appeal; exchange emails with Justice Hainey and all counsel re further attendance; review of supplementary submissions; attendance at 9:30 chambers appointment; further review of supplementary submissions; legal research

Supplementary Submissions and Attendances							
Person	**Hours**	**Actual Rate**	**Actual Total/HR**	**Subst. Rate (90% of Actual Rate)/HR**	**Subst. Total (90% of Actual Total)/HR**	**Partial Rate (60% of Actual Rate)/HR**	**Partial Total (60% of Actual Rate)/HR**
Douglas, James 2017	4.2	$895.00	$3,759.00	$805.50	$3,383.10	$537.00	$2,255.40
Douglas, James 2018	9.7	$925.00	$8,972.50	$832.50	$8,075.25	$555.00	$5,383.50
Sainsbury, Caitlin 2017	10.7	$550.00	$5,885.00	$495.00	$5,296.50	$330.00	$3,531.00
Sainsbury, Caitlin 2018	18.6	$580.00	$10,788.00	$522.00	$9,709.20	$348.00	$6,472.80
Splawski, Graham 2017	1.8	$372.41	$670.34	$335.17	$603.30	$223.45	$402.20
Splawski, Graham 2018	5.9	$405.00	$2,389.50	$364.50	$2,150.55	$243.00	$1,433.70
Smith, Sandra 2018	5.8	$320.00	$1,856.00	$288.00	$1,670.40	$192.00	$1,113.60
TOTAL			**$34,320.34**		**$30,888.30**		**$20,592.20**

LAWYER'S CERTIFICATE

I CERTIFY that the hours claimed have been spent, that the rates shown are correct and that each disbursement has been incurred as claimed.

Date: May 30, 2018

CAITLIN SAINSBURY

APPENDIX "A"

Non-Taxable Disbursements	
Notice of Appearance/Intent to Defend	$144.00
Notice of Motion	$160.00
Sub-Total Non-Taxable Disbursements	**$304.00**
Non-Taxable Disbursements	
Fax Pages	$8.25
Photocopies and Printing	$314.58
Quicklaw Searches	$490.00
Westlaw Searches	$804.00
Laser Printing	$2,501.50
Binding Charges	$463.20
Scanning Cost	$114.30
Sub-Total Taxable Disbursements	**$4,695.83**
HST on Taxable Disbursements	**$610.46**
Sub-Total Taxable Disbursements & HST	**$5,306.29**
TOTAL DISBURSEMENTS & HST	**$5,610.29**

E&OE

TAB
3

AMENDED THIS May 30, 2017 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☑ RULE/LA RÈGLE 26.02 (A)
☐ THE ORDER OF _____
L'ORDONNANCE DU
DATED/ FAIT LE _____
C. Irwin
REGISTRAR Registrar
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

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

AMENDED AMENDED AMENDED STATEMENT OF CLAIM

TO THE DEFENDANT(S):

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES,

LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $1,000.00 for costs, within the time for serving and filing your Statement of Defence, you may move to have this proceeding dismissed by the Court. If you believe the amount claimed for costs is excessive, you may pay the Plaintiff's Claim and $400.00 for costs and have the costs assessed by the Court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date May 31, 2016 Issued by "M. Godin"
Local Registrar

Address of court office: 330 University Avenue,
7th Floor
Toronto ON
M5G 1R7

TO: **NORTON ROSE FULLBRIGHT CANADA LLP**
Suite 3800, Royal Bank Plaza
South Tower, 200 Bay Street
P.O. Box 84
Toronto ON M5J 2Z4

Orestes Pasparakis
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Lawyers for the Defendant,
VimpelCom Ltd.

CLAIM

1. The Plaintiff claims:

(a) against the Defendants VimpelCom Ltd. ~~and,~~ UBS Securities Canada Inc. and Globalive Capital Inc., on a joint and several basis, damages in the amount of ~~$750,000,000~~ $1,300,000,000 for breach of contract and breach of confidence;

(b) against the Defendants Globalive Capital Inc., Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64 NM Holdings LP, LG Capital Investors LLC, Serruya Private Equity Inc., Novus Wireless Communications Inc., West Face Capital Inc., UBS Securities Canada Inc., ~~and Mid-Bowline Group Corp.,~~ on a joint and several basis:

(i) damages in the amount of ~~$750,000,000~~ $1,300,000,000 for misuse of confidential information, conspiracy, and inducing breach of contract; and

(ii) Punitive damages in the amount of $1,000,000;

(c) Against the Defendants John Doe #1 LP, John Doe #2 LP, and John Doe #3 LP, an Order tracing any portion of the proceeds from the sale of Wind (defined below) that were transferred to them by the Conspirators;

~~(c)~~(d) against all of the Defendants on a joint and several basis:

(i) Prejudgment and postjudgment interest in accordance with sections 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;

(ii) The costs of this action, plus the applicable taxes; and

(iii) Such further and other relief as to this Honourable Court may seem just.

The Plaintiff – The Catalyst Capital Group Inc. ("Catalyst")

2. Catalyst is a corporation with its head office located in Toronto, Ontario. Catalyst is widely recognized as the leading firm in the field of investments in distressed and undervalued Canadian situations for control or influence, known as "special situations investments for control".

The Defendants

3. VimpelCom Ltd. ("VimpelCom") is a company subsisting under the laws of the Netherlands in the field of telecommunications services. Its headquarters is located in Amsterdam, Netherlands.

4. Globalive Capital Inc. ("Globalive") is private equity corporation based in Toronto. Globalive was one of the founders of Wind Mobile Canada ("Wind").

5. UBS Securities Canada Inc. ("UBS") is an investment bank that provides advisory services to clients.

6. Tennenbaum Capital Partners LLC ("Tennenbaum") is an alternative investment management firm headquartered in Los Angeles, California.

7. 64NM Holdings GP, LLC ("64NM GP") is the general partner of 64NM Holdings, LP ("64NM LP"), a limited partnership organized under the laws of the State of Delaware in the United States of America. 64NM GP is headquartered in New York, New York. 64NM was

formed by LG Capital Investors LLC ("LG") for the purpose of participating in the acquisition of Wind.

8. Serruya Private Equity Inc. ("Serruya") is a private equity investment fund headquartered in Markham, Ontario.

9. Novus Wireless Communications Inc. ("Novus") is a telecommunications provider based in Vancouver, British Columbia.

10. West Face Capital Inc. ("West Face") is a Toronto-based private equity corporation with assets under management of approximately $2.5 billion.

~~11. Mid-Bowline Group Corp. ("Mid-Bowline") is an entity incorporated by the members of the Consortium (defined below) for the purpose of purchasing VimpelCom's interest in Wind.~~

11. John Doe #1 LP, John Doe #2 LP and John Doe #3 LP are limited partners of Tennebaum, 64 NM GP, 64NM LP, LG and West Face. The Defendants refuse to disclose the identities of the limited partners. The Plaintiff will substitute the actual names after they are disclosed.

Wind Mobile's Inception

12. Wind was founded in 2008. It acquired Advanced Wireless Services spectrum licences during an auction open to small entrants in Canada's telecommunications industry held by the Government of Canada.

13. Wind was initially jointly owned by Globalive and Orascom Telecom Holdings ("Orascom") through a holding company called Globalive Investment Holdings Corp. ("GIHC"). Globalive indirectly held 67% of Wind's voting shares and 34% of its total equity. Orascom

indirectly held 100% of Wind's non-voting shares, 32% of its voting shares and 65% of its total equity. The remaining 1% of Wind's voting shares and total equity was held by a former Orascom employee.

14. In 2011, VimpelCom acquired the majority shareholder of Orascom, and, as a result, acquired Orascom's interest in GIHC and Wind.

15. In June 2012, VimpelCom and Globalive entered into negotiations to determine whether one could buy the other's interest in Wind. As the negotiations progressed, VimpelCom became increasingly interested in acquiring Globalive's interest in Wind and the parties ultimately entered into a share purchase agreement whereby VimpelCom agreed to purchase Globalive's equity in Wind. Ultimately, VimpelCom could not secure the required regulatory approval from Industry Canada ("IC") to purchase Globalive's equity and the agreement was terminated.

VimpelCom Intends to Exit Wind

16. In early 2013, VimpelCom engaged UBS for the purpose of finding a purchaser for its debt and equity interests in Wind.

17. At all material times, UBS was VimpelCom's agent for the purpose of finding a purchaser for VimpelCom's debt and equity interests in Wind and completing the transaction.

18. ~~17.~~ By the fall of 2013, VimpelCom had financed Wind's capital purchases and operating expenses through shareholder loans that Wind could not repay. As a result of Wind's massive debts owed to VimpelCom, VimpelCom controlled the sale process for Wind despite only owning a minority voting interest in the company.

19. ~~18.~~ In the fall of 2013 and winter of 2014, several parties, including Catalyst, expressed an interest in purchasing VimpelCom's interest in Wind.

20. ~~19.~~ VimpelCom negotiated with numerous bidders in 2013, including Verizon Wireless, a U.S. wireless company, and Birch Hill, a private equity firm.

21. ~~20.~~ In December 2013, Catalyst negotiated in earnest potential terms for a deal with VimpelCom to acquire its interest in Wind. On January 2, 2014, Catalyst delivered a letter of intent to VimpelCom whereby it offered to purchase Globalive Wireless Management Corp. for C$550,000,000, all-cash on closing. VimpelCom did not accept Catalyst's offer.

Globalive Seeks a Financier

22. ~~21.~~ At the same time as VimpelCom was seeking to sell its interest in Wind, and entirely separate from that process, Globalive approached a number of parties, including Catalyst, in an attempt to find capital to purchase VimpelCom's shares in Wind. Globalive wanted to control the identity of the other shareholder of Wind.

23. ~~22.~~ Anthony Lacavera ("Lacavera") is the principal of Globalive. At all material times, Lacavera was the former chief executive officer of Wind. Lacavera directed Globalive to seek out funding to purchase VimpelCom's shares in Wind.

VimpelCom Writes Down its Investment in Wind

24. ~~23.~~ On March 6, 2014, VimpelCom announced that it had written off its investment in Wind as a result of challenges it was facing in the Canadian market. It was apparent to all bidders that VimpelCom was motivated to sell its share in Wind. It was also widely known to all

bidders that if VimpelCom did not receive a suitable offer for its interest in Wind, it would likely push Wind into insolvency proceedings.

25. ~~24.~~ VimpelCom continued to aggressively pursue purchasers for its interest in Wind. Given the nature of the sale process and the fact that Wind was a privately held company, VimpelCom demanded that interested bidders execute a non-disclosure agreement.

Catalyst Executes Confidentiality Agreement and Continues Negotiations with VimpelCom

26. ~~25~~. In March 2014, Catalyst re-engaged with VimpelCom through UBS.

27. ~~26.~~ On March 23, 2014, Catalyst executed a confidentiality agreement with VimpelCom and Global Telecom Holding S.A.E (the "Confidentiality Agreement"). The Confidentiality Agreement was intended in part, to protect the confidentiality of information exchanged during the diligence process. It also mandated complete confidentiality over the sale process:

> Agreement and Related Negotiations. Each Party agrees that, unless required (pursuant to the advice of reputable outside legal advisors) by applicable law or by the rules of any national stock exchange on which such Party's securities are listed or by any competent regulator authority (in any such case such Party will promptly advise and consult with the other Party and its legal advisers prior to such disclosure), without the prior written consent of the other Party, such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement.

28. VimpelCom, Global Telecom Holding S.A.E and Catalyst are parties to the Confidentiality Agreement.

29. UBS was also bound by the terms of the Confidentiality Agreement:

> "**Authorized Person**" shall mean, in relation to a Party, any Affiliate, agent, director, officer, employee, representative or professional advisor (including without limitation legal advisors, auditors and accountants) and potential financing sources and the professionals advisors of such Party, excluding in relation to the Company only, the Dave Entities.

30. Pursuant to the Confidentiality Agreement, UBS could not reveal, *inter alia*, that Catalyst and VimpelCom were in negotiations to anyone other than a Party or Authorized Person, as defined by the Confidentiality Agreement.

31. ~~27.~~ Between March and May of 2014, Catalyst and UBS negotiated terms upon which Catalyst would acquire VimpelCom's interest in Wind.

Wind Defaults on Vendor Debt and Catalyst Negotiations Continue

32. ~~28.~~ On May 1, 2014, Wind defaulted on $150 million in vendor debt. It had until May 30, 2014 to cure the default.

33. ~~29.~~ On May 6, 2014, Catalyst and VimpelCom agreed to preliminary terms for an acquisition of Wind: Catalyst would purchase Wind based on an enterprise value of ~~$300 million~~ $1.3 billion, with a closing date of no later than May 30, 2014.

34. ~~30.~~ Catalyst's review of documents stored in VimpelCom's confidential "data room" commenced on May 9, 2014, after its meeting with Wind's management in Toronto.

35. ~~31.~~ Catalyst negotiated with VimpelCom and its advisors, UBS and Bennett Jones LLP, throughout May and June of 2014, but it could not finalize terms of a share purchase agreement during this period.

Other Suitors Pursue Transaction with VimpelCom

36. ~~32.~~ At the same time that Catalyst was negotiating with VimpelCom, VimpelCom was negotiating with other parties, including Tennenbaum and West Face.

37. ~~33.~~ In May 2012, Tennenbaum, together with an unknown partner, acquired certain vendor debt owed by Wind. During 2013 and 2014, Tennenbaum and its partner reached out to VimpelCom and Wind to offer to provide additional debt and equity capital to fund the business.

38. ~~34.~~ After Wind defaulted on its vendor debt on May 1, 2014, including the debt owed to Tennenbaum, VimpelCom informed Tennenbaum that it was selling its stake in Wind. Tennenbaum met with Wind's management in early May 2014 and started negotiating a proposal to acquire Wind. Tennenbaum's negotiations continued through May and June 2014.

39. ~~35.~~ While Tennenbaum negotiated with VimpelCom, it also began building a consortium of equity partners, including Oak Hill, Blackstone and LG. This initial consortium was permitted to conduct diligence on Wind.

40. ~~36.~~ In May 2014, West Face separately conducted diligence and negotiated with VimpelCom regarding a potential purchase of VimpelCom's interest in Wind.

41. ~~37.~~ West Face was unable to pursue the transaction on its own. In June 2014, it reached out to a strategic partner and worked with that partner on a potential acquisition of Wind, but ultimately the strategic partner backed out.

Catalyst Enters Into Exclusivity With VimpelCom

42. ~~38.~~ In July 2014, Catalyst reached a critical point with VimpelCom such that a deal was imminent. In an effort to control the negotiations, Catalyst proposed that the parties enter into an

exclusivity agreement which would allow Catalyst and VimpelCom to continue negotiating for a defined period without the possibility of a competing bid interfering with those negotiations.

43. ~~39.~~ On July 23, 2014, Catalyst and VimpelCom entered into an exclusivity agreement that provided for exclusive negotiations between the parties (the "Exclusivity Agreement"). The Exclusivity Agreement contained the following express and implied terms:

> (a) VimpelCom and Catalyst shall and shall cause their respective Affiliates to deal exclusively with each other in connection with the Transaction and VimpelCom shall use its reasonable efforts to ensure that GWMC and its subsidiaries deal exclusively with Catalyst and its respective Affiliates in connection with the Transaction;
>
> (b) VimpelCom shall not, shall ensure that its Affiliates will not, and shall use its reasonable efforts to ensure that GWMC and its subsidiaries do not, directly or indirectly, through any of its or their respective Representatives, solicit or encourage offers from, participate in any negotiations or discussions with, enter into any agreements with, or furnish any information to, any person regarding any alternative transaction to the Transaction (including but not limited to an acquisition, merger, arrangement, amalgamation, other business combination, joint venture or equity or other financing) involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets (an "Alternative Transaction");
>
> (c) VimpelCom shall, shall cause its Affiliates and its and their respective Representatives to and shall use its reasonable efforts to ensure that GWMC and its subsidiaries, (A) discontinue or cause to be discontinued any existing activity of the nature described in Section 2(a), including but not limited to precluding access to any due diligence data room (except for access provided to Catalyst and its Representatives) and (B) enforce and not release any third party from, or otherwise waive, any standstill covenants or obligations owed by any such third party to VimpelCom and/or its Affiliates and/or GWMC or its subsidiaries under any confidentiality agreement entered into with respect to a potential Transaction involving GWMC or any of its subsidiaries, their respective voting or equity shares or any of their respective material assets; and

(d) VimpelCom and Catalyst would undertake to negotiate with each other in good faith during the exclusivity period and would not take any steps to undermine the purpose and intent of the Exclusivity Agreement.

44. Pursuant to the Exclusivity Agreement, VimpelCom and its agents and advisors, including UBS, were not permitted to negotiate with any party other than Catalyst during the term of the Agreement.

45. ~~40.~~ The Exclusivity Agreement also required that the parties and their agents and advisors, including UBS, keep the existence and terms of the Exclusivity Agreement confidential.

46. ~~41.~~ The Exclusivity Agreement is governed by the laws of the Province of Ontario.

47. ~~42.~~ VimpelCom instructed Wind's management, including Lacavera, that all discussions with any other prospective purchaser of GWMC, its subsidiaries or any of their material assets must cease until the end of the exclusivity period. Although not a party to the Exclusivity Agreement, Lacavera was obligated not to take any steps that undermined its purpose and intent.

48. ~~43.~~ Catalyst's reasonable expectation was that during the exclusivity period, VimpelCom and Lacavera could not and would not negotiate with any party, including West Face or Tennenbaum, regarding an alternative transaction, and that VimpelCom would honour its obligation to negotiate with Catalyst in good faith.

49. ~~44.~~ Catalyst also understood that during the exclusivity period, Wind's management, including Lacavera, was instructed to and was obligated to assist in exclusively attempting to conclude a deal between Catalyst and VimpelCom.

50. VimpelCom, UBS and Lacavera had no intention of abiding by the terms of the Confidentiality or Exclusivity Agreements.

Other Bidders for ~~the Consortium~~ Wind

51. Prior to July 21, 2014, Tennenbaum, West Face, LG, Serruya, and Novus engaged in discussions regarding the formation of a consortium to pursue the purchase of VimpelCom's interest in Wind (the "Consortium").

52. On July 21, 2014, West Face sought VimpelCom's permission to join the Consortium. VimpelCom consented.

53. ~~45. By July 2014, Tennenbaum, West Face, LG, Serruya, and Novus had formed a consortium to pursue the purchase of VimpelCom's interest in Wind (the "Consortium").~~The Consortium received Lacavera's and Globalive's support in the form of information provided to the Consortium by Lacavera and other senior managers of Globalive that was not provided to Catalyst.

54. At all material times, VimpelCom, UBS and Globalive knew of the existence of the Consortium and the Consortium's goal of concluding a transaction with VimpelCom for its debt and equity interests in Wind.

UBS and Globalive Inform Consortium of the Terms of the Exclusivity Agreement

55. While Catalyst and VimpelCom were negotiating the Exclusivity Agreement between July 21 to 23, 2014, Globalive and UBS revealed the state of these negotiations to Tennenbaum.

56. On July 23, 2014, UBS communicated to Oak Hill Capital ("Oak Hill"), a former member of the Consortium, Catalyst's confidential information, including the existence and

terms of the Exclusivity Agreement. UBS told Oak Hill that VimpelCom had entered into exclusivity with Catalyst at the "reserve price" and would be in exclusivity for five to seven days.

57. Oak Hill transmitted the confidential information received from UBS to Tennenbaum, LG and West Face.

58. On July 29, 2014, UBS and Globalive communicated Catalyst's confidential information to Tennenbaum, the specified date on which the term of the Exclusivity Agreement expired. Tennenbaum communicated this confidential information to West Face.

59. At all times, Tennenbaum, West Face and LG knew that information about the Exclusivity Agreement, that were communicated by UBS and Globalive was Catalyst's confidential information.

Catalyst Extends the Exclusivity Agreement

60. ~~46.~~ By way of written extensions to the Exclusivity Agreement, Catalyst and VimpelCom agreed to extend the exclusivity period to August 18, 2014.

61. ~~47.~~ On or about August 3, 2014, VimpelCom and Catalyst reached an agreement in principle for the purchase of Wind by Catalyst.

62. ~~48.~~ In violation of the Confidentiality Agreement and the Exclusivity Agreement, VimpelCom, UBS, and Globalive informed the Consortium that an agreement had been reached with Catalyst in principle.

The Consortium Forms a Conspiracy

63. ~~49.~~ On or around July 23, 2014, UBS breached the Exclusivity Agreement and revealed to the Consortium that VimpelCom had entered into the Exclusivity Agreement.

64. ~~50.~~ Further, or in the alternative, VimpelCom breached the Exclusivity Agreement and revealed to the Consortium that it had entered into the Exclusivity Agreement.

65. ~~51.~~ Together with Lacavera and Globalive, the Consortium began discussing how they might cause VimpelCom to breach the Exclusivity Agreement so as to prevent Catalyst from successfully acquiring Wind.

66. ~~52.~~ The Consortium's and Globalive's joint intention was to induce VimpelCom to breach the Exclusivity Agreement knowing that, in so doing, they would cause damage to Catalyst.

67. ~~53. In or About~~ On August 1, 2014, the members of the Consortium, Globalive, ~~and~~ Lacavera and UBS (together, the Conspirators") entered into a conspiracy. ~~t~~The predominant purpose of which was to induce VimpelCom to breach the Exclusivity Agreement, to cause VimpelCom to cease negotiating with Catalyst in good faith and to thereby cause harm to Catalyst (the "Conspiracy").

68. ~~54.~~ The following parties ~~met in in or about~~ attended a call on August ~~2016~~ 1, 2014 to discuss how to induce VimpelCom to breach the Exclusivity Agreement, as particularized below:

(a) Michael Leitner ("Leitner"), as the principal of Tennenbaum;

(b) Lawrence Guffy ("Guffy") and Hamish Burt, ("Burt") as principals of LG Capital Investors LLC ~~("LG")~~ and the manager of the managing member of 64NM GP;

(c) Greg Boland ("Boland"), Anthony Griffin ("Griffin"), Tom Dea ("Dea") and Peter Fraser ("Fraser"), as principals of West Face;

(d) Michael Serruya ("M. Serruya"), Aaron Serruya ("A. Serruya"), and Simon Serruya ("S. Serruya"), as principals of Serruya;

(e) Terence Hui ("Hui"), as principal of Novus; ~~and~~

(f) Lacavera, as the principal of Globalive ~~(together, the "Conspirators");~~ and

(g) Jonathan Herbst, on behalf of UBS (together, the "Conspirators").

69. By August 1, 2014, Globalive and UBS had communicated the following confidential information to the Conspirators:

(a) Catalyst and VimpelCom were negotiating a transaction to purchase VimpelCom's equity and debt interests in Wind;

(b) The structure of the deal that Catalyst proposed to VimpelCom;

(c) The price that Catalyst was offering to VimpelCom to purchase Wind.

(d) Catalyst and VimpelCom had entered into the Exclusivity Agreement; and

(e) The term of the Exclusivity Agreement.

70. ~~55.~~ The Conspirators knew that VimpelCom and Catalyst were party to the Exclusivity Agreement and were aware that a term of the Exclusivity Agreement was that VimpelCom could not negotiate a potential sale of its interest in Wind with any other purchaser during ~~the term of the Agreement~~ its term.

71. Between August 1 and 10, 2014, Lacavera and UBS provided confidential information to the other Conspirators concerning the state of negotiations between VimpelCom and Catalyst. In particular, Lacavera and UBS informed the other Conspirators about the structure of the deal that Catalyst believed it had with VimpelCom and the communication VimpelCom's Board of Directors were having about the negotiations with Catalyst.

72. On or about August 1, 2014, UBS and Globalive communicated the impending vote to Tennenbaum in contravention to the Confidentiality Agreement, the Exclusivity Agreement and their duty of confidence to Catalyst.

73. On August 1, 2014, Tennenbaum informed the Consortium that VimpelCom's Board of Directors intended to vote on the share purchase agreement proposed by Catalyst.

74. Tennenbaum and the other members of the Conspiracy knew that the information was confidential.

75. On August 4, 2014, the Consortium, including Lacavera, met to discuss the terms of their offer to VimpelCom to induce it to breach the Exclusivity Agreement.

76. ~~56.~~ Together, the Conspirators prepared terms of an offer to VimpelCom that were designed to induce VimpelCom to breach the Exclusivity Agreement and to cause VimpelCom to negotiate with Catalyst in bad faith during the terms of the Exclusivity Agreement. The Conspirators used their extensive knowledge of the Exclusivity Agreement to design their offer.

77. ~~57.~~ The Conspirators agreed that one of the terms they would offer to VimpelCom would be that the closing of their offer would not be conditional on any regulatory approval from IC.

The Conspirators included this term in their offer with the knowledge that Catalyst had not offered this term and would not do so.

78. ~~58.~~ Lacavera knew that the proposed offer that all the conspirators crafted would have the effect of causing VimpelCom to breach the Exclusivity Agreement and cause damage to Catalyst.

79. ~~59.~~ Leitner agreed to be the individual who would submit the terms agreed to by the Conspirators to VimpelCom. In so doing, Leitner was acting on his own behalf and on behalf of his fellow co-Conspirators, who in turn were acting for the benefit of the investments funds with which they were associated.

80. ~~60.~~ Tennenbaum is vicariously liable for all conduct of Leitner pleaded herein.

81. ~~61.~~ Lacavera agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy. Additionally, Lacavera agreed that Globalive would join the Conspiracy.

82. ~~62.~~ Globalive is vicariously liable for all conduct of Lacavera pleaded herein.

83. ~~63.~~ At all material times, Guffy was acting as principal of LG, 64NM GP and 64NM LP and agreed that LG, 64NM GP and 64NM LP would participate in the Conspiracy. Guffy agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

84. ~~64.~~ LG, 64NM GP and 64NM LP are vicariously liable for all conduct of Guffy pleaded herein.

85. ~~65.~~ At all material times, Burt was acting as principal of LG, 64NM GP and 64NM LP and agreed that LG, 64NM GP and 64NM LP would participate in the Conspiracy. Burt agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

86. ~~66.~~ LG, 64NM GP and 64NM LP are vicariously liable for all conduct of Burt pleaded herein.

87. ~~67.~~ At all material times, Boland, Griffin, Dea and Fraser were acting as principals of West Face and agreed that West Face would participate in the Conspiracy. Boland, Griffin, Dea and Fraser agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

88. ~~68.~~ West Face is vicariously liable for all conduct of Boland, Griffin, Dea and Fraser pleaded herein.

89. ~~69.~~ At all material times, M. Serruya, A. Serruya, and S. Serruya were acting as principals of Serruya and agreed that Serruya would participate in the Conspiracy. M. Serruya, A. Serruya, and S. Serruya agreed that Leitner should send an offer to VimpelCom in furtherance of the Conspiracy.

90. ~~70.~~ Serruya is vicariously liable for all conduct of M. Serruya, A. Serruya, and S. Serruya pleaded herein.

91. ~~71.~~ At all material times, Hui was acting as a principal of Novus and agreed that Novus would participate in the Conspiracy. Hui ~~instructed~~ agreed that Letiner should send an offer to VimpelCom in furtherance of the Conspiracy.

92. ~~72.~~ Novus is vicariously liable for all conduct of Hui pleaded herein.

93. At all material times, Herbst was acting on behalf of UBS and agreed that it would participate in the Conspiracy.

94. UBS is vicariously liable for all conduct of Herbst pleaded herein.

~~Misuse of Catalyst's~~ Lacavera Transmits Confidential Information ~~by~~ to the Consortium

95. ~~73.~~ While Tennenbaum and West Face were engaged in negotiations with VimpelCom beginning in May 2014, Lacavera was in constant communication with them in his capacity as Chief Executive Officer ("CEO") of Wind.

96. ~~74.~~ Lacavera had intimate knowledge of Catalyst's confidential negotiations with VimpelCom, which he received in his role as CEO of Wind, including Catalyst's regulatory strategy ~~and~~, its negotiating positions with VimpelCom and the terms of the Exclusivity Agreement ("Catalyst's Confidential Information").

97. ~~75.~~ Lacavera knew that if Catalyst was the successful bidder, it intended to terminate his position as CEO of Wind and to eliminate his equity position in the company. In order to prevent this from occurring, and contrary to his contractual obligations to Catalyst under the Confidentiality Agreement, Lacavera shared Catalyst's Confidential Information with West Face and Tennenbaum, including the fact that Catalyst was negotiating with VimpelCom with regard to Wind.

98. ~~76.~~ Between April 2014 and August 18, 2014, Lacavera repeatedly communicated Catalyst's Confidential Information to the Consortium, either jointly or to individual members of

the Consortium, to assist the Conspirators in their efforts to prevent Catalyst from successfully purchasing Wind.

~~77. The Confidential Information that Lacavera transmitted included critical information regarding Catalyst's confidential negotiation communications with VimpelCom.~~

99. After Lacavera and Globalive signed a support agreement whereby they agreed to support VimpelCom's negotiations, including the Exclusivity Agreement with Catalyst, Lacavera continued to communicate Catalyst's Confidential Information to the Consortium through Serruya.

100. ~~78.~~ Lacavera knew that ~~this~~ the information he was communicating was confidential and that information was shared with him on the condition that he not communicate this information to other parties bidding for Wind. In breach of this obligation, Lacavera shared this information with the other bidders, including West Face, to give those other bidders an unfair advantage in their pursuit of Wind.

101. ~~79.~~ The Consortium knowingly received and misused Catalyst's Confidential Information to create the Proposal and gain an unfair advantage over Catalyst in its negotiations with VimpelCom.

102. ~~80.~~ By wrongly transmitting Catalyst's Confidential Information to the Consortium, Lacavera, acting on behalf of Globalive, and, separate and apart from the interests of Wind and VimpelCom, knew that the transmission would (and did) cause damage to Catalyst.

UBS Transmits Confidential Information to the Consortium

103. UBS had intimate knowledge of Catalyst's Confidential Information, which it received in confidence by virtue of its relationship of confidence with Catalyst as VimpelCom's agent.

104. Between July 21 2014 and August 18, 2014, UBS repeatedly communicated Catalyst's Confidential Information to the Consortium, either jointly or to individual members of the Consortium, for the purpose of assisting the Conspirators in their efforts to prevent Catalyst from successfully purchasing Wind.

105. The Confidential Information that UBS transmitted included Catalyst's negotiating positions with VimpelCom, the terms of the Exclusivity Agreement, and the status of the negotiations between Catalyst and VimpelCom.

106. UBS knew that this information was confidential and that information was shared with it on the condition that it not communicate this information to other parties bidding for Wind. UBS repeatedly breached Catalyst's confidence by transmitting this information to the Consortium, including Tennenbaum and West Face, to give those other bidders an unfair advantage in their pursuit of Wind.

107. The Consortium knowingly received and misused Catalyst's Confidential Information to create the Proposal (defined below) and to gain an unfair advantage over Catalyst in its negotiations with VimpelCom.

108. UBS knowingly and willingly participated in the conspiracy by transmitting Catalyst's Confidential Information to the other Conspirators in furtherance of the Conspiracy's predominant purpose which was to induce VimpelCom to breach the Exclusivity Agreement.

109. By wrongly transmitting Catalyst's Confidential Information to the Consortium, UBS knew that the transmission would (and did) cause damage to Catalyst.

The Consortium Induces VimpelCom to Breach the Exclusivity Agreement

110. ~~81.~~ On August 6, 2014, acting in furtherance of the Conspiracy, Leitner sent a proposal to VimpelCom and UBS entitled "Superior Proposal to purchase WIND Canada" (the "Proposal"). The Proposal included the following terms:

(a) Binding commitments to purchase VimpelCom's equity and debt interests for a cash amount that approximates the net amounts distributed to VimpelCom based on the "reserve price";

(b) The proposal would not require regulatory approval and requires no engagement with regulatory authorities;

(c) The proposal would close quickly; and

(d) The Consortium would purchase Wind's Vendor Loans at par and refinance them.

111. ~~82.~~ Leitner delivered the Proposal with authorization and instructions from Tennenbaum, 64NM GP, 64NM LP, LG, Serruya, Novus, West Face, Globalive, Guffy, Burt, M. Serruya, A. Serruya, and S. Serruya, Hui, Boland, Griffin, Dea, Fraser and Lacavera.

112. ~~83.~~ In furtherance of the Conspiracy, Leitner submitted the Proposal with the intent that VimpelCom would breach the terms of the Exclusivity Agreement and prevent Catalyst and VimpelCom from completing any deal, thereby causing damage to Catalyst.

113. On August 8, 2014, West Face, in furtherance of the Conspiracy, contacted Felix Saratovsky of VimpelCom to discuss the Proposal. West Face told Saratovsky that it was sending further details about the Proposal.

VimpelCom Uses Catalyst as a Stalking Horse Bid and Causes Catalyst Harm

114. ~~84.~~ The Conspiracy had the desired effect of causing VimpelCom to breach the Exclusivity Agreement. Between August 6 and August 18, VimpelCom and UBS engaged in discussions and negotiations with the Consortium, Globalive and Lacavera over the Proposal, in breach of the Exclusivity Agreement.

115. ~~85.~~ Following receipt of the Proposal, on August 7 and 8, 2014, VimpelCom ceased negotiating with Catalyst in good faith. Instead, it used its negotiations with Catalyst as a stalking horse to improve the terms of the Proposal.

116. On or about August 8, 2014, VimpelCom instructed UBS to inform the Consortium that VimpelCom was interested in concluding a transaction with the Consortium.

117. On or about August 10, 2014, Leitner engaged in negotiations with UBS and provided details of further equity commitments to bolster the Proposal. Leitner intended that UBS transmit this information to VimpelCom in furtherance of the Conspiracy.

118. ~~86.~~ On or about August 11, 2014, VimpelCom and Catalyst contacted IC to provide an update on the negotiations. During the conference call, Catalyst and VimpelCom told IC that the "deal was done".

119. ~~87.~~ VimpelCom continually and repeatedly stalled its negotiations with Catalyst by, among other things, insisting on the need for approvals from its Board and its finance committee.

The Board and the finance committee then insisted on additional, commercially unreasonable terms with the knowledge and intent that Catalyst could not agree to these new terms.

120. While VimpelCom stalled negotiations with Catalyst, UBS, on VimpelCom's instruction, continued to communicate with the Consortium in contravention of the Exclusivity Agreement. On August 12, 2014, UBS informed Leitner of the term of the Exclusivity Agreement. and the state of negotiations between Catalyst and VimpelCom.

121. ~~88.~~ Despite the representations to IC on August 11, 2014 that the deal was, in fact, done, on or about August 15, 2014, VimpelCom demanded that Catalyst agree to a $5-20 million break-fee to be paid in the event that Catalyst's purchase of Wind did not receive regulatory approval. Prior to this date, VimpelCom had never requested a break fee from Catalyst.

122. ~~89.~~ VimpelCom's intention was to frustrate and defeat the purpose and intent of the Exclusivity Agreement so that its exclusivity period with Catalyst would expire without a signed agreement. While doing so, VimpelCom and the Conspirators continued to negotiate and discuss the terms of an agreement.

Exclusivity ~~W~~with Catalyst Ends

123. ~~90.~~ On August 19, 2014, the exclusivity between VimpelCom and Catalyst terminated without a signed agreement.

124. ~~91.~~ 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.

Harm to Catalyst

125. ~~92.~~ As a result of VimpelCom, UBS and Lacavera's breaches of the Confidentiality Agreement, the Exclusivity Agreement, and their duties of confidence, the Conspiracy was formed with the intent of harming Catalyst.

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

127. ~~94.~~ 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 ~~$750,000,000~~ $1,300,000,000, thereby crystallizing Catalyst's damages as a result of the Conspirators' and VimpelCom's wrongful conduct, as described above.

Catalyst Discovers the Conspiracy in January 2015

128. ~~95.~~ In December 2014, Mid-Bowline commenced an application to seek Court approval of a plan of arrangement pursuant to which Shaw intended to acquire all of the equity in Mid-Bowline~~. The application~~ (the "Arrangement Proceeding"). The Arrangement Proceeding originally sought a release of an unrelated claim by Catalyst to a constructive trust over West Face's interest in Wind.

129. ~~96.~~ In January 2015, Catalyst brought a motion to oppose the ~~plan of arrangement.~~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.

130. ~~97.~~ 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.

131. ~~98.~~ 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.

132. ~~99.~~ 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 throughout the exclusivity period.

Damage to Catalyst

133. ~~100.~~ As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst has suffered damages, which are crystallized in the form of the profits realized by the Conspirators from the sale of Wind to Shaw, which Catalyst estimates to ~~$750,000,000~~ $1,300,000,000~~.~~ (the "Proceeds").

Distribution of Proceeds

134. The Plaintiff initially opposed the Arrangement Proceeding. During January and February 2016, the Plaintiff negotiated an agreement with the Applicants to withdraw its continued opposition to the Arrangement Proceeding in exchange for, among other things, the

right to pursue tracing claims against parties that received proceeds from the sale of Wind to Shaw.

135. On or about April 5 2017, the Plaintiff discovered, for the first time, that West Face had distributed a significant portion of the Proceeds to its limited partners after this action was commenced.

136. West Face refuses to disclose the identity of the limited partners in receipt of the distributed Proceeds.

137. Other Conspirators, including Tennenbaum, LG, 64NM, and Serruya, have also distributed their share of the wrongfully acquired Proceeds to their limited partners. Despite requests from the Plaintiff, the Conspirators have not disclosed the identity of the limited partners who received distributions of the proceeds. The Plaintiff do not know the identities of the recipients of the distributed Proceeds at this time.

138. John Doe #1 LP, John Doe #2 LP and John Doe #3 LP are wrongfully in receipt of any share of the Proceeds. The Proceeds were obtained by the Conspirators by unlawful means.

139. John Doe #1 LP, John Doe #2 LP and John Doe #3 LP received their share of the Proceeds with knowledge of the Plaintiff's claim against the Defendants and its entitlement to Proceeds.

Punitive Damages

~~134.~~140. ~~101.~~ Catalyst claims that the Defendants' egregious actions, as pleaded above, were so high-handed, wilful, wanton, reckless, contemptuous and contumelious of Catalyst's

rights and interests so as to entitle Catalyst to a substantial award of punitive, aggravated and exemplary damages.

~~135.~~141. ~~102.~~ Accordingly, the Defendants are liable, on a joint and several basis, to Catalyst for $1 million in punitive damages.

Service *Ex Juris*

~~136.~~142. ~~103.~~ The Defendants' actions include torts committed in Ontario. At all material times, the Defendants carried on business in Ontario. The matters at issue in this proceeding concern contracts entered into and governed by the laws of Ontario.

~~137.~~143. ~~104.~~ Pursuant to the terms of the Exclusivity Agreement, VimpelCom attorned to the jurisdiction of the courts of the Province of Ontario.

~~138.~~144. ~~105.~~ Catalyst pleads reliance on Rule 17.02(f), (g) and (p) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194.

~~139.~~145. ~~106.~~ Catalyst proposes that this action be tried at Toronto.

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Plaintiff

-and-

VIMPELCOM LTD. et al.
Defendant

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

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

AMENDED AMENDED AMENDED
STATEMENT OF CLAIM

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TAB
4

Paras. 43, 86

2018 ONSC 2471
Ontario Superior Court of Justice [Commercial List]

The Catalyst Capital Group Inc. v. VimpelCom Ltd.

2018 CarswellOnt 6161, 2018 ONSC 2471

THE CATALYST CAPITAL GROUP INC. (Plaintiff / Responding Party) 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 Parties)

Hainey J.

Heard: August 16, 2017; August 17, 2017; August 18, 2017; April 16, 2018
Judgment: April 18, 2018
Docket: CV-16-11595-00CL

Counsel: Rocco DiPucchio, Andrew Winton, Brad Vermeersch, David Moore, for Catalyst Capital Group Inc.
Kent Thomson, Matthew Milne-Smith, Andrew Carlson, for West Face Capital Inc.
James D.G. Douglas, Caitlin R. Sainsbury, Graham Splawski, for Globalive Capital Inc.
Orestes Pasparakis, Rahool Agarwal, Michael Bookman, for VimpelCom Ltd.
Michael Barrack, Kiran Patel, Daniel Szirmak, for Tennenbaum Capital Partners LLC, 64NM Holdings GP LLC, 64NM Holdings LP, LG Capital Investors LLC
Junior Sirivar, Jacqueline Cole, for Novus Wireless Communications Inc.
Daniel S. Murdoch, for UBS Securities Canada Inc.
Jameel Madhany, for Serruya Private Equity Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Headnote
Bankruptcy and insolvency
Business associations
Civil practice and procedure
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s. 182 — considered

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Generally — referred to

Privacy Act, R.S.B.C. 1996, c. 373

Generally — referred to

Rules considered:

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

R. 21.01(1)(a) — considered

***Hainey J.*:**

Overview

Nature of the Motions

1 The defendants move to dismiss, permanently stay, or strike the statement of claim of The Catalyst Capital Group Inc. ("Catalyst") on the basis of:

(a) Issue Estoppel;

(b) Cause of Action Estoppel; and

(c) Abuse of Process.

2 The defendants, VimpelCom Ltd. ("VimpelCom") and UBS Securities Canada Inc. ("UBS") also move to dismiss Catalyst's claim on the ground that it is barred against them by a court-ordered release.

3 UBS and Globalive Capital Inc. ("Globalive") also move to strike Catalyst's statement of claim for breach of contract on the ground that it discloses no reasonable cause of action against them.

4 Although Globalive challenged Catalyst's jury notice this was not argued on the motion and I do not intend to deal with it.

5 Catalyst's claim in this action arises from its efforts to purchase Wind Mobile Corp. ("Wind") from VimpelCom in 2014. Catalyst alleges that certain of the defendants committed the torts of inducing breach of contract, conspiracy, and breach of confidence which prevented it from acquiring Wind. It also alleges that VimpelCom breached its exclusivity agreement and confidentiality agreement with respect to Catalyst's negotiations with VimpelCom to acquire Wind which was ultimately purchased from VimpelCom by a consortium of purchasers in September 2014 ("Catalyst's Current Action").

Parties

6 Catalyst is a Toronto-based investment firm that specializes in investments in distressed and undervalued Canadian businesses.

7 The defendants fall into two categories: (1) shareholders of Wind in 2014 ("2014 Wind Shareholders") and their advisors, and (2) the consortium that bought Wind in September 2014 ("Consortium").

8 The 2014 Wind Shareholders are as follows:

(a) VimpelCom, a telecom company based in Amsterdam; and

(b) Globalive, an investment company based in Toronto.

9 UBS is an investment bank that provided advisory services to VimpelCom with respect to the Wind transaction.

10 The Consortium includes the following defendants:

(a) West Face Capital Inc. ("West Face"), a private equity corporation headquartered in Toronto;

(b) Tennenbaum Capital Partners LLC ("Tennenbaum"), an investment management firm based in Los Angeles; 64NM Holdings GP LLC ("64NM GP"), the general partner of 64NM Holdings LP ("64NM LP"), a limited partnership organized in Delaware and headquartered in New York (together "64NM"). 64NM was formed by LG Capital Investors LLC ("LG"), an investment firm in New York (collectively referred to as the "US Investors");

(c) Serruya Private Equity Inc. ("Serruya"), a private equity investment fund headquartered in Markham; and

(d) Novus Wireless Communications Inc. ("Novus"), a telecommunications provider based in Vancouver.

Allegations

11 The main allegations in Catalyst's Current Action are as follows:

(a) Globalive and UBS owed a duty of confidence to Catalyst and breached that duty by communicating confidential information to the Consortium;

(b) The Consortium conspired amongst themselves, Globalive and UBS to induce VimpelCom to breach its exclusivity agreement with Catalyst and to enter into negotiations with them instead; and

(c) VimpelCom breached its confidentiality agreement and its exclusivity agreement with Catalyst and negotiated with the Consortium.

12 Catalyst claims damages in the amount of $1.3 billion, which is the estimated profit that the Consortium generated from the subsequent sale of Wind to Shaw Communications ("Shaw") in January 2016.

Facts

The Wind Transaction

13 Wind is a Canadian telecommunications provider formed in 2008 by Globalive and Orascom Telecom Holdings ("Orascom"). In 2011, VimpelCom bought Orascom's interest in Wind. Because VimpelCom is both a Dutch-headquartered and mostly Russian-owned company, Globalive, a Canadian company, held the majority voting equity in Wind and VimpelCom held the majority of the total equity. This was to satisfy the federal government's Canadian ownership requirements.

14 In 2012, the Canadian government relaxed restrictions on foreign control of small telecommunication companies such as Wind. VimpelCom saw this as an opportunity to buy-out Globalive to gain full control of Wind. VimpelCom and Globalive entered into a share purchase agreement whereby VimpelCom was to purchase Globalive's equity in Wind. However, the federal government refused to approve the takeover, notwithstanding the relaxed foreign ownership restrictions. In early 2013, frustrated by its experience in Canada, VimpelCom decided to sell its interest in Wind. It engaged UBS to find a buyer. VimpelCom's

asking price for the sale of its interest in Wind was based upon a $300 million enterprise value for the entire company. This was well-known within the industry. VimpelCom also made it known that if it could not sell its interest in Wind at this price it would commence proceedings under the *Companies' Creditors Arrangement Act* [1] ("CCAA") to recover its interest through Wind's insolvency.

15 In late 2013, Catalyst began negotiating with VimpelCom for the potential purchase of Wind. On March 22, 2014, Catalyst executed a confidentiality agreement with VimpelCom ("Confidentiality Agreement"), in which VimpelCom agreed to provide Catalyst with Wind's business plan, enterprise value and VimpelCom's equity structure. The Confidentiality Agreement provided, among other things, that the existence and content of the negotiations between Catalyst and VimpelCom were confidential as follows:

> Each Party agrees that ... without the prior written consent of the other Party, such Party will not, and will cause its Authorised Persons not to, disclose to any person other than the other Party and its Authorised Persons (a) the fact that discussions or negotiations are taking place with the other Party concerning the Project, (b) any of the terms, conditions or other facts related to the other Party's participation in the Project, including the status thereof, or (c) the existence of this Agreement, the terms hereof or that Confidential Information has been made available pursuant to this Agreement.

16 On May 6, 2014, after prolonged negotiations, Catalyst agreed to purchase Wind based upon an enterprise value of $300 million, with a closing date of no later than May 30, 2014. A share purchase agreement was not completed, but negotiations between Catalyst and VimpelCom continued.

17 While Catalyst was negotiating with VimpelCom, VimpelCom was also negotiating with other parties including Tennenbaum and West Face.

18 During June and July 2014, Catalyst continued to negotiate with VimpelCom to purchase Wind and made progress in the negotiations. According to Catalyst, it understood that the fact and content of its negotiations with VimpelCom were confidential pursuant to the Confidentiality Agreement.

19 On July 23, 2014, believing that they were close to a deal, Catalyst and VimpelCom entered into an agreement pursuant to which VimpelCom could only negotiate with Catalyst until July 29, 2014 ("Exclusivity Agreement").

20 By July 30, 2014, it appeared that VimpelCom and Catalyst were close to a deal. They agreed to extend the Exclusivity Agreement to August 5, 2014. On August 1, 2014, VimpelCom confirmed to Catalyst that the share purchase agreement was "substantially completed" subject to any settling details in the schedules. By August 3, 2014, Catalyst

and VimpelCom agreed that the deal was "substantially settled", subject to approval from VimpelCom's directors. This automatically extended the Exclusivity Agreement an additional five business days.

21 On August 6, 2014 the Consortium sent VimpelCom a "superior proposal" to purchase Wind which provided as follows:

> (a) Our proposal will be superior to any other offer as our proposal will not require regulatory approval...
>
> (b) Our transaction will not be a change of control of [Wind], and as a result requires no engagement with the regulatory authorities.
>
> (c) [O]ur proposal will be economically superior to any other proposal...

22 On August 7, 2014, Globalive entered into a support agreement with VimpelCom in which it agreed to sell its interest in Wind to a buyer of VimpelCom's choosing or alternatively to support VimpelCom commencing CCAA proceedings with respect to Wind if the sale did not proceed. At the time, Globalive believed the proposed Catalyst transaction was the only realistic alternative to insolvency proceedings for Wind.

23 On August 8, 2014, VimpelCom and Catalyst extended the Exclusivity Agreement to August 18, 2014.

24 On August 11, 2014, VimpelCom and Catalyst held a joint conference call with Industry Canada to advise that their deal "was done".

25 On August 15, 2014, VimpelCom advised Catalyst of the following two new demands: (1) it insisted on shortening the regulatory approval period from three months (with an automatic one-month extension) to two months, and (2) it asked for a $5-20 million break fee if the deal did not close. These new demands were the result of VimpelCom's concerns about the risk that regulatory approval for the sale of Wind to Catalyst would either not be obtained or would be significantly delayed.

26 Catalyst refused to agree to VimpelCom's two new demands and stopped negotiating with it. The exclusivity period between Catalyst and VimpelCom terminated on August 18, 2014 without a deal being concluded. As a result, VimpelCom seriously considered proceeding with CCAA proceedings.

27 On August 25, 2014, VimpelCom and the Consortium entered into an exclusivity agreement. On September 16, 2014, the Consortium concluded a deal with VimpelCom to purchase Wind for $300 million through a corporation called Mid-Bowline Group Corp. ("Mid-Bowline").

28 The benefit to VimpelCom of this transaction was that the Consortium, which included Wind's controlling shareholder, Globalive, only acquired VimpelCom's non-controlling interest in Wind. As there was no change in the control of Wind, there was no risk that the transaction would not receive regulatory approval, as none was required.

The Previous Litigation

29 In early 2014, Brandon Moyse ("Moyse") was working as a junior analyst at Catalyst. In March 2014, Moyse was assigned to Catalyst's internal "telecom" deal team following the departure of another Catalyst analyst. At the time, Catalyst's partners were considering pursuing an acquisition of Wind. Moyse worked on Catalyst's potential acquisition of Wind.

30 On May 24, 2014, Moyse resigned from Catalyst to work for West Face. Catalyst became concerned that Moyse might pass confidential information to West Face concerning the Wind opportunity and commenced an action against him and West Face on June 25, 2014 to enforce Moyse's non-competition clause in his employment agreement with Catalyst ("Moyse/West Face Action").

31 In September 2014, when the Consortium concluded its deal to purchase Wind, Catalyst amended its statement of claim in the Moyse/West Face Action to allege that Moyse had communicated confidential information to West Face about Catalyst's acquisition strategy with respect to Wind. Catalyst alleged that West Face used the confidential information it received from Moyse to successfully pursue its acquisition of Wind from VimpelCom.

32 Catalyst again amended its statement of claim in the Moyse/West Face Action in December 2014 to add claims for a constructive trust over West Face's interest in Wind and for a tracing remedy.

33 In January 2015 Catalyst brought a motion for injunctive relief to enjoin West Face from exercising any management role in Wind and to appoint a supervising solicitor to inspect West Face's computers to determine whether it had received any of Catalyst's confidential information concerning Wind from Mr. Moyse. The motion was dismissed by Glustein J. in July 2015. Catalyst's motion for leave to appeal Glustein J.'s decision was dismissed in January 2016.

The Plan of Arrangement Proceeding

34 In December 2016 the Consortium agreed to sell Wind to Shaw for $1.6 billion. Because Catalyst's claim for a constructive trust over West Face's interest in Wind had to be eliminated to enable Shaw to acquire clear title to Wind, the sale was structured to proceed by a plan of arrangement pursuant to s. 182 of the *Business Corporations Act (Ontario)* ("OBCA").

35 The plan of arrangement proceeding began before Newbould J. on January 25, 2016. [2] Catalyst took the position that the plan should not be approved so that Catalyst could amend its statement of claim in the Moyse/West Face Action because of information it's Chief Operating Officer, James Riley, had just recently obtained from the plan of arrangement application material. During oral argument that day counsel to Catalyst advised for the first time that the proposed amendment to its statement of claim was to allege that West Face had induced VimpelCom to breach the Exclusivity Agreement.

36 Justice Newbould rejected Catalyst's request. He concluded that it had known about the information since early 2015. He concluded that the plan of arrangement was fair and reasonable but he did not approve it at the time because he ordered an expedited trial of an issue as to whether Catalyst had a right to a constructive trust over West Face's interest in Wind. In his reasons for judgment in the plan of arrangement proceeding he referred to Catalyst's proposed claim against West Face for inducing the breach of the Exclusivity Agreement as follows at paras. 59 and 61:

> 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. 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.
>
> . . .
>
> 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.

37 On January 31, 2016, Catalyst withdrew its claim for a constructive trust. The trial of an issue was therefore abandoned. Justice Newbould approved the plan of arrangement on February 3, 2016. Shaw's acquisition of Wind closed on March 1, 2016.

Catalyst's Current Action

38 On June 1, 2016 Catalyst provided West Face with its statement of claim in this proceeding. This was five days before the commencement of the trial in the Moyse/West Face Action. West Face's counsel immediately wrote to Catalyst's counsel to complain that

this new action was litigation by installment and an abuse of process. Catalyst's counsel responded that para. 61 of Newbould J.'s reasons for judgment in the plan of arrangement proceeding barred Catalyst from alleging that West Face had induced a breach of the Exclusivity Agreement in the Moyse/West Face Action.

The Moyse/West Face Trial

39 Catalyst's claim against Moyse and West Face was tried before Newbould J. for six days commencing on June 6, 2016. In his reasons for judgment [3] Newbould J. described the nature of the action as follows at paras. 1-5:

> The Catalyst Capital Group Inc. ("Catalyst") brings this action against West Face Capital Inc. ("West Face") for an alleged misuse of confidential Catalyst information regarding WIND Mobile Inc. ("WIND") that Catalyst claims was obtained by West Face from the defendant Brandon Moyse who had previously worked for Catalyst before joining West Face. Catalyst claims that West Face used that confidential Catalyst information to successfully acquire an interest in WIND.
>
> Both Catalyst and West Face are Toronto-based investment management firms and have been competitors on potential deals. They were competitors in the chase for WIND.
>
> West Face was part of a consortium that acquired WIND. Before it did so, Catalyst was a bidder for WIND and had an exclusive right for a period of time to negotiate a purchase. When Catalyst failed to conclude a purchase of WIND, West Face and its consortium partners acquired an indirect interest in WIND on September 16, 2014 based on an enterprise value of WIND of $300 million.
>
> Mr. Moyse was an analyst at Catalyst for a little under two years. He left Catalyst in May 2014 and worked at West Face for three and a half weeks from June 23 to July 16, 2014. It is alleged that at some time between March 14, 2014 when Mr. Moyse first spoke to West Face and July 16, 2014 when he stopped working at West Face he gave West Face confidential information regarding Catalyst's strategy to acquire WIND that was used by West Face to structure its bid for WIND.
>
> The consortium in which West Face was a member later sold [WIND] to Shaw Communications for approximately $1.6 billion. Catalyst claims an accounting of the profits made by West Face.

40 At the outset of the trial counsel for West Face set out a series of findings of fact that he asked Newbould J. to make at the conclusion of the trial. Counsel for Catalyst did not suggest that the proposed findings of fact were not relevant or were outside of the scope of the

matters that were in issue in the trial. The defendants rely upon the following four proposed findings of fact that counsel for West Face asked Justice Newbould to make:

> (1) Catalyst would not have completed the acquisition of Wind in 2014 without obtaining regulatory concessions, including to permit it to sell Wind or its wireless spectrum to an incumbent after five years;
>
> (2) The Canadian government gave Catalyst no indication that it was willing to grant Catalyst its required regulatory concessions. Instead, the government made clear that the concessions sought by Catalyst would not be granted;
>
> (3) Catalyst intended to sign a Share Purchase Agreement with VimpelCom and then engage in a course of conduct that the Agreement specifically precluded in the period prior to closing; and
>
> (4) Catalyst failed to acquire Wind because it refused to meet VimpelCom's demands for a break fee to protect VimpelCom from regulatory risk. Catalyst made that choice based on its own assessment and on the advice of senior corporate counsel from Faskens and investment bankers from Morgan Stanley.

41 Newbould J. dismissed the Moyse/West Face Action in its entirety. He made the following findings at paras. 126-130 of his reasons for judgment:

> **Did Catalyst suffer any detriment or compensable damage?**
>
> Even if a case of misuse of confidential Catalyst information were made out, I cannot find that it caused Catalyst any detriment or damage.
>
> Catalyst has failed to establish that it suffered any detriment by any misuse of Catalyst confidential information. There is no evidence that the bid of the Consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom.
>
> On August 11, 2014, the Chairman of the Board of VimpelCom advised Mr. De Alba [Catalyst's Managing Director] that the Board was concerned about the Government's behaviour and wanted protection in case the Government did not approve the transaction. The Chairman advised Catalyst that VimpelCom insisted on a new term that provided for a $5-20 million break fee if regulatory approval was not granted within 60 days. Mr. Glassman [Catalyst's Managing Partner] was furious and told his people on August 11, 2014 as well as Mr. Levin of Faskens who was advising Catalyst that

> VimpelCom had to announce the deal publicly that day or else there would be no deal. He stated: "I am fed up. I do not want to hear a single more excuse from them." On August 14, 2014 Mr. Glassman told his people that the deal was technically dead or in deep trouble. The next day Mr. Levin advised that VimpelCom was "out to lunch and I think we should tell them." Mr. Babcock of Morgan Stanley, Catalyst's financial advisor, advised Catalyst to tell VimpelCom that "and then down communication. This needs to go past the exclusivity time and [VimpelCom] needs to see his alternatives and their terms."
>
> 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 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.
>
> For the same reason, Catalyst has not established that it suffered any damages. Catalyst has not established that but for the misuse by West Face of the confidential Catalyst information that it says West Face was given by Mr. Moyse it would have acquired WIND from VimpelCom. It was Catalyst's refusal to agree to a break fee requested by VimpelCom that caused Catalyst to end negotiations with VimpelCom.

42 In his costs endorsement, [4] in which costs were awarded to West Face on a substantial indemnity scale against Catalyst, Newbould J. stated as follows at para. 10:

> This law suit [sic] 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.

43 Newbould J.'s decision was appealed to the Court of Appeal for Ontario. Counsel suggested and I agreed to delay finalizing my decision until the Court decided the appeal. The Court of Appeal released its decision on March 22, 2018. [5] The Court dismissed Catalyst's appeal. Following the release of its decision counsel requested an opportunity to make further submissions regarding the *Court of Appeal's decision*. I agreed to receive limited written submissions and I heard oral submissions on April 16, 2018. I have taken those submissions into account in my analysis of the issues raised on these motions.

Issues

44 The issues I must decide are as follows:

> (1) Is Catalyst's Current Action barred by the doctrine of issue estoppel?
>
> (2) Is Catalyst's Current Action barred by the doctrine of cause of action estoppel?
>
> (3) Is Catalyst's Current Action barred by the doctrine of abuse of process?
>
> (4) Are the US Investors and Globalive privies to West Face for the purposes of the doctrines of issue estoppel and cause of action estoppel?
>
> (5) Can VimpelCom and UBS rely upon the plan of arrangement to bar Catalyst's Current Action against them?
>
> (6) Should Catalyst's breach of contract claims against Globalive and UBS be struck as disclosing no reasonable cause of action?

Positions of the Parties

The Defendants

45 West Face submits that Catalyst's Current Action is barred against it because of the following:

> (a) Catalyst's claims turn on issues that were decided against Catalyst in the Moyse/West Face Action and are barred by the doctrine of issue estoppel;
>
> (b) Catalyst's claims arise from the same causes of action as those asserted in the Moyse/West Face Action and are barred by the doctrine of cause of action estoppel; and
>
> (c) To allow Catalyst's Current Action to proceed would be manifestly unfair to West Face and would bring the administration of justice into disrepute. The action is therefore barred by the doctrine of abuse of process.

46 The US Investors and Globalive submit that they are privies of West Face and adopt West Face's submissions which they maintain apply to them as well.

47 Globalive also submits that Catalyst's breach of contract claim against it should be struck as disclosing no reasonable cause of action.

48 Novus and Serruya submit that Catalyst's Current Action is an abuse of process as it seeks to re-litigate issues that were already determined in the Moyse/West Face Action. Further, it asks the court to make findings of fact that directly contradict and are inconsistent with findings of fact made by Newbould J. in the Moyse/West Face Action.

49 VimpelCom and UBS submit that Catalyst's Current Action is an abuse of process for the same reasons. They also submit that the action is barred by a court-ordered release contained in Newbould J.'s order dated February 3, 2016 in which he approved the plan of arrangement with respect to Wind.

50 Globalive and UBS also submit that Catalyst's Current Action does not disclose a cause of action against them for breach of contract as there is no privity of contract between Catalyst and them to support such a cause of action.

The Plaintiff

51 Catalyst submits as follows:

> (a) The factual findings made by Newbould J. in the Moyse/West Face Action that are relied upon by the defendants are *obiter* and were not fundamental to the determination of the Moyse/West Face Action and therefore do not satisfy the test for issue estoppel;
>
> (b) Justice Newbould expressly prohibited Catalyst from asserting its inducing breach of contract claim in the Moyse/West Face Action;
>
> (c) Catalyst's Current Action will turn on the reason why VimpelCom requested the break fee after it had previously told Catalyst that the share purchase agreement was "substantially settled";
>
> (d) The causation issue in Catalyst's Current Action is entirely different from the causation issue determined by Newbould J. in the Moyse/West Face Action. The causation question in this action will boil down to whether Catalyst could have concluded a deal with VimpelCom absent VimpelCom's breach or the Consortium's interference;
>
> (e) Justice Newbould's finding that VimpelCom would not agree to a deal with Catalyst that was conditional on receiving regulatory concessions was not fundamental to his decision;
>
> (f) This action is not an attempt to impose a new legal theory of wrongdoing on the same facts. It is a new claim that arises out of different legal relationships and

conduct by West Face acting in concert with others, which give rise to distinct and separate causes of action;

(g) This action is not an effort to recast the Moyse/West Face Action. It is about whether the Consortium, Globalive and UBS conspired to induce VimpelCom to breach the Exclusivity Agreement and misused confidential information they received about Catalyst's negotiations with VimpelCom;

(h) The US Investors and Globalive are not privies of West Face because they had no "skin in the game" because an adverse result in the Moyse/West Face Action would not have affected their own interests;

(i) This action is not an abuse of process because it is not oppressive, vexatious or a scandal to the administration of justice;

(j) The plan of arrangement does not extinguish Catalyst's claims against VimpelCom and UBS. This determination cannot be made on a motion pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*;[6] and

(k) Catalyst's breach of contract claims against Globalive and UBS should not be struck because it is not plain and obvious that they cannot succeed.

Analysis

West Face's Motion

52 West Face relies upon the following three doctrines in support of its motion: (1) issue estoppel, (2) cause of action estoppel, and (3) abuse of process. In *Danyluk v. Ainsworth Technologies Inc.*[7] Binnie J. summarized the principles underlying these three doctrines at para. 18 as follows:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry ... An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.

53 West Face submits that Catalyst was required to put its best foot forward in the Moyse/West Face Action on the issue of whether West Face had improperly deprived it of the opportunity to acquire Wind and to advance all of its related claims, causes of action and

allegations against West Face in the one proceeding. West Face argues that Catalyst was not entitled to "lie in the weeds" to reserve to itself a second "bite at the cherry" on these issues.

Is Catalyst's Current Action barred by issue estoppel?

54 The Supreme Court of Canada reaffirmed the following three-part test for issue estoppel in *Danyluk* at para. 25:

> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

55 In *Martin v. Goldfarb*[8] Perell J. described issue estoppel at para. 59 as follows:

> Issue estoppel precludes a litigant from asserting a position that is inconsistent or contrary to a fundamental point decided in a past proceeding in which the litigant or his or her privies participated.

56 In *Danyluk*, the Supreme Court of Canada recognized that issue estoppel promotes the principles of finality and judicial efficiency noting at para. 54 as follows:

> Issue estoppel simply means that once a material fact such as a valid employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding.

Has the Same Question Been Decided?

57 The first part of the test in *Danyluk* requires me to determine whether the same questions were decided in the Moyse/West Face Action as must be decided in Catalyst's Current Action. Any right, question or fact determined directly by Newbould J. in the previous action may form the basis of issue estoppel. MacKenzie J. made this clear in *Dableh v. Ontario Hydro*[9] at para. 16 as follows:

> The case law cited above provides that the question must be fundamental to the decision in the earlier proceeding and that the question can be any right, question or fact distinctly put in issue and directly determined by the court in the earlier proceeding.

58 West Face makes the following submissions at para. 77 of its factum:

> ... Justice Newbould made critical findings of fact in deciding the Moyse action that are flatly inconsistent with and fatal to the claims asserted by Catalyst against West Face in the case at bar. Those findings were fundamental to Catalyst's claims in the Moyse action for breach of confidence. They defeated the causation and damages element of those claims. They were 'distinctly put in issue and directly determined by the court'. The causes of action pleaded against West Face in this action are breach of confidence, conspiracy and inducing breach of contract. All three of these torts include the requirement that the defendant's conduct actually caused damage to the plaintiff. That is, no doubt, why Catalyst pleaded in the case at bar that the conduct of the defendants did, in fact, cause it loss or harm.

59 West Face relies upon the fact that Newbould J. concluded that the members of the Consortium did not cause Catalyst to suffer any loss or harm because:

> (a) He found 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." [10]
>
> (b) He also found that there was no evidence "that the bid of the consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst. It was that position taken by VimpelCom that caused Catalyst to terminate discussions with VimpelCom." [11]
>
> (c) He also found that "Catalyst had no intention of closing a deal with VimpelCom if it could not obtain the concessions it was looking for from the Government" [12] and concluded that he had "considerable doubt of the plausibility of any theory that the Government would change its position on granting concessions based on Mr. Glassman's statements to Industry Canada or anyone else in Government." [13]
>
> (d) Justice Newbould did not accept Mr. Glassman's evidence that he expected that the Government would soften its position. He concluded that "It is difficult to accept that based on his (Mr. Glassman's) analysis the Government would soften its position. The Government never said that it would. Mr. Drysdale, the Government relations expert retained by Catalyst made clear to Catalyst that the Government had said it would not grant concessions to Catalyst and that Industry Canada, the PCO/PMO and Prime Minister Harper were entrenched on this. Mr. Acker

> of Faskens, Catalyst's lawyers, an experienced communications lawyer advised Catalyst on July 25, 2014 that the current Government had made it clear that any proposed transfer of commercial mobile spectrum to an incumbent would be subject to very close scrutiny and, in the current climate, most unlikely to succeed." [14]
>
> (e) Justice Newbould further concluded as follows at para. 131 of his reasons for judgment:
>
> > There is another reason why Catalyst has not established any damages from misuse of confidential Catalyst information. 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 condition, there was no chance that Catalyst could have successfully concluded a deal with VimpelCom.

60 Catalyst submits that these findings by Newbould J. were *obiter* and not fundamental to the determination of the Moyse/West Face Action. I do not agree with this submission for the following reasons.

61 Catalyst's failure to acquire Wind and its acquisition by the Consortium is at the heart of Catalyst's Current Action. Paragraphs 63-65 of Catalyst's Amended Amended Amended Statement of Claim ("Catalyst's Statement of Claim") allege that the Consortium formed a conspiracy "to prevent Catalyst from successfully acquiring Wind". Paragraphs 126 and 127 provide as follows:

> 126. 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.
>
> 127. 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 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.

62 Paragraph 133 of Catalyst's Statement of Claim further describes its damages as the loss of profits from the sale of Wind to Shaw as follows:

> 133. As a result of the Consortium's inducement of breach of contract and VimpelCom's breach of the Exclusivity Agreement, Catalyst has suffered damages, which are crystallized 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.

63 The damages claimed clearly flow from Catalyst's failure to acquire Wind and its acquisition by the Consortium.

64 I disagree with Catalyst's submission that this new action is "not an attempt to impose a new legal theory of wrongdoing on the same facts". In my view, that is exactly what Catalyst is attempting to do in this proceeding.

65 Because Justice Newbould determined the reason why Catalyst did not acquire Wind in the Moyse/West Face Action, Catalyst cannot now pursue a new action alleging other misconduct by West Face and the other defendants that it alleges caused its failure to acquire Wind. To succeed in this proceeding Catalyst must ask the court to make findings that are inconsistent with Newbould J.'s findings. Catalyst's failure to acquire Wind was a central issue in the Moyse/West Face Action. It is also the central issue in Catalyst's Current Action. This issue has been decided by Justice Newbould. It cannot be re-litigated in this proceeding.

66 The *Court of Appeal's decision* supports my conclusion.[15] At paras. 41 and 42 the Court described Newbould J.'s findings that Catalyst maintains were *obiter* as "germane" to Catalyst's claim and West Face's defence as follows:

> ... evidence of the dealings between West Face and the consortium on one side and the vendor of the Wind shares on the other side in August 2014 was germane to the appellant's claim and West Face's defence that it pursued its own strategies in seeking to purchase the Wind shares, which were very different from those employed by the appellant. That strategy was reflected, in part, in the unsolicited proposal to purchase the Wind shares made by West Face and the consortium in early August 2014.
>
> The trial judge heard a great deal of evidence about the dealings between the vendor of the Wind shares and West Face and the consortium, particularly in August 2014. The appellant did not object to any of this evidence and, indeed, elicited most of it. In their closing arguments at trial, counsel for the appellant and the respondents urged the

> trial judge to make certain findings in respect of the dealings between West Face, the consortium and the vendor of the Wind shares. The trial judge's findings reflect those arguments and a preference for the position put forward by the respondents. We see no unfairness to the appellant in the manner in which these issues were litigated at trial. The judge's findings of fact in respect of these issues are supported by the evidence.

67 In arriving at my view that Justice Newbould decided the same questions that would have to be decided in this proceeding I have relied upon the British Columbia Supreme Court's decision in *Foreman v. Niven*.[16] In that case, the plaintiff, Foreman, was interested in acquiring a property. He sought financing from Niven, who refused to provide the loan. Niven passed on the information he had received from Foreman about the property to a third party, Chambers, who ultimately acquired it for himself. Foreman unsuccessfully sued Chambers because the Court concluded that Foreman could never have acquired the property because he had insufficient assets to obtain the necessary financing. After the action against Chambers was dismissed, Foreman commenced a second action against Niven who successfully defended himself by relying on the doctrines of issue estoppel and abuse of process. The Court struck out Foreman's statement of claim because the issue of whether Foreman could have acquired the property had been decided in the previous case. At para. 24 of his decision Savage J. held as follows:

> As I read both the decision of the trial judge and that of the Court of Appeal, both Courts accepted as made out that Niven rejected the loan application based on Foreman's lack of net worth. Both Courts also accepted that Foreman's claims against Chambers as a fiduciary failed because he could not make out that but for any breach he would have been able to acquire the lots. In short, the issue of his credit worthiness to obtain financing for the opportunity was a central issue in the action and Foreman was unable to show that he could have obtained financing and thus have availed himself to the alleged opportunity.

68 In my view, the finding at the first trial that Foreman lacked the ability to obtain financing to buy the property is essentially the same as Newbould J.'s finding that Catalyst would never have acquired Wind because it would not agree to a break fee and it would never have received the concessions it required from the Government of Canada. This is the same question that would have to be determined in this proceeding.

69 A second case that supports my conclusion is *Dableh*. In that case, Dableh, who was an employee of Ontario Hydro, was granted a patent relating to the operation of the Candu nuclear reactor. Another employee was granted a different patent which Dableh claimed infringed his patent. Dableh sued for breach of confidence and breach of fiduciary duty in the Ontario Court General Division over the patent dispute. He later commenced a patent infringement action in the Federal Court which proceeded to trial before the Ontario Court

action. Dableh's Federal Court action was dismissed on the basis that the two patents were distinct from each other. The defendants moved to dismiss the Ontario Court action on the ground of issue estoppel. Notwithstanding that the legal issues in the two cases were different - breach of confidence in the Ontario Court action - and patent infringement in the Federal Court action - MacKenzie J. concluded at para. 16 that issue estoppel applied as follows:

> ... I am of the view that the fundamental question in the earlier proceeding and in the present action is, who invented the LIM method and resulting apparatus. Muldoon J. found that Cenanovic was the inventor. This finding was essential or fundamental for the disposition against his interest of Dableh's claim in the Federal Court action.

70 Newbould J.'s finding that Catalyst would never have acquired Wind was both essential and fundamental for the determination of the Moyse/West Face Action. It is equally essential and fundamental to the determination of Catalyst's Current Action.

71 I am therefore satisfied that the first part of the *Danyluk* test has been met.

Was the prior decision final?

72 The second part of the *Danyluk* test requires me to determine whether Justice Newbould's decision in the Moyse/West Face Action is final. When this motion was argued his decision was under appeal. As noted above, the Court of Appeal for Ontario dismissed Catalyst's appeal. [17]

73 I am satisfied that the prior decision of Newbould J. relied upon by the defendants is now final. The second part of the *Danyluk* test has been satisfied.

Are the parties to both proceedings the same?

74 West Face and Catalyst are parties to both proceedings. The third part of the *Danyluk* test is therefore satisfied.

Conclusion

75 For these reasons I have concluded that Catalyst's Current Action is barred by issue estoppel. Further, I have not identified any manifest injustice in applying the doctrine in this case that would cause me to exercise my residual discretion not to apply it. Catalyst had its opportunity to put its best foot forward in the Moyse/West Face Action in which it complained that West Face had been responsible for its failure to acquire Wind. It is not entitled to a "second bite at the cherry" in this proceeding. To deny it one cannot be said to be unjust.

Is Catalyst's Current Action barred by Cause of Action Estoppel?

76 West Face submits that Catalyst's Current Action is also barred by cause of action estoppel as a result of the rule in *Henderson v. Henderson*.[18] In that case the plaintiff was barred from asserting estate claims against his sister-in-law because he had failed to do so in previous estate litigation. Vice Chancellor Wigram of the U.K. Court of Chancery described the rule at p.319 as follows:

> I believe I state the rule of the Court correctly when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of [a] matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in a special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of the litigation, and which the parties exercising reasonable diligence, might have brought forward at the time.

77 A cause of action in the context of cause of action estoppel was described by Sharpe J. (as he then was) at para. 18 in *Las Vegas Strip Ltd. v. Toronto (City)*[19] as follows:

> It is apparent that analysis of [the] question must focus on the causes of action that were asserted in the prior proceedings. "Cause of action" does not appear to have been precisely defined in the authorities cited by the parties. Standard dictionary definitions, however, suggest that it refers to a set of facts giving rise to a legal claim or entitlement ... A claim in law sufficient to demand judicial attention; the composite of facts necessary to give rise to the enforcement of a right ... The factual circumstances which give rise to a right to sue ... The fact or set of facts which gives a person a right of action ... The fact or facts which give a person a right to judicial redress or relief against another.

Justice Sharpe's decision was upheld by the Court of Appeal for Ontario.[20]

78 The set of facts which gives Catalyst a right of action in both the Moyse/West Face Action and Catalyst's Current Action is Catalyst's failure to acquire Wind and its acquisition by the Consortium. Justice Newbould determined this issue in the Moyse/West Face Action. Catalyst was required to bring forward its "whole case" in that proceeding. It did not do so and it is therefore now barred by the doctrine of cause of action estoppel in this proceeding.

79 Catalyst submits that it was prohibited from advancing its claim for inducing breach of contract in the Moyse/West Face Action by Justice Newbould. However, I have concluded that Justice Newbould only prohibited Catalyst from asserting that claim in the trial of an issue in the plan of arrangement proceeding that was to be heard on an expedited basis in February 2016. The trial of an issue was abandoned when Catalyst withdrew its claim for a constructive trust over West Face's interest in Wind and the plan of arrangement was approved.

80 The full trial of the Moyse/West Face Action that proceeded in June 2016 was not subject to any prohibition by Justice Newbould with respect to Catalyst's claim for inducing breach of contract. My conclusion is supported by the *Court of Appeal's decision* at paras. 39 and 40 as follows:

> The appellant argues that the trial judge made a series of factual findings against the appellant in respect of the dealings between the vendor of the WIND shares and West Face and the consortium in August 2014. The appellant argues that these findings were made despite the trial judge having refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of the WIND shares to breach its agreement with the appellant in the course of those August dealings. The appellant contends that the trial judge's findings were beyond the scope of the claim as framed in the pleadings before him and were based on an inadequate evidentiary record.
>
> 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.

81 I disagree with Catalyst's submission that this proceeding involves a different causation issue and different causes of action. They are essentially the same. Catalyst is attempting to re-litigate the same causes of action in this proceeding that it did in the Moyse/West Face Action. In my view, this proceeding amounts to litigation by installment. The Supreme Court of Canada made it clear that litigation by installment is barred by cause of action estoppel in the case of *Doering v. Grandview (Town)*.[21] Doering sued the Town of Grandview for flooding on his property caused by a dam. The first action he brought, which was based upon an allegation that repairs to the dam caused the flooding, was dismissed. Doering brought a second action based upon a different theory as to why the dam caused the flooding. The Supreme Court held that the second action was barred by cause of action estoppel because it could have been brought in the original action. At para. 118 Ritchie J. stated as follows:

> [A]ll the facts which are alleged to constitute tortious conduct by the town in the present case existed when the prior action went to trial and it was there found that these facts did not support the present respondent's action for damage to his crops by water. ... Nothing had changed between the bringing of the first action and the second one except that the respondent had received advice from a soil expert who expounded the aquifer theory.

82 The same can be said about Catalyst's allegations in this proceeding. All of the facts that Catalyst relies upon in support of its claim for inducing breach of contract against West Face were well known to it long before the trial before Newbould J. In fact, Justice Newbould admonished Catalyst for choosing to "lie in the weeds" with respect to its knowledge of the facts giving rise to its claim for inducing breach of contract in his reasons for judgment in the plan of arrangement proceeding at para. 59 as set out above. I also disagree with Catalyst's submission that its current action "will turn on the reason why VimpelCom requested a break fee". Catalyst's theory as to why VimpelCom requested a break fee is based upon its allegation that VimpelCom demanded the break fee to deliberately terminate negotiations with Catalyst so that it could pursue the Consortium's proposal. To succeed Catalyst would have to ask the court to make inconsistent findings from Newbould J.'s findings because he found at para. 127 of his reasons for judgment that:

> ... There is no evidence that the bid of Consortium of August 7, 2014 was even looked at by the board of VimpelCom during the period of exclusivity with Catalyst, or that it played any part in the position taken by VimpelCom with Catalyst that it wanted a break fee from Catalyst.

83 This finding is entirely inconsistent with Catalyst's claim in this proceeding that VimpelCom demanded a break fee to terminate its negotiations with Catalyst so that it could accept the Consortium's proposal. This issue cannot be re-litigated in this proceeding.

Conclusion

84 For these reasons I have concluded that Catalyst's Current Action is barred by cause of action estoppel because it is based upon the same facts as were alleged in the Moyse/West Face Action. Some facts may have been added in this proceeding, but the issue remains the same — whether West Face was responsible for Catalyst's failure to acquire Wind. Sharpe J. came to the same conclusion in *Las Vegas Strip* when he concluded as follows at para. 23:

> In my view, the present application cannot be said to be based upon a different set of facts for the purpose of *res judicata*. Las Vegas has, in effect, subtracted certain facts from the earlier claim, those concerning the prior use of the premises, but the issue remains whether its operation is illegal under the By-law.

Is Catalyst's Action barred by Abuse of Process?

85 All of the defendants submit that Catalyst's Current Action is barred by the doctrine of abuse of process which is a more flexible doctrine than issue estoppel or cause of action estoppel and applies to all of them. The Supreme Court of Canada explained the doctrine in *Toronto (City) v. C.U.P.E., Local 79*[22] at para. 51 as follows:

> Rather than focus on the motive or status of the parties, the doctrine of abuse of process concentrates on the integrity of the adjudicative process. Three preliminary observations are useful in that respect. First, there can be no assumption that relitigation will yield a more accurate result than the original proceeding. Second, if the same result is reached in the subsequent proceeding, the relitigation will prove to have been a waste of judicial resources 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.

86 In my view, these principles apply in this case for many of the same reasons that I have relied upon to conclude that issue estoppel and cause of action estoppel applies to Catalyst's Current Action. Catalyst unsuccessfully litigated its failure to acquire Wind in the Moyse/West Face Action. Justice Newbould made findings at trial that are determinative of its claims against the defendants in this proceeding. Catalyst's Current Action advances claims that it chose not to allege in the previous action. It also seeks findings that are entirely inconsistent with Justice Newbould's findings in the Moyse/West Face Action. In my view, this constitutes an abuse of process because it would result in the relitigation of the reason why Catalyst's bid to acquire Wind failed.

87 My conclusion is supported by the Court of Appeal for British Columbia's decision in *Gonzalez v. Gonzalez*.[23] In that case Mrs. Gonzalez filed an affidavit in matrimonial proceedings that included financial information about her husband that she found on his computer. Mr. Gonzalez moved unsuccessfully before Butler J. in the matrimonial proceedings to strike those portions of her affidavit on the ground that his wife had violated his right to privacy. He later brought an action against his wife for breach of the British Columbia *Privacy Act*[24] alleging that she had breached his right to privacy by accessing the financial information on his computer. The Court of Appeal concluded that the new action constituted an abuse of process. Bennett J.A. stated as follows at paras. 25 and 32:

> In my view, the question of Mr. Gonzalez's privacy interest was the issue 'front and centre' in the litigation before Butler J. and was the issue before Wong J. The documents

> in both cases were alleged to have been obtained from a computer in Mrs. Gonzalez's home. He asserted that the computer belonged to him, that both the computer and his e-mail account were password-protected and that he had an expectation of privacy.
>
> . . .
>
> None of the circumstances discussed in *Toronto* at para. 52-53 that may have avoided a finding of abuse of process is present. Mr. Gonzalez did not argue that relitigation would yield a more accurate result. If a court hearing his civil claim were to make the same findings as Butler J., the litigation would prove to be a waste of judicial resources and unnecessary expense for the parties, particularly Mrs. Gonzalez. On the other hand, if contrary findings were reached, this inconsistency would 'undermine the credibility of the entire judicial process, thereby diminishing its authority, its credibility and its aim of finality'. Mr. Gonzalez has not shown that relitigation would 'enhance, rather than impeach, the integrity of the judicial system'.

88 The same can be said about Catalyst's attempt in this proceeding to relitigate why it failed to acquire Wind. This issue was "front and centre" in the litigation before Newbould J. It is also the main issue in Catalyst's Current Action. In my view, relitigation of this issue in this proceeding would impeach the integrity of the judicial system. It should not be permitted.

Conclusion

89 For these reasons I have concluded that Catalyst's Current Action is an abuse of process.

Are the US Investors and Globalive Privies of West Face?

The US Investors

90 The US Investors submit that they are privies of West Face by virtue of their direct and extensive involvement in the Moyse/West Face Action and their clear community of interest with West Face in defeating Catalyst's claims.

91 The question of whether a party is a privy in a previous proceeding is a fact-specific inquiry that must be made on a case-by-case basis. The Court of Appeal for Ontario in *Rasanen v. Rosemount Instruments Ltd.*.[25] concluded that the plaintiff was a privy in a prior proceeding where he had "a clear community of interest" with the party in the prior proceeding. The Court also relied upon the fact that Rasanen "had a meaningful voice, through his own evidence"[26] in the prior proceeding.

92 The US Investors actively participated in both the plan of arrangement proceeding and the Moyse/West Face trial. Michael Leitner ("Leitner"), the managing partner of

Tennenbaum and Hamish Burt ("Burt"), a member of 64NMGP, filed affidavits in the plan of arrangement proceeding in which they explained how they became involved in the Wind transaction. They denied receiving or using any of Catalyst's confidential information or that they were aware of Catalyst's regulatory strategy.

93 Leitner and Burt also submitted affidavits and testified at the Moyse/West Face trial and were cross-examined by Catalyst's counsel.

94 At trial they both confirmed that they had no knowledge regarding the status of Catalyst's negotiations with VimpelCom during Catalyst's exclusivity period. They explained how the Consortium developed its proposal to acquire Wind without any knowledge of Catalyst's acquisition strategy.

95 In his reasons for judgment, Newbould J. commented upon Leitner's and Burt's testimony. He described them both as "impressive" witnesses and accepted their evidence that the Consortium's proposal was not based upon any knowledge of Catalyst's bid or strategies. He had the following to say about their testimony at paras. 108, 114 and 116 of his reasons for judgment:

> In his affidavit, Mr. Leitner stated that the "advantage" of their August 7, 2014 proposal was to meet VimpelCom's desire for a speedy transaction that carried little to no regulatory risk to VimpelCom. It was put to him on cross-examination that he was referring to an advantage of the proposal over the Catalyst offer that was being dealt with by VimpelCom and the consortium knew from Mr. Moyse that Catalyst could not waive regulatory approval. Mr. Leitner denied this and said the advantage referred to was an advantage over the earlier proposal made by Tennenbaum ... that was for control of Wind that would require Government approval. As I read Mr. Leitner's affidavit, his explanation makes sense and I accept it. He knew that VimpelCom wanted to deal with no risk of Government rejection and it was an advantage to VimpelCom to have an offer without such a condition ...
>
> I accept the evidence of Mr. Leitner that the proposal made by him to VimpelCom on behalf of the consortium on August 7, 2014 and the ultimate deal made with VimpelCom was not based on anything that Catalyst was doing but rather was based on what Tennenbaum had concluded from its own due diligence and understanding of Wind and its prospect and of the lack of regulatory risk to what it was proposing. I accept his evidence that the lack of a need for regulatory concessions, and the lack of a need for a condition in the offer to VimpelCom of Government regulatory approval, were not based on or derived from any knowledge of what Catalyst was doing with VimpelCom or of Catalyst's regulatory strategies.

> ... Mr. Burt's evidence was that LG Capital had no knowledge of the details of Catalyst's offer or negotiations with VimpelCom. They assumed, but did not know that Catalyst's bid would be conditional on obtaining regulatory approval, because VimpelCom's standard form of agreement included such a term. I make the same findings regarding 64NM as I do with respect to Mr. Leitner.

96 The US Investors, through the participation of Leitner and Burt as witnesses at trial, clearly had a meaningful voice in the Moyse/West Face Action. Leitner and Burt were important witnesses at trial on the issue of whether the Consortium had been aware of or had taken advantage of Catalyst's acquisition strategy for Wind. Justice Newbould clearly relied upon their evidence in arriving at his decision that the Consortium was not responsible for Catalyst's failure to acquire Wind.

97 The US Investors also had a community of interest with West Face in the action, not only through Leitner's and Burt's testimony, but also by reason of their status as members of the Consortium which Catalyst alleged was responsible for its failure to acquire Wind.

Conclusion

98 For these reasons, I have concluded that the US Investors are privies of West Face for the purpose of issue estoppel and cause of action estoppel with respect to the Moyse/West Face Action.

Globalive

99 As set out above, Globalive founded Wind with Orascom in 2008 and held the majority of the voting shares of Wind. In 2011, VimpelCom acquired the majority of Wind's equity when it acquired Orascom. This ownership structure, in which Globalive was the controlling shareholder of Wind but VimpelCom held the majority equity interest, remained in place until September 2014 when the Consortium purchased VimpelCom's interest in Wind through Mid-Bowline. From 2008 until early 2015, Globalive's executives managed Wind's day-to-day operations.

100 Globalive submits that it is a privy of West Face with respect to the Moyse/West Face Action because it was a member of the Consortium and its representative, Simon Lockie ("Lockie"), Globalive's Chief Legal Officer, testified in the plan of arrangement proceeding and at the Moyse/West Face trial. Lockie testified at the Moyse/West Face trial about Globalive's relationship to VimpelCom and the Consortium, its involvement in supporting the negotiations between VimpelCom and Catalyst, the Consortium's bid for VimpelCom's interest in Wind and the regulatory environment at the time. His evidence was central to the factual matrix in the Moyse/West Face trial and was relied upon by Newbould J. in arriving

at his decision at trial. This same evidence would have to be adduced again in Catalyst's Current Action as it is highly relevant to its allegations in this proceeding.

101 Further, Newbould J. made findings of fact in the Moyse/West Face Action that related to the entire Consortium and not just West Face. This was necessary because Catalyst's allegations in the Moyse/West Face Action were directed not just at West Face, but at the Consortium as a whole. Newbould J. made key findings about the actions of the entire Consortium at paras. 105 and 122 of his reasons for judgment as follows:

> ... As a result, neither VimpelCom nor Globalive had any discussions 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.
>
> . . .
>
> The basic strategy of Catalyst was based on its belief that Wind could not survive without Government concessions that would allow Wind to sell its spectrum to an incumbent by the end of five years. Even had West face or its consortium members been told of this strategy by Mr. Moyse or anyone else, it played no part in the reasoning of West face to bid as it did by itself and later with the consortium.

102 Globalive clearly had a "meaningful voice" in the Moyse/West Face Action by reason of Lockie's participation as an important witness at trial. Further, Globalive had a clear "community of interest" with West Face in defeating Catalyst' claims against the Consortium. I am therefore satisfied that Globalive is a privy of West Face with respect to the Moyse/West Face Action.

103 My decision is supported by the decision of E. Macdonald J. in *Machado v. Pratt & Whitney Canada Inc.*.[27] In that case, the plaintiff was dismissed for cause by his employer, Pratt & Whitney, because he was alleged to have sexually harassed three other employees. The plaintiff brought a claim before the Employment Standards Branch of the Ministry of Labour, and the referee found that Pratt & Whitney had just cause to dismiss the plaintiff. The three employees were witnesses in the proceeding before the referee. The plaintiff later sued Pratt & Whitney for unjust dismissal and the three employees for conspiracy and defamatory libel. The Court found that the three employees were privies to the proceeding before the referee because they had testified in that proceeding and their evidence was central to Pratt & Whitney's defence to the claim before the referee. The action was dismissed against them on the basis of issue estoppel.

Conclusion

104 For these reasons I have concluded that Globalive is a privy of West Face for the purposes of issue estoppel and cause of action estoppel with respect to the Moyse/West Face Action.

Can VimpelCom and UBS rely upon the plan of arrangement to bar Catalyst's Current Action against them?

105 The next issue I must decide is whether the release contained in Justice Newbould's order dated February 3, 2016 approving the plan of arrangement bars Catalyst's claims against VimpelCom and UBS in this proceeding.

106 As outlined above, the sale of Wind by the Consortium to Shaw was structured to proceed by a plan of arrangement. This was to enable Shaw to obtain clear title to Wind notwithstanding Catalyst's claim for a constructive trust over West Face's interest in Wind. Ultimately, Catalyst withdrew its claim for a constructive trust and consented to Justice Newbould's order dated February 3, 2016 approving the plan of arrangement. The plan of arrangement carves out certain specified claims that Catalyst is permitted to pursue and extinguishes all other possible claims relating to the transaction in article 4.5 of the plan which reads in part 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 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.

107 VimpelCom and UBS submit that none of Catalyst's claims that are carved out in article 4.5 are applicable to its claims against them in this proceeding. They argue that the court has jurisdiction to determine this issue as a question of law and dismiss Catalyst's claim against them pursuant to Rule 21.01(1)(a) of the *Rules of Civil Procedure*. [28]

108 On a motion under Rule 21.01(1)(a), the moving party must show there is a question of law that can be determined without the adjudication of any factual issues. The court must accept all of the facts pleaded in the statement of claim as proven for the purpose of the motion. Although additional evidence may be admitted on the motion with leave of the court, VimpelCom and UBS have not sought leave to introduce any evidence on this motion.

109 In my view, the application of the release in the plan of arrangement to VimpelCom and UBS is not a pure legal question because it requires a fact — driven analysis that includes consideration of the language of the document itself, the circumstances surrounding its execution, and evidence of the intention of the parties. The Supreme Court of Canada made it clear in *Creston Moly Corp. v. Sattva Capital Corp.* [29] that the interpretation of a contract is a question of mixed fact and law "as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix". [30]

110 In order to determine the scope of the terms of the plan of arrangement including Article 4.5, the court must have regard to the facts giving rise to the plan. These facts are set out in the evidentiary record before this court for the purpose of VimpelCom's and UBS' abuse of process motions. However, I am not entitled to consider this evidence to determine their Rule 21.01(1)(a) motion. Therefore, in the absence of any evidence of the factual matrix giving rise to the terms of the plan of arrangement, I cannot determine whether it applies to VimpelCom and UBS. To do so would violate the principles of contractual interpretation set out by the Supreme Court of Canada in *Sattva*.

111 Further, it is not "plain and obvious" from the document itself that the parties who negotiated the plan of arrangement intended to extinguish any claim that Catalyst may have against VimpelCom or UBS. The intention of the plan of arrangement was to permit Shaw to purchase the shares of Mid-Bowline free from any claim that Catalyst might make concerning those shares. The plan of arrangement on its face had nothing to do with VimpelCom or

UBS who were not parties to the plan of arrangement proceeding and had no interest in its outcome.

112 Article 2.1 of the plan of arrangement provides in part as follows:

> This Plan of Arrangement shall become effective at, and be binding at and after, the Effective Time on the Corporation, Guarantor, Purchaser, the Vendors and all Persons who were immediately prior to the Effective Time holders or beneficial owners of Purchased Shares or Options.

113 VimpelCom and UBS are not included in Article 2.1. Based upon this Article, it is not plain and obvious to me that the plan of arrangement was intended to apply to claims against non-parties to the plan such as VimpelCom and UBS.

Conclusion

114 The jurisprudence is clear that this type of motion can only be granted if it is plain and obvious that the action will fail. I cannot come to this conclusion with respect to VimpelCom's and UBS' motions under Rule 21.01(1)(a) without evidence of the factual matrix in relation to the plan of arrangement and accordingly their motions for this relief are dismissed.

Should Catalyst's breach of contract claims against Globalive and UBS be struck as disclosing no reasonable cause of action?

115 Globalive and UBS submit that Catalyst's claim for breach of contract against them should be struck because it is plain and obvious that Catalyst's statement of claim does not disclose a reasonable cause of action against them for breach of contract.

116 They argue that Catalyst has not pleaded sufficient facts in its statement of claim to sustain its breach of contract claim against either of them. In *McCarthy Corp. PLC v. KPMG LLP*[31] Mesbur J. set out the following requirements for pleading breach of contract at para. 26:

> A claim for breach of contract must contain sufficient particulars to identify the nature of the contract, the parties to the contract and the facts supporting privity of contract between the plaintiff and defendant, the relevant terms of the contract, which term or terms was breached, and the damages that flow from that breach. It must also plead clearly who breached the term, and how it was breached.

117 Catalyst has not pleaded any of these elements against Globalive or UBS in its statement of claim. Globalive and UBS are not parties to either the Exclusivity Agreement or the Confidentiality Agreement. Paragraphs 28 and 43 of Catalyst's statement of claim set

out the parties to the Confidentiality Agreement and the Exclusivity Agreement and neither Globalive nor UBS are alleged to be parties to these agreements. I do not accept Catalyst's submission that VimpelCom entered into these agreements as agent for Globalive and UBS because of the definition of "Authorised Person" in the Confidentiality Agreement and that they are therefore bound by the terms of the Confidentiality Agreement. This theory is not pleaded in Catalyst's statement of claim. Further, there is no privity of contract between either Globalive or UBS and Catalyst and none is pleaded in Catalyst's statement of claim. In my view this is fatal to Catalyst's breach of contract claims against Globalive and UBS.

118 Ewaschuk J. made this clear in *Napev Construction Ltd. v. Lebedinsky*,[32] when he stated as follows:

> It is trite law that a stranger to a contract cannot be sued on that contract ... A person can be sued for breach of contract only when he or she has agreed to accept obligations or duties created by the contract.

Conclusion

119 I have concluded for these reasons that it is plain and obvious that Catalyst's breach of contract claims against Globalive and UBS cannot succeed and they should be struck. In light of the number of opportunities Catalyst has had to properly plead its breach of contract claims against Globalive and UBS (the statement of claim has already been amended three times) and the fact that there is no contract between Catalyst and either Globalive or UBS such that an amendment could produce a viable cause of action against them for breach of contract, I am of the view that I should not grant Catalyst leave to amend its statement of claim to properly plead its breach of contract claims.

Conclusion

120 For the reasons outlined above Catalyst's Current Action is dismissed as against all of the defendants as an abuse of process. It is also dismissed against West Face, the US Investors and Globalive on the grounds of issue estoppel and cause of action estoppel.

121 Catalyst's breach of contract claims against Globalive and UBS are struck without leave to amend.

122 VimpelCom's and UBS' motions to dismiss Catalyst's Current Action on the ground that it is barred against them by the release contained in the plan of arrangement are dismissed.

Costs

123 If the parties cannot settle the issue of costs they may schedule a 9:30 a.m. appointment with me to determine costs.

124 I thank all counsel for their helpful submissions.

Footnotes

1 *Companies' Creditors Arrangement Act*, R.S.C., 1985, c. C-36.

2 *Mid-Bowline Group Corp., Re*, 2016 ONSC 669, [2016] O.J. No. 434 (Ont. S.C.J. [Commercial List]).

3 *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 5271, [2016] O.J. No. 4367 (Ont. S.C.J. [Commercial List]), [*Moyse/West Face decision*"].

4 *Catalyst Capital Group Inc. v. Moyse*, 2016 ONSC 6285, [2016] O.J. No. 5210 (Ont. S.C.J. [Commercial List]).

5 *The Catalyst Capital Group Inc. v. Moyse*, 2018 ONCA 283, 130 O.R. (3d) 675 (Ont. C.A.), [*Court of Appeal's decision*].

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

7 *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), [*Danyluk*].

8 *Martin v. Goldfarb*, [2006] O.J. No. 2768, [2006] O.T.C. 629 (Ont. S.C.J.).

9 *Dableh v. Ontario Hydro*, [1994] O.J. No. 2771, 51 A.C.W.S. (3d) 836 (Ont. Gen. Div.), [*Dableh*].

10 *Moyse/West Face decision*, *supra* note 3 at para. 129.

11 *Ibid* at para. 127.

12 *Ibid* at para. 124.

13 *Ibid* at footnote 13.

14 *Ibid.*

15 *Court of Appeal's decision*, *supra* note 5.

16 *Foreman v. Niven*, 2009 BCSC 1476, [2009] B.C.J. No. 2148 (B.C. S.C.).

17 *Court of Appeal's decision*, *supra* note 5.

18 *Henderson v. Henderson* (1843), 67 E.R. 313 (Eng. V.-C.).

19 *Las Vegas Strip Ltd. v. Toronto (City)* (1996), 30 O.R. (3d) 286 (Ont. Gen. Div.), [*Las Vegas Strip*].

20 *Las Vegas Strip Ltd. v. Toronto (City)* (1997), 32 O.R. (3d) 651 (Ont. C.A.).

21 *Doering v. Grandview (Town)*, [1976] 2 S.C.R. 621 (S.C.C.).

22 *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.).

23 *Gonzalez v. Gonzalez*, 2016 BCCA 376, 91 B.C.L.R. (5th) 221 (B.C. C.A.).

24 *Privacy Act*, R.S.B.C. 1996, c. 373.

25 *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (Ont. C.A.).

26 *Ibid* at para. 47.

27 *Machado v. Pratt & Whitney Canada Inc.*, [1995] O.J. No. 1732 (Ont. Gen. Div.).

28 *Supra* note 6.

29 *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), [*Sattva*].

30 *Ibid* at para. 50.

31 *McCarthy Corp. PLC v. KPMG LLP*, [2007] O.J. No. 32 (Ont. S.C.J. [Commercial List]).

32 *Napev Construction Ltd. v. Lebedinsky*, [1984] O.J. No. 1129, 25 A.C.W.S. (2d) 149 (Ont. H.C.).

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5

2018 ONCA 283
Ontario Court of Appeal

The Catalyst Capital Group Inc. v. Moyse

2018 CarswellOnt 4307, 2018 ONCA 283, 130 O.R. (3d) 675, 291 A.C.W.S. (3d) 149, 46 C.C.E.L. (4th) 35

The Catalyst Capital Group Inc. (Plaintiff / Appellant) and Brandon Moyse and West Face Capital Inc. (Defendants / Respondents)

Doherty, J. MacFarland, D.M. Paciocco JJ.A.

Heard: February 20-21, 2018
Judgment: March 22, 2018
Docket: CA C62655

Proceedings: affirming *Catalyst Capital Group Inc. v. Moyse* (2016), 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons to *Catalyst Capital Group Inc. v. Moyse* (2016), 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Brian H. Greenspan, David C. Moore, Michelle Biddulph, for Appellant
Robert A. Centa, Kristian Borg-Olivier, Denise Cooney, for Respondent, Brandon Moyse
Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, for Respondent, West Face Capital Inc.

Subject: Civil Practice and Procedure; Intellectual Property; Public; Restitution; Torts; Employment
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.A Unfounded allegations

Intellectual property
V Trade secrets and confidential information
V.2 Elements of action
Restitution and unjust enrichment
VI Benefits arising through wrongful acts
VI.3 Breach of confidence
Torts
XIX Spoliation
Torts
XIX Spoliation

Headnote

Intellectual property --- Trade secrets and confidential information — Elements of action

Plaintiff and defendant W Inc. made separate efforts to acquire certain company — It appeared that plaintiff and principal shareholder of company had reached agreement for sale of company to plaintiff — Within days, that agreement had fallen apart and W Inc., along with other entities, had come forward with new and eventually successful bid for company — Plaintiff brought action alleging that W Inc. effectively "stole" deal from plaintiff by improperly using confidential information W Inc. obtained about plaintiff's strategies in respect of its negotiations for purchase of company — According to plaintiff's claim, confidential information came from defendant M, who had worked for plaintiff as analyst for about two years before quitting to go to work for W Inc. — In addition to claims based on misuse of confidential information, plaintiff sued defendants for spoliation — Trial judge dismissed all claims — Trial judge found, as fact, that M had not provided any confidential information to W Inc. in relation to plaintiff's negotiations for purchase of company shares — Plaintiff appealed — Appeal dismissed — Trial judge approached evidence of defendants' witnesses no differently than he did evidence of plaintiff's witnesses — No misapprehension of any material facts by trial judge was seen.

Restitution and unjust enrichment --- Benefits arising through wrongful acts — Breach of confidence

Plaintiff and defendant W Inc. made separate efforts to acquire certain company — It appeared that plaintiff and principal shareholder of company had reached agreement for sale of company to plaintiff — Within days, that agreement had fallen apart and W Inc., along with other entities, had come forward with new and eventually successful bid for company — Plaintiff brought action alleging that W Inc. effectively "stole" deal from plaintiff by improperly using confidential information W Inc. obtained about plaintiff's strategies in respect of its negotiations for purchase of company — According to plaintiff's claim, confidential information came from defendant M, who had worked for plaintiff as analyst for about two years before quitting to go to work for W Inc. — In addition to claims based on misuse of confidential information, plaintiff sued defendants for spoliation — Trial judge dismissed all claims — Trial judge found, as fact, that M had not provided any confidential

information to W Inc. in relation to plaintiff's negotiations for purchase of company shares — Plaintiff appealed — Appeal dismissed — Trial judge approached evidence of defendants' witnesses no differently than he did evidence of plaintiff's witnesses — No misapprehension of any material facts by trial judge was seen.

Torts --- Spoliation

Plaintiff and defendant W Inc. made separate efforts to acquire certain company — It appeared that plaintiff and principal shareholder of company had reached agreement for sale of company to plaintiff — Within days, that agreement had fallen apart and W Inc., along with other entities, had come forward with new and eventually successful bid for company — Plaintiff brought action alleging that W Inc. effectively "stole" deal from plaintiff by improperly using confidential information W Inc. obtained about plaintiff's strategies in respect of its negotiations for purchase of company — According to plaintiff's claim, confidential information came from defendant M, who had worked for plaintiff as analyst for about two years before quitting to go to work for W Inc. — In addition to claims based on misuse of confidential information, plaintiff sued defendants for spoliation — This claim arose out of M's destruction of what plaintiff claimed was relevant evidence contained on M's cellphone and his personal computer — Trial judge dismissed all claims — Plaintiff appealed — Appeal dismissed — Trial judge found as fact that M did not destroy relevant evidence — Plaintiff had not established any basis upon which court could interfere with that factual finding — That finding put end to any argument that M's deletion of data from his computer and cellphone supported adverse inference against M or W Inc.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Trial judge dismissed plaintiff's claims, and awarded costs to defendant W Inc. on substantial indemnity basis and costs to defendant M on partial indemnity basis — Plaintiff brought application for leave to appeal costs order — Application dismissed — No error in principle was seen in trial judge's decision to award costs on substantial indemnity basis to W Inc. — Trial judge awarded costs on substantial indemnity basis because plaintiff chose to make very serious allegations against W Inc., maintain those allegations in face of substantial evidence refuting allegations, and in end "utterly failed" to substantiate any of claims — Trial judge made no error in exercise of his discretion in considering impact of M's conduct on costs award.

Table of Authorities

Cases considered:

Robb Estate v. Canadian Red Cross Society (2001), 2001 CarswellOnt 4159, 152 O.A.C. 60, 9 C.C.L.T. (3d) 131, [2001] O.T.C. 352 (Ont. C.A.) — referred to

APPEAL by plaintiff from judgment reported at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 5271, 2016 CarswellOnt 13362, 35 C.C.E.L. (4th) 242 (Ont. S.C.J. [Commercial List]), dismissing plaintiff's claims; APPLICATION by plaintiff for leave to appeal from

judgment reported at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293 (Ont. S.C.J. [Commercial List]), concerning costs.

***Per curiam*:**

I

1 The appellant, The Catalyst Capital Group Inc. ("Catalyst"), and the respondent, West Face Capital Inc. ("West Face"), two investment management firms, made separate efforts to acquire WIND Mobile Inc. ("WIND") in 2014. In early August, it appeared that Catalyst and the principal shareholder of WIND had reached an agreement for the sale of WIND to Catalyst. Within days, that agreement had fallen apart and West Face, along with other entities (the "consortium") had come forward with a new, and eventually, successful bid for WIND. The consortium and West Face later sold WIND for a very substantial profit to Shaw Communications.

2 In this lawsuit, Catalyst alleged that West Face effectively "stole" the WIND deal from Catalyst by improperly using confidential information West Face obtained about Catalyst's strategies in respect of its negotiations for the purchase of WIND. According to Catalyst's claim, the confidential information came from the respondent, Brandon Moyse ("Mr. Moyse"). He had worked for Catalyst as an analyst for about two years until May 2014 when he quit Catalyst to go to work for West Face.

3 Mr. Moyse had worked on the WIND file while at Catalyst, although the extent of his involvement in the file was a matter of dispute in the evidence. He also actively pursued employment with West Face while at Catalyst and while involved in Catalyst's attempts to acquire WIND.

4 In the lawsuit, Catalyst alleged that the misuse of confidential information by West Face and Mr. Moyse caused damage to Catalyst. Catalyst also sought an accounting of the profits made by West Face and the consortium when Shaw Communications purchased WIND from the consortium.

5 In addition to the claims based on the misuse of confidential information, Catalyst sued West Face and Mr. Moyse for spoliation. This claim arose out of Mr. Moyse's destruction of what Catalyst claimed was relevant evidence contained on Mr. Moyse's cellphone and his personal computer. Catalyst advanced spoliation as a distinct tort claim, alleging damages equal to Catalyst's costs in pursuing the misuse of confidential information claim. Catalyst also advanced spoliation as an evidentiary rule available to assist Catalyst in proving the misuse of confidential information by West Face and Mr. Moyse.

6 The trial judge dismissed all claims. He awarded costs to West Face on a substantial indemnity basis and costs to Mr. Moyse on a partial indemnity basis. Catalyst appeals from the dismissal of its claims and seeks leave to appeal from the costs order.

7 At the end of oral argument, the court dismissed Catalyst's appeal from the judgment dismissing the action and reserved judgment on the costs-related appeals. These reasons address both.

II

8 To succeed on the misuse of confidential information claim, Catalyst had to prove that:

- Mr. Moyse gave confidential information concerning Catalyst's bid to purchase WIND to West Face;
- West Face used that confidential information when pursuing its bid for WIND; and
- The misuse of that confidential information caused detriment to Catalyst.

9 Catalyst did not have direct evidence to support its allegations. It relied on a body of circumstantial evidence and primarily on the testimony of its partners, Newton Glassman, Gabriel De Alba, and James Riley.

10 On the first issue, whether Mr. Moyse had provided confidential information about Catalyst's strategies in respect of the acquisition of WIND to West Face, Catalyst relied heavily on inferences it claimed should be drawn from Mr. Moyse's conduct while he was pursuing employment with West Face, immediately after he left Catalyst to join West Face, and after this litigation was commenced. That evidence included the following:

- Mr. Moyse deliberately provided Catalyst's confidential information to West Face when he was trying to get a job with West Face. This information did not relate to WIND.
- Mr. Moyse erased emails that showed he provided that confidential information to West Face;
- Mr. Moyse erased all of the contents of the BlackBerry Catalyst had provided to him for work purposes before he returned it to Catalyst after he quit;
- Mr. Moyse made inaccurate and potentially misleading statements in affidavits filed on preliminary motions in this litigation;

• Mr. Moyse deleted his internet browsing history from his personal computer and installed programs to scrub the computer registry where deletions could otherwise be detected, in the face of a court order requiring that he turn his computer over to his lawyer so that the computer could be forensically examined for the purposes of this litigation.

11 Catalyst claimed that Mr. Moyse's conduct was consistent only with him having provided confidential information about Catalyst's proposed acquisition of WIND to West Face.

12 Mr. Moyse gave various "innocent" explanations for his conduct. West Face also led evidence that when Mr. Moyse was hired by West Face, extensive measures were taken to ensure that Mr. Moyse had no knowledge of, or involvement in, West Face's ongoing negotiations for the purchase of WIND shares. The witnesses testified that there were no breaches of this confidentiality wall during the few weeks that Mr. Moyse was actually present in the West Face offices.

13 The respondents also introduced a body of evidence, which they claimed demonstrated that no confidential information from Catalyst had been used in the ultimately successful bid for WIND. The respondents argued that the approach taken by West Face and its consortium to the acquisition of WIND, particularly with respect to the need to obtain certain concessions from the government, was fundamentally different than the approach taken by Catalyst. Consequently, West Face had no use for any information pertaining to Catalyst's strategies.

14 The respondents also defended on the basis that the appellant had not proved any damages. The respondents claimed that Catalyst's bid to acquire WIND in August 2014 failed, not because of any competing bid made by West Face and the consortium, but because Catalyst chose to terminate negotiations with the vendor of the WIND shares after the vendor demanded a significant break fee very late in its negotiations with Catalyst. The respondents contended at trial that the evidence showed that Catalyst chose to end the negotiations rather than agree to the break fee demanded by the vendor. On this argument, which did not depend on the trial judge accepting the testimony of Mr. Moyse, or the West Face witnesses, Catalyst suffered no damages or detriment, even if Mr. Moyse had given confidential information to West Face and West Face had attempted to use that information in its negotiations with the vendor of the WIND shares.

15 The trial judge gave lengthy and detailed reasons for judgment. He found against Catalyst on almost every contested factual issue. Specifically, he found (paras. 126-30) that the appellant chose to terminate its negotiations with the vendor of the WIND shares when the vendor demanded a substantial break fee.

16 In his reasons, the trial judge made strong credibility findings against the appellant's primary witnesses, particularly Mr. Glassman, and equally strong credibility findings in favour of the respondents' witnesses, including Mr. Moyse. The trial judge accepted the explanations offered by Mr. Moyse for his conduct outlined above, at para. 10. The trial judge found, as a fact, that Mr. Moyse had not provided any confidential information to West Face in relation to the appellant's negotiations for the purchase of the WIND shares.

III

17 Catalyst advanced essentially three arguments on appeal. The first asserts alleged errors in the trial judge's fact-finding process, the second alleges procedural unfairness, and the third relates to the trial judge's treatment of the spoliation arguments.

A. THE ALLEGED FACT-FINDING ERRORS

18 The appellant submits that the trial judge's factual findings cannot stand, first, because they are the product of an unfair and uneven scrutiny by the trial judge of the competing versions of the relevant events and, second, because they are tainted by several material misapprehensions of the evidence.

19 Counsel for the appellant candidly acknowledge that they face an uphill climb in their assault on the fact-finding at trial. This was a hard-fought trial. The result was almost entirely fact-driven. The trial judge's findings of fact turned on his assessment of the credibility of the key witnesses, the reliability of their evidence, and the inferences to be drawn from certain primary findings of fact. All of those tasks engage a myriad of considerations by the trial judge. His determinations are owed strong deference on appeal. The appellant must overcome that deference in the face of reasons by the trial judge that display a strong command of the evidentiary record and a full understanding of the issues and positions of the parties.

(i) The Alleged Uneven Scrutiny of the Evidence

20 In support of the uneven scrutiny argument, counsel submits that the credibility of the Catalyst witnesses was subject to a hypercritical microscopic examination by the trial judge. Any misstep or inconsistency in their testimony, no matter how apparently minor, became, for the trial judge, a reason to reject the evidence of those witnesses. In contrast, argues counsel for the appellant, the trial judge forgave or ignored similar, and much more serious, defects in the evidence of witnesses for the respondents.

21 To demonstrate the unevenness of the trial judge's consideration of the evidence, counsel compared the trial judge's treatment of Mr. Moyse's testimony with that afforded Mr.

Glassman's evidence. The appellant argues that the trial judge excused the litany of serious misconduct by Mr. Moyse, including a deliberate breach of a court order, as mere "mistakes" or "errors" explainable by Mr. Moyse's youth or his fatigue. Counsel contrasts the trial judge's benign treatment of Mr. Moyse's evidence with his aggressive rejection of Mr. Glassman's evidence on what counsel argues are much weaker and more subjective grounds.

22 The appellant submits that the trial judge totally rejected Mr. Glassman's evidence because on occasion he slipped into the role of advocate when testifying and overstated certain matters. Counsel submits that even if this characterization is accurate, Mr. Glassman's transgressions pale beside the egregious misconduct of Mr. Moyse. Counsel submits that the trial judge's complete acceptance of Mr. Moyse's evidence and his total rejection of Mr. Glassman's evidence can be explained only by the application of very different levels of scrutiny to their testimony.

23 Counsel devoted much of their oral argument to their uneven scrutiny submission. They referred to various examples from the trial judge's reasons, which they claimed demonstrated his uneven scrutiny of the evidence.

24 Counsel's submissions make a case for different credibility and reliability assessments than those made by the trial judge. Unfortunately for the appellant, that is not enough to warrant appellate intervention. It is not for this court to consider what alternative findings may have been reasonably available on the trial record.

25 The trial judge approached the evidence of the respondents' witnesses no differently than he did the evidence of the appellant's witnesses. The trial judge's reasons must be considered in their entirety. Mr. Moyse's evidence that he did not provide confidential information concerning the WIND negotiations to West Face did not stand alone. The evidence found considerable, largely uncontradicted support in the testimony of the West Face witnesses. It also gained some inferential support in the trial judge's findings as they related to the West Face strategy in respect of the WIND negotiations, and the ultimate reason for the breakdown of the negotiations between the appellant and the vendor of the WIND shares.

26 The trial judge was alive to the details of the evidence said to demonstrate Mr. Moyse's dishonesty and the unreliability of his evidence. He appreciated the appellant's argument and the need to carefully and critically examine Mr. Moyse's evidence. The trial judge examined the evidence at length, particularly as it related to the allegation that Mr. Moyse had deliberately deleted material from his personal computer and installed programming to hide that deletion and prevent any recovery of the material. In the end, the trial judge accepted Mr. Moyse's explanations for what he had done, and concluded that it could not be established that Mr. Moyse had actually used the programs he had installed on the computer to hide the deletions.

27 The trial judge approached Mr. Moyse's evidence by examining the substance of that evidence in the context of the entirety of the evidence. He also considered, as a trial judge is entitled to do, his impressions of Mr. Moyse as he testified. The trial judge took the same approach to Mr. Glassman and other witnesses for the appellant. As often occurs, the same approach to the evidence of different witnesses yielded very different credibility and reliability assessments. Those different assessments are not indicative of any flawed fact-finding process, but instead reflect the essential witness-specific nature of credibility and reliability determinations.

28 We do not propose to examine all of the passages from the trial judge's reasons relied on by the appellant to demonstrate the asserted different levels of scrutiny of the evidence. Each argument fails for a variety of reasons.

29 For example, the appellant argues that the trial judge used Mr. Glassman's repetition of parts of his evidence as a reason for finding that Mr. Glassman was not credible, but did not give the same effect to the repetition of evidence by witnesses for the respondents. This submission is not supported by the reasons. The trial judge referred to repetition of parts of the evidence as a by-product of the manner in which the trial was conducted. We do not read his reasons as using the repetition of evidence as a basis for disbelieving Mr. Glassman or otherwise discounting his evidence.

30 The appellant also argues that the trial judge treated inconsistencies or overstatements in the evidence of the appellant's witnesses much more harshly than he did similar deficiencies in the respondents' witnesses. The appellant submits that the trial judge did the same thing when he faulted Mr. Glassman for not making obvious concessions, but made no comment when the same reluctance was evident in the testimony of witnesses for the respondents.

31 The evaluation of the impact on credibility and reliability of specific inconsistencies and similar flaws in a witness's testimony lies at the very core of the trial judge's function. His conclusion that a certain inconsistency negatively impacted on the credibility of one witness, while a different inconsistency did not have the same negative impact on the credibility of a different witness testifying about an entirely different topic, does not, on its own, establish that the trial judge applied different levels of scrutiny to the evidence of those witnesses. Instead, it demonstrates that credibility and reliability assessments are fact and witness-specific.

32 In support of the unequal scrutiny argument, the appellant also submitted that the trial judge proceeded from the assumption that the West Face witnesses were credible, while the appellant had to demonstrate the credibility of its witnesses. In support of this argument, counsel relies on observations made by the trial judge in his costs reasons.

33 Setting aside whether a judge's comments in his costs reasons can assist in interpreting his reasons for judgment, the trial judge's comments do not support the appellant's submission. In his reasons for costs, the trial judge observed that the appellant could not have succeeded at trial without establishing that the West Face witnesses were lying when they claimed they had not received any confidential information from Mr. Moyse. This observation was correct, having regard to the nature of the claim advanced by the appellant, the respective positions of the parties, and the burden of proof on the appellant.

(ii) The Alleged Misapprehensions of the Evidence

34 The appellant alleged three material misapprehensions of evidence in the body of its factum and listed several others in an appendix to the factum. We see no misapprehension of any material facts by the trial judge, and do not propose to review the appellant's claims one-by-one.

35 Some of the appellant's allegations of material misapprehensions of the evidence fail because the trial judge did not make the factual finding said to constitute the material misapprehension. For example, the appellant argues that the trial judge wrongly held that Mr. Moyse did not have any confidential information about the WIND negotiations when he left the employment of Catalyst. The trial judge did not make any such finding. He did find that Mr. Moyse was not aware of the negotiating strategy of Catalyst with the government of Canada and the vendor of the WIND shares (para. 48). That finding was open on the evidence of Mr. Moyse.

36 Other submissions made by the appellant alleging material misapprehensions of the evidence fail because, even if valid, they relate to factual issues that were relatively insignificant and not material to the outcome of the trial. For example, the appellant argues that the trial judge misapprehended the evidence pertaining to West Face's need for an analyst when it hired Mr. Moyse. Even if it could be said that the trial judge went beyond the evidence in describing the extent to which West Face needed an analyst, that error could not possibly have impacted on his overall assessment of the evidence, or the ultimate findings of fact he relied on in dismissing the claim.

37 Most of the appellant's arguments, however, fail because they do not reveal any misapprehension of the evidence, but instead reveal that the trial judge preferred the evidence of the respondents' witnesses and the inferences that flowed from that evidence over the competing evidence and inferences relied on by the appellant. For example, the trial judge found that West Face and others in the consortium did not have actual knowledge of the Catalyst bid for the shares of WIND in August 2014. That finding is supported by the respondents' witnesses who testified that they deduced that Catalyst was a bidder in light of "market chatter", comments in the media, and a statement made by counsel for the appellant

to counsel for West Face when Mr. Moyse joined West Face. This evidence provided ample grounds for the trial judge's factual finding that West Face and the consortium had no actual knowledge of the bid.

38 The appellant's submissions go no further than to suggest that the evidence could also have justified the further inference that West Face was aware of the actual bid. The trial judge did not make that inference, no doubt because he accepted the evidence of the West Face witnesses that West Face did not have knowledge of the actual bid. The trial judge's preference for the direct evidence of the West Face witnesses over the inference urged by the appellant is a function of the trial judge's fact-finding responsibilities and does not reflect any misapprehension of the evidentiary record.

B. THE PROCEDURAL UNFAIRNESS ARGUMENT

39 The appellant argues that the trial judge made a series of factual findings against the appellant in respect of the dealings between the vendor of the WIND shares and West Face and the consortium in August 2014. The appellant argues that these findings were made despite the trial judge having refused to allow the appellant to amend its claim to allege that West Face had induced the vendor of the WIND shares to breach its agreement with the appellant in the course of those August dealings. The appellant contends that the trial judge's findings were beyond the scope of the claim as framed in the pleadings before him and were based on an inadequate evidentiary record.

40 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.

41 More to the point, evidence of the dealings between West Face and the consortium on one side and the vendor of the WIND shares on the other side in August 2014 was germane to the appellant's claim and West Face's defence that it pursued its own strategies in seeking to purchase the WIND shares, which were very different from those employed by the appellant. That strategy was reflected, in part, in the unsolicited proposal to purchase the WIND shares made by West Face and the consortium in early August 2014.

42 The trial judge heard a great deal of evidence about the dealings between the vendor of the WIND shares and West Face and the consortium, particularly in August 2014. The appellant did not object to any of this evidence and, indeed, elicited most of it. In their closing arguments at trial, counsel for the appellant and the respondents urged the trial judge to make certain findings in respect of the dealings between West Face, the consortium and the vendor of the WIND shares. The trial judge's findings reflect those arguments and a preference for

the position put forward by the respondents. We see no unfairness to the appellant in the manner in which these issues were litigated at the trial. The trial judge's findings of fact in respect of these issues are supported by the evidence.

C. THE SPOLIATION ARGUMENT

43 The spoliation submission began as an argument that the trial judge had failed to properly identify the elements of the tort of spoliation. In oral argument, counsel abandoned any reliance on the tort of spoliation. [1]

44 Counsel argued that the trial judge erred in holding that an adverse evidentiary inference could be drawn against the respondents as a result of Mr. Moyse's destruction of relevant evidence only if the appellant established that Mr. Moyse and/or West Face destroyed that evidence for the specific purpose of affecting the outcome of the litigation. Counsel submitted that the adverse inference was appropriately drawn if relevant evidence was destroyed in the face of pending or reasonably foreseeable litigation.

45 The appellant's argument faces an insurmountable factual hurdle. Any inference that may be drawn against the respondents can arise only after a finding that Mr. Moyse destroyed relevant evidence. The trial judge found as a fact that Mr. Moyse did not destroy relevant evidence (paras. 147, 165). The appellant has not established any basis upon which this court can interfere with that factual finding. That finding puts an end to any argument that Mr. Moyse's deletion of data from his computer and cellphone supports an adverse inference against Mr. Moyse or West Face.

46 As this argument runs aground on the trial judge's factual finding, we need not consider the merits of the substance of the argument. We should not be taken as agreeing that the appropriate evidentiary approach to evidence that a party to a proceeding destroyed relevant evidence should be functionally different from the approach to be taken to other kinds of circumstantial evidence.

D. THE COSTS APPEAL

47 The appellant seeks leave to appeal the costs order. The appellant recognizes that this court grants leave to appeal from costs orders only sparingly. It submits, however, that the orders made in this case reveal errors in principle that warrant leave and intervention by this court.

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. 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.

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.

52 The trial judge found that the appellant had made an unwarranted attack on the reputation and integrity of Mr. Moyse. He went on, however, to indicate, at para. 18:

> However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

53 The characterization of some of Mr. Moyse's conduct as "mistakes" is charitable. This is particularly true in respect of his conduct when ordered by the court to turn his personal computer over to his lawyer so that it could be forensically examined. His decision to delete material from the computer without speaking to his lawyer and before turning the computer over to his lawyer was a serious breach of the court order, even given that he did not delete information relevant to the allegations.

54 The fact remains, however, that the trial judge recognized that Mr. Moyse's conduct should be taken into account in assessing the appropriate costs order. He determined in the exercise of his discretion that it should reduce the order from one of costs of substantial indemnity to one of costs on a partial indemnity basis. Even if other judges might have gone further, the trial judge made no error in the exercise of his discretion in considering the impact of Mr. Moyse's conduct on the costs award.

55 We would not grant leave to appeal from the order awarding costs to Mr. Moyse on a partial indemnity basis.

E. CONCLUSION

56 The appeal is dismissed. The application for leave to appeal the costs order is dismissed.

57 Counsel should exchange and file submissions on the costs of the appeal within 30 days of the release of these reasons. The submissions should not exceed 7 pages.

Appeal dismissed; application dismissed.

Footnotes

1 The existence of an independent tort of spoliation is an open question in this court: *Robb Estate v. Canadian Red Cross Society* (2001), 152 O.A.C. 60 (Ont. C.A.), at 203-208.

End of Document

TAB
6

Paras. 6 - 11

2016 ONSC 6285
Ontario Superior Court of Justice [Commercial List]

Catalyst Capital Group Inc. v. Moyse

2016 CarswellOnt 16043, 2016 ONSC 6285, [2016] O.J. No. 5210, 272 A.C.W.S. (3d) 280, 35 C.C.E.L. (4th) 293

THE CATALYST CAPITAL GROUP INC (Plaintiff) and BRANDON MOYSE and WEST FACE CAPITAL INC (Defendants)

Newbould J.

Judgment: October 7, 2016
Docket: CV-16-11272-00CL

Proceedings: additional reasons to *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Rocco DiPucchio, Andrew Winton, Bradley Vermeersch, for Plaintiffs
Robert A. Centa, Kris Borg-Olivier, Denise M. Cooney, for Defendant, Brandon Moyse
Kent E. Thomson, Matthew Mile-Smith, Andrew Carlson, for Defendant, West Face Capital Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Intellectual Property; Property; Restitution; Torts

Related Abridgment Classifications

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XXIV Costs
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Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations

Plaintiff's action was dismissed — Parties made submissions concerning costs — Substantial indemnity costs to be paid by plaintiff to defendant W Inc. fixed at $1,239,965; partial indemnity costs to be paid by plaintiff to defendant M fixed at $339,500.18 — In industry in which both plaintiff and W Inc. participated, personal integrity was extremely important

— Accusation that W Inc. knowingly solicited confidential information from employee of plaintiff and used it against plaintiff was allegation of wrongdoing that attacked integrity of W Inc. and its executives — Plaintiff was aware that in order to prove its allegations it had to establish that W Inc. witnesses were lying — Law suit was driven by G, who was not able to accept that he lost his chance to acquire certain company by being outsmarted by someone else — He set out to prove his belief that W Inc. witnesses were lying and that W Inc. had obtained confidential information of plaintiff from M that they used to defeat plaintiff's bid to acquire company in issue — He failed — W Inc. was entitled to costs on substantial indemnity basis — M had destroyed evidence of his web browsing history and had wiped his blackberry to remove personal information — Steps that M took that he had readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, had to be considered in deciding what level of costs to be awarded to M, and it was reason not to award costs on substantial indemnity basis.

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Andersen v. St. Jude Medical Inc. (2006), 2006 CarswellOnt 710, 264 D.L.R. (4th) 557, 208 O.A.C. 10 (Ont. Div. Ct.) — followed

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131843 Canada Inc. v. Double "R" (Toronto) Ltd. (1992), 7 C.P.C. (3d) 15, 1992 CarswellOnt 437 (Ont. Gen. Div.) — referred to

Rules considered:

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

R. 1.03 "substantial indemnity costs" — considered

R. 57.01 — considered

ADDITIONAL REASONS to judgment reported at *Catalyst Capital Group Inc. v. Moyse* (2016), 2016 ONSC 5271, 2016 CarswellOnt 13362 (Ont. S.C.J. [Commercial List]), concerning costs.

***Newbould J.*:**

1 I have now received cost submissions from the parties following the dismissal of this action.

West Face costs

2 West Face claims costs on a substantial indemnity basis. The normal rule is that costs are to be paid on a partial indemnity basis. However, conduct of a party that is reprehensible, scandalous or outrageous are grounds for costs to be awarded on a substantial or complete indemnity basis. See *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.). The conduct giving rise to such an award can be conduct either in a circumstances giving rise to the cause of action or in the proceedings themselves. See Orkin, *The Law of Costs*, 2nd ed. at para. 219 and *Ford Motor Co. of Canada v. Ontario (Municipal Employees Retirement Board)* (2006), 17 B.L.R. (4th) 169 (Ont. C.A.).

3 Unfounded allegations of improper conduct seriously prejudicial to the character or reputation of a party can give rise to costs on a substantial indemnity scale. See *131843 Canada Inc. v. Double "R" (Toronto) Ltd.* (1992), 7 C.P.C. (3d) 15 (Ont. Gen. Div.) per Blair J. (as he then was). In *Bisyk (No. 2), Re* (1980), 32 O.R. (2d) 281 (Ont. H.C.); aff'd [1981] O.J. No. 1319 (Ont. C.A.), Robins J. (as he then was), held that unproven allegations of undue influence in the preparation of a will were allegations of improper conduct seriously prejudicial to the character or reputation of a party deserving of costs on a solicitor and client basis. Both of these cases were referred with acceptance in *Davies v. Clarington (Municipality)* (2009), 100 O.R. (3d) 66 (Ont. C.A.) at para. 47.

4 In *Thoughtcorp Systems Inc. v. Tanju*, [2009] O.J. No. 1856 (Ont. S.C.J.), it was alleged that the defendant formed a competing business in breach of his fiduciary duties to the plaintiff and his non-competition agreement, hired a former employee of the plaintiff in breach of non-competition and non-solicitation clauses in her employment agreement, appropriated the plaintiff's confidential information, knowingly participated in the former employee's breach of fiduciary duties to the plaintiff, interfered with economic relations and unlawfully conspired with the former employee to the plaintiff's detriment. Hoy J. (as she then was) viewed the allegations as harmful to the defendant's integrity and awarded costs on a substantial indemnity basis. She said:

21 The allegations in this case go beyond breach of employment contract. Allegations of appropriation of confidential information and knowingly participating in breach of a fiduciary duty appear to me to be seriously prejudicial to, and to impugn the integrity of, a young professional developing a career in the "trusted intelligence services" field and, in the absence of a release which effectively puts an end to the allegations, to, in appropriate cases, justify costs on a substantial indemnity scale in the event of a discontinuance.

5 In this case, the claim against West Face was pleaded as follows:

34.6 West Face wrongfully used Catalyst's Confidential Information, which it solicited and obtained from Moyse, to obtain an unfair advantage over Catalyst in its negotiations with Wind. But for the transmission of confidential information concerning Wind from Moyse to West Face, West Face would not have successfully negotiated a purchase of Wind.

6 On the face of it, this is an accusation of soliciting and misusing confident information. To solicit it indicates an intention to obtain confidential information. In the industry in which both West Face and Catalyst participated, personal integrity is extremely important. The accusation that West Face knowingly solicited confidential information from an employee of Catalyst and used it against Catalyst was an allegation of wrongdoing that attacked the integrity of West Face and its executives.

7 In this case, Catalyst was aware before it amended its statement of claim to make this claim that West Face had set up a confidentiality wall before Mr. Moyse began working for West Face. It was also aware that Mr. Griffin of West Face had sworn two affidavits denying that West Face had obtained any confidential information about Catalyst from Mr. Moyse or had used such information in its dealings to acquire an interest in Wind. It was also aware of affidavits from Messrs. Leitner and Burt, principals of two of the partners of West Face in the bid for Wind, denying that they had received any information from West Face about Catalyst's dealings regarding Wind. Catalyst had also received extensive production of all of West Face's productions. Catalyst openly admitted at the opening of trial that it had no "direct" evidence that Mr. Moyse communicated confidential Catalyst information about Wind to West Face.

8 This was not a case in which it was acknowledged by West Face that it had obtained Catalyst information from Mr. Moyse and the issue was whether it constituted confidential information or was used by West Face. Rather it was a straight contest as to whether West Face had obtained confidential Catalyst information about Wind and had used it. Catalyst was aware aware that in order to prove its allegations it had to establish that West Face witnesses were lying. There was no way around that. In its closing argument it alleged "subterfuge and secrecy" as being as essential part of the asserted tort.

9 Thus the allegations not only impugned the integrity of Mr. Griffin and other persons at West Face by asserting a solicitation and misuse of confidential Catalyst information but also attacked their honesty in their asserting that no confidential information regarding Catalyst was obtained from Mr. Moyse or used by West Face.

10 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. [1]

11 In these circumstances I am of the view that West Face is entitled to costs on a substantial indemnity basis.

12 Regarding the amount of the costs claimed by West Face on a substantial indemnity basis, Catalyst raises no argument on the quantum. West Face claims substantial indemnity costs totalling $1,239,970.41, including fees of $1,053,238.29, disbursements and HST.

13 West Face in its bill of costs claimed $843,246.50 on a partial indemnity basis, including fees of $702,155.18, disbursements and HST. Catalyst accepts that that claim on a partial indemnity basis is reasonable. Under rule 1.03 the definition of substantial indemnity cost means 1.5 times partial indemnity costs. 1.5 times $702,155.18, the amount of fees claimed by West Face on a partial indemnity basis and accepted by Catalyst as reasonable, comes to $1,053,232.77, which is within $5 dollars of the amount claimed by West Face for substantial indemnity fees.

14 Thus I fix the substantial indemnity costs to be paid by Catalyst to West Face at $1,239,965.

Brandon Moyse

15 Mr. Moyse also claims costs on a substantial indemnity basis. In many ways he is entitled to costs on that scale for the same reasons that West Face is entitled to substantial indemnity costs. His reputation and integrity were attacked. Had the allegation stuck that he disclosed confidential Catalyst information to West Face, it would have had a very detrimental effect on his career prospects at a very early stage of his career. As it was, the allegations alone caused Mr. Moyse great difficulty. As a result of the litigation, Mr. Moyse was off work from July 16, 2014 until December 2015, and had significant difficulties securing a new job.

16 Mr. Moyse made some mistakes at the outset of this sorry saga. He destroyed evidence of his web browsing history out of a concern that it would show he had accessed adult entertainment websites and become part of the public record. He wiped his blackberry to remove personal information. He always asserted that they were honest mistakes and that he never passed on to West Face any confidential Catalyst information regarding its Wind initiative or destroyed any evidence of any such activities. Mr. Moyse was a young man at that time who had a very close relationship with his girlfriend who is now his fiancée.

17 Mr. Glassman caused Catalyst to assert a full scale attack on this young man. No thought was given to all of the denials by Mr. Moyse as well as by the West Face witnesses that there had not been any confidential Catalyst information regarding Wind given to West Face by Mr. Moyse. Catalyst claimed general damages against Mr. Moyse. What those would be were not particularized, which in a case involving a claim by Catalyst against West Face in excess of $500 million, would leave Mr. Moyse in a perilous state. It was only in its closing submissions on a question from the bench that Catalyst counsel said that damages equivalent to an award covering its costs of the case would be appropriate. That amount in this expensive litigation would be something that Mr. Moyse would in all likelihood be unable to pay. [2]

18 However, the steps that Mr. Moyse took that he has readily acknowledged were mistakes, albeit with no intention to destroy any relevant evidence, must be considered in deciding what level of costs to be awarded to Mr. Moyse. In my view, it is a reason not to award costs on a substantial indemnity basis, and I award costs only on a partial indemnity basis.

19 Mr. Moyse claims partial indemnity costs of $339,500.18, made up of fees to the end of trial of $282,330.50, disbursements of $20,466.71 and HST. Catalyst argues that the fees claimed are excessive. It has filed a bill of costs of its own costs on a partial indemnity basis with fees to the end of trial being $455,381 plus HST. The arguments of Catalyst essentially come down to an assertion that the spoliation case against Mr. Moyse was a separate claim that did not require all of the time spent. I do not accept that argument. Mr. Moyse had to be represented throughout the case, including discoveries and cross-examinations of West Face witnesses and at trial. The spoliation case against him was not divorced from the evidence led against West Face and he was exposed to a very large judgment that could have been affected by an award against West Face.

20 The fees claimed by counsel for Mr. Moyse are approximately 61% of the fees claimed in the Catalyst bill of costs. The fees claimed by counsel for Mr. Moyse are 40% of the fees claimed by counsel for West Face on a partial indemnity basis. It is evident that the work done by counsel for Mr. Moyse was substantially less than the work done for Catalyst and West Face.

21 It is not the court's function when fixing costs to second guess successful counsel of the amount of time spent unless the time spent was obviously too much. See *Fiorillo v. Krispy Kreme Doughnuts Inc.*, [2009] O.J. No. 3223 (Ont. S.C.J. [Commercial List]) and the authorities cited in it. I am in no position to say that the time spent was obviously too much.

22 There are three areas specified by Catalyst in its critique of the bill of costs of Mr. Moyse:

(a) Mr. Moyse claimed 15 hours for Commercial List attendances. It is said there were six attendances since January 2016 and that none lasted more than one hour. This ignores preparation time. It is said no costs were sought, awarded or reserved for those attendances. That is irrelevant. Attendances at 9:30 am conferences are the norm in the Commercial List and they save a lot of time and expense, as acknowledged by Catalyst in its costs submissions that costs were reduced because disputes between the parties were resolved at those appointments without fully briefed motions. Counsel are entitled to their costs of those attendances as they are steps in the proceeding.

(b) Mr. Moyse claimed 151.4 hours for oral discoveries. It is said that the only discovery that Mr. Moyse conducted was of Catalyst's witness for thirty minutes and that he only gave six undertakings during his one day of discovery. It is said that it is not possible for one day of defending a witness and preparing for a 30 minute oral discovery to take 140 hours of preparation. This ignores the fact that counsel for Mr. Moyse had 7800 productions to consider, including 3400 documents produced by Catalyst between late March and May, 2016 and also attended, quite properly, the other discoveries. To have ignored those would have been foolhardy.

(c) Catalyst complains that counsel for Mr. Moyse claimed 218.3 hours for direct and cross-examination preparation yet he only called two witnesses during trial and only cross-examined four witnesses. It should be pointed out that 70 hours were spent by a law clerk for preparing briefs of documents for witnesses and 5 hours were for a student. It is said counsel for Mr. Moyse need not have spent so much preparation time. I cannot say that the time spent was obviously too much. Second-guessing successful counsel in a complex case such as this, particularly the spoliation case, is a difficult thing to do on the basis of simply looking at the hours.

23 In this case, with the personal attack made on Mr. Moyse by Catalyst that affected Mr. Moyse's livelihood, Catalyst had to know that Mr. Moyse had no alternative but to take every possible step he could to defend himself.

24 Taking into account the factors in rule 57.01 and discussed in *Andersen v. St. Jude Medical Inc.*, [2006] O.J. No. 508 (Ont. Div. Ct.), I fix the partial indemnity costs to be paid to Mr. Moyse by Catalyst at the amount claimed of $339,500.18.

Order accordingly.

Footnotes

1 I in no way impugn the integrity of Catalyst's lawyers who conducted the case in an entirely professional manner.

2 One might wonder why the action against Mr. Moyse was continued after his leave of absence from West Face. He was in no position to pay any substantial award of damages. If Catalyst was hoping that in order to get out of the impending financial disaster, Mr. Moyse would "turn state's evidence" and say that he had disclosed confidential Catalyst information regarding its Wind initiative to West Face, it did not work. The fact that West Face has paid Mr. Moyse's legal fees may have had something to do with that, although West Face has not indemnified Mr. Moyse against any damage award. Mr. Moyse continued his denial of making any such disclosure and I accepted his evidence.

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TAB
7

Paras. 24, 26 - 27

2013 ONSC 677
Ontario Superior Court of Justice

Rousseau v. Scotia Mortgage Corp.

2013 CarswellOnt 1043, 2013 ONSC 677, 19 C.C.L.I. (5th) 288, 226 A.C.W.S. (3d) 660

Richard Rousseau, Plaintiff and Scotia Mortgage Corporation, Scotia Insurance, and Canada Life Assurance, Defendants

Robert B. Reid J.

Heard: November 19, 2012
Judgment: January 30, 2013 *
Docket: 11-25007

Counsel: E. Boschetti, for Plaintiff
D. Smith, D. Elman, for Defendants, Scotia Mortgage Corporation and Scotia Insurance
M. Stroh, for Lou Ferro
No one for Canada Life Assurance

Subject: Insurance; Civil Practice and Procedure; Contracts; Corporate and Commercial; Property; Torts

Related Abridgment Classifications

Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.d Costs against solicitor personally
XXIV.7.d.ii Misconduct of solicitor
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.B Misconduct
Civil practice and procedure
XXIV Costs
XXIV.8 Scale and quantum of costs
XXIV.8.d Quantum of costs
XXIV.8.d.iv Miscellaneous

2013 ONSC 677, 2013 CarswellOnt 1043, 19 C.C.L.I. (5th) 288, 226 A.C.W.S. (3d) 660

Headnote

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Misconduct

Plaintiff was disabled from motor vehicle accident that occurred in 2005 — Plaintiff alleged that, in process of him applying for residential mortgage, he should have been advised about need for disability insurance coverage and that this was not done — Plaintiff brought action against mortgage corporation and insurers for negligence, bad faith damages, mental distress, and punitive damages — Two of defendants brought successful motion for summary judgment to dismiss action, on grounds that action was statute barred, abuse of process, and res judicata based on findings in earlier action on same facts — Parties made submissions on costs for both motion and action — Costs payable by plaintiff to moving defendants, on substantial indemnity basis and in amount of $24,007.07 — Conclusion that action was abuse of process and that issues were res judicata was relevant to scale of costs issue — Re-litigation of claims was not in public interest and was to be discouraged — Defendants are entitled to protection as to their own costs and plaintiffs must expect to pay accordingly — As such, costs award on substantial indemnity scale was appropriate.

Civil practice and procedure --- Costs — Scale and quantum of costs — Quantum of costs — Miscellaneous

Plaintiff was disabled from motor vehicle accident that occurred in 2005 — Plaintiff alleged that, in process of him applying for residential mortgage, he should have been advised about need for disability insurance coverage and that this was not done — Plaintiff brought action against mortgage corporation and insurers for negligence, bad faith damages, mental distress, and punitive damages — Two of defendants brought successful motion for summary judgment to dismiss action, on grounds that action was statute barred, abuse of process, and res judicata based on findings in earlier action on same facts — Parties made submissions on costs for both motion and action — Costs payable by plaintiff to moving defendants, on substantial indemnity basis and in amount of $24,007.07 — It was reasonable to assume plaintiff understood that costs could be in order of magnitude of $25,000.00 if matter was unsuccessfully re-litigated — Given allegations of improper conduct, it would have come as no surprise to plaintiff to learn that claim was being aggressively defended — Award represented amount claimed, but reduced by $834.00 for three hour counsel fee that was unreasonable because matter with which attendance was concerned could have been dealt with in advance on consent.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs against solicitor personally — Misconduct of solicitor

Plaintiff was disabled from motor vehicle accident that occurred in 2005 — Plaintiff alleged that, in process of him applying for residential mortgage, he should have been advised about need for disability insurance coverage and that this was not done — Plaintiff brought action against mortgage corporation and insurers for negligence, bad faith damages, mental distress, and punitive damages — Two of defendants brought successful motion for summary

judgment to dismiss action, on grounds that action was statute barred, abuse of process, and res judicata based on findings in earlier action on same facts — Parties made submissions on costs for both motion and action — Costs payable by plaintiff to moving defendants, on substantial indemnity basis and in amount of $24,007.07 — Costs against plaintiff's counsel personally were not appropriate — First part of inquiry was satisfied because, based on abuse of process and res judicata findings, costs were incurred unnecessarily by way of commencement and prosecution of duplicate proceeding — However, privilege had not been waived and there was insufficient evidence that steps taken by counsel in prosecuting second action were without client's instruction.

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Rousseau v. Scotia Bank (2012), 2012 ONCA 279, 2012 CarswellOnt 5206 (Ont. C.A.) — referred to

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Toronto (City) v. C.U.P.E., Local 79 (2003), 232 D.L.R. (4th) 385, 9 Admin. L.R. (4th) 161, [2003] 3 S.C.R. 77, 17 C.R. (6th) 276, 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 311 N.R. 201, 2003 C.L.L.C. 220-071, 179 O.A.C. 291, 120 L.A.C. (4th) 225, 31 C.C.E.L. (3d) 216 (S.C.C.) — followed

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — applied

Statutes considered:

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s. 131 — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

Generally — referred to

Rules considered:

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

R. 20.06 — considered

R. 49 — considered

R. 57.01(1) — considered

R. 57.07 — considered

R. 57.07(1) — considered

RULING on costs following successful motion by defendants for summary judgment and dismissal of action.

***Robert B. Reid J.*:**

1 The plaintiff sued Scotia Mortgage Corporation, Scotia Insurance and Canada Life Assurance in this action commenced January 19, 2011. The claim was for negligence, bad faith damages, mental distress damages and punitive damages.

2 The defendants, Scotia Mortgage Corporation and Scotia Insurance, collectively "the Scotia defendants" brought a summary judgment motion, seeking a dismissal of the action because:

a. it is statute barred under the Limitations Act, 2002 [1] ;

b. it is an abuse of process since it is the second court action brought by the plaintiff on the same facts; and

c. based on findings of fact and law in the first action, the claim is *res judicata*.

3 The defendant Canada Life Assurance did not participate in the proceedings and there appears to be a live dispute about whether it was served with the statement of claim. No defence has been filed by it, nor did counsel attend the motion.

4 The Scotia defendants were successful on all three grounds and as a result, the action was dismissed. Written submissions have been received on the question of costs.

Issues in the Costs Submissions:

5 The costs submissions involve four issues:

a. Are the Scotia defendants entitled to costs?

b. What is the proper scale of costs?

c. What is the appropriate quantum of costs?

d. Should the costs be payable personally by counsel for the plaintiff?

Background to the Litigation:

6 The factual basis of the claim began with the plaintiff's application for a residential mortgage through the Bank of Nova Scotia in 2002. The claim alleges that the bank was acting as agent for Scotia Mortgage Corporation. Representatives of the bank apparently offered creditors' group insurance to the plaintiff. The insurance was held by the Bank of Nova Scotia with Canada Life including mortgage insurance for the plaintiff payable in the event of the plaintiff's death. Also offered was so-called "health crisis protection" which would cover the plaintiff's loan balance in the event he suffered specified illness. The plaintiff completed the application for life insurance coverage and declined the health crisis protection. In the claim, it is alleged that the bank and its employees, acting on behalf of Scotia Mortgage Corporation, ought to have advised the plaintiff about the need for disability coverage and failed to do so. Disability coverage was not available as part of the bank's group insurance.

7 The plaintiff was disabled in a motor vehicle accident that occurred in October 2005.

Prior Action and Summary Judgment Argument:

8 The previous court action was begun March 20, 2007 between the plaintiff and "Scotia Bank". The defendant was incorrectly named and should have been Bank of Nova Scotia. The essential facts of that action were the same as those in the current claim, set out above.

9 Mr. Justice James Ramsay dismissed the prior action on a summary judgment motion on August 2, 2011 and his decision was upheld by the Court of Appeal in a decision issued April 12, 2012 [2012 CarswellOnt 5206 (Ont. C.A.)]. A subsequent application for leave to appeal to the Supreme Court of Canada by the plaintiff was denied.

10 The plaintiff alleged that in January 2011, during cross examinations on affidavits filed in support of a summary judgment motion in that prior proceeding, he discovered for the first time that a relationship may have existed between the Bank of Nova Scotia, Scotia Mortgage Corporation, Scotia Insurance and Canada Life. The plaintiff wished to explore that relationship to appreciate the various roles undertaken by those entities, in support of his allegation that a duty of care was owed by those parties to the plaintiff. The plaintiff chose not to move to amend his statement of claim in the previous action but to start the second action instead.

11 I found that the circumstances of the mortgage application, the insurance application and the motor vehicle accident were all well known to the plaintiff at a much earlier date than the commencement of these proceedings. That is demonstrated by the facts alleged in the first statement of claim issued in March 2007.

12 There is no dispute that the plaintiff was provided with an affidavit of documents by the defendant in the prior action during December 2007. The Schedule A documents in the affidavit of documents fully disclosed the participation of the various parties to the transaction. I agreed with the defendants that by exercising reasonable diligence, the plaintiff could have discovered all the facts necessary to support his current claim from the date that the documentary material was provided. As a result, the commencement of this claim in January 2011 was at least one year out of time.

13 The plaintiff argued that the statement of claim in this action set out a different duty of care than what was relied on in the first action. He submitted that it would be improper to shut down this action without allowing a full examination of that duty of care applicable to the facts as they may be disclosed. I accept the caution offered by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*[2] where the court indicated that the discretionary remedy arising from abuse of process in order to prevent re-litigation should not be used in circumstances which would create unfairness. I also noted that that doctrine should not typically be used when there are different parties to the litigation. On that latter point, I was satisfied that in both actions, with the exception of the defendant Canada Life, the Bank of Nova Scotia is the actual defendant. In the first claim, the defendant was named as Scotia Bank but the claim was defended by Bank of Nova Scotia. In this action, Scotia Mortgage Corporation appears to be a subsidiary of Bank of Nova Scotia and the action has been defended on that basis. In its statement of defence, the defendants alleged that Scotia Insurance is not a legal entity. However it is clear that the allegations in the statement of claim relate to the mortgage offered through Bank of Nova Scotia and ultimately held by Scotia Mortgage Corporation, and that the insurance applications were offered and processed by Bank of Nova Scotia employees.

14 I was satisfied that this action is simply a recasting of the same facts as were alleged in the first claim with the proposed addition of a different legal theory of negligence. As such, adopting Justice Sharp's comments in *Las Vegas Strip Ltd. v. Toronto (City)*[3], the contentions advanced by the plaintiff did not constitute a separate and distinct cause of action. There were no new facts, merely new legal arguments and these could readily have been advanced in the earlier proceeding. To permit the plaintiff to advance them would violate the policies underlying the rules against abuse of process, namely the public interest in finality to litigation and the private interest in being protected from repeat litigation. At

paragraph 30 of his judgment, Justice Sharp quoted from the Privy Council in *Hoystead v. Commissioner of Taxation*[4] as follows:

> Parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances.
>
> If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted, and there is abundant authority reiterating that principle.

15 Based on my previous comments, the parties or their privies with the exception of Canada Life are the same in the two actions. Clearly Scotia Mortgage Corporation and Scotia Insurance (if in fact it exists as a separate entity) are privies of the Bank of Nova Scotia which was the proper defendant in the previous action. Not only was that confirmed by the defendants but in the statement of claim, the plaintiffs allege that the Bank of Nova Scotia was acting as agent for Scotia Mortgage Corporation. Scotia Insurance is identified in the statement of claim as a mortgage insurance intermediary and a wholly-owned subsidiary of the bank.

16 In his endorsement dismissing the earlier action, Justice Ramsay found that the evidence of the plaintiff and his wife that they thought they had bought disability insurance when they applied for the mortgage loan was not believable. He further found that it was not credible that the plaintiff would have bought disability insurance if it had been offered. Those findings were accepted by the Court of Appeal. In addition, the Court of Appeal noted that the plaintiff acknowledged that he did not have disability insurance at any point prior to obtaining the loan in question from the bank, that there was no evidence that he had intended to apply for disability insurance, that he did not recall asking the bank's representative about any disability insurance and that the bank representative did not offer disability insurance to its customers at the relevant time. The Court of Appeal added that the record was devoid of any evidence of a reasonable basis for the plaintiff to believe that he had disability insurance with Canada Life as a result of his dealings with the bank.

17 In my view, those findings of fact would prevent any damages flowing to the plaintiff even if he was successful in establishing a duty of care and a breach of the standard of care arising from the sale of insurance products by the bank employees.

Award of Costs:

18 The Bank of Nova Scotia seeks costs on a substantial indemnity basis for the motion and the action and an order that payment be made by counsel for the plaintiff personally.

The plaintiff responds that any costs should be payable on a partial indemnity basis only and not against counsel personally.

19 The discretion to award costs under section 131 of the *Courts of Justice Act* [5] is guided by the factors set out in rule 57.01(1) of the *Rules of Civil Procedure* [6]. The first consideration is the result in the proceeding and presumptively the successful party receives some portion of its costs from the unsuccessful party.

20 In this case, the Scotia defendants were entirely successful and there is no reason to make a costs order other than in their favor for both the action and the summary judgment motion.

Scale of Costs:

21 Although rule 20.06 of the *Rules of Civil Procedure* [7] gives the court discretion to award costs on a substantial indemnity basis as regards a summary judgment motion, that discretion is to be exercised if a party acted unreasonably by making or responding to the motion or if a party acted in bad faith for the purpose of delay. The Scotia defendants suggest that the plaintiff acted in bad faith in commencing the action itself. I do not consider that to be within the proper ambit of rule 20.06. The rule is focused on ensuring that summary judgment motions are appropriately brought and defended.

22 There was no rule 49 offer to settle which could attract a substantial indemnity costs award.

23 Substantial indemnity costs when awarded independently of a relevant rule 49 offer contain an element of penalty. For example, such a costs award was made where one party to the litigation behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily ran up the costs of the litigation. [8] An award of substantial indemnity costs, or the threat of it, can ideally function as a tool available to the courts to prevent or control frivolous or needless litigation. Making such an award in proper circumstances enhances access to the justice system for other litigants. [9]

24 Similarly, where the claim made includes allegations of misconduct, high-handed, malicious, arbitrary or highly reprehensible conduct, or other suggestions that call into question the character or reputation of a party, it is to be expected that the claim will be vigorously defended. In addition, if the claims are not substantiated, a substantial indemnity costs award may follow on the theory that such allegations should be discouraged except in appropriate cases [10].

25 In the statement of claim, the plaintiff alleged that the Scotia defendants were unlicensed insurance brokers, unlawfully arranging for the sale of insurance products. The

plaintiff alleged that the Bank of Nova Scotia was doing business illegally in that it was selling mortgage disability insurance without a license even though there was no evidence of mortgage disability insurance being offered. It was alleged that the group insurance offered "was nothing but a cleverly disguised policy of junk insurance" and the plaintiff claimed that he intended to introduce evidence of extensive bank misconduct as regards the sale of financial services.

26 My conclusion that the action was an abuse of process and that the issues were *res judicata*, since it was based on the same facts as were alleged in the 2007 action which were dealt with by Justice Ramsay, is relevant to the scale of costs issue. As I noted, the re-litigation of claims is not in the public interest and is to be discouraged. Defendants are entitled to protection as to their own costs and plaintiffs must expect to pay accordingly.

27 Based on the foregoing, it is appropriate to award costs on a substantial indemnity scale.

Quantum of Costs:

28 The Scotia defendants seek costs for both the motion and the action in the total amount of $24,949.59 inclusive of HST and disbursements.

29 The result in the prior action was an award of costs, presumably on a partial indemnity basis in the amount of $25,000. It is reasonable to assume that the plaintiff must have understood that costs could be in that order of magnitude if the matter was unsuccessfully re-litigated. Given the allegations of improper conduct, it would have come as no surprise to the plaintiff to learn that the claim was being aggressively defended.

30 Although in general I take no exception to the Bill of Costs provided by the Scotia defendants, I do note that a counsel fee of three hours, amounting to $834, for the attendance October 25, 2012 seems unreasonable. The matter was to be argued on October 23 but counsel for the plaintiff was hospitalized that day. The presiding judge ordered the plaintiff to advise the defendants whether counsel would be available October 25 or whether a further adjournment would be sought. That advice was provided within the time contemplated and yet some three hours was spent on October 25, presumably for the purpose of arguing that the further adjournment should be peremptory to the plaintiff. However frustrated the defendants may have been with the plaintiff's conduct, it seems unreasonable to me that the matter could not have been dealt with in advance on consent. As result, the substantial indemnity costs award will be reduced by $834 plus HST, resulting in a total payable of $24,007.07.

Responsibility for Costs:

31 Presumptively, the plaintiff should be responsible for the costs award in favor of the Scotia defendants. However, the defendants have submitted that costs should be payable by counsel for the plaintiff personally.

32 The Scotia defendants argued that the commencement and prosecution of the second action was at counsel's direction. They referred to repeated arguments made by the plaintiff in the first action that he only had a grade 8 education and that as such, he relied on the bank's advice regarding insurance. By analogy, the Scotia defendants suggest that he must have relied on the advice of his counsel as to the commencement of the second action as opposed to seeking leave to amend the statement of claim in the first action.

33 The defendants note the provisions of rule 57.07 of the *Rules of Civil Procedure*[11] which specifically authorize the court to make a costs award against a solicitor where the lawyer has caused costs to be incurred without reasonable cause.

34 The defendants acknowledge the direction from the Supreme Court of Canada in *Young v. Young*[12] to the effect that costs are typically awarded as compensation for the successful party, not in order to punish a barrister. As well, that case stands for the principle that courts must be extremely cautious in awarding costs personally against a lawyer, given the duties upon a lawyer to guard the confidentiality of instructions and to bring forward with courage even unpopular causes.

35 In response, counsel for Lou Ferro (the plaintiff's lawyer in both actions) submits that any consideration of a personal costs award against the lawyer should be on the basis of the two-part inquiry set out by the Divisional Court in *Carleton v. Beaverton Hotel*[13]. The first step is to determine whether the lawyer's conduct falls within rule 57.07(1) in the sense of causing costs to be incurred unnecessarily. The second step is to consider, as a matter of discretion and applying the extreme caution principle identified in *Young v. Young*[14], whether in the circumstances of the particular case the imposition of costs against the lawyer personally is warranted.

36 I am satisfied as to the first part of the inquiry that, based on the abuse of process and *res judicata* findings, costs were certainly incurred unnecessarily by way of the commencement and prosecution of a duplicate proceeding.

37 As to the second part of the inquiry, counsel for Mr. Ferro references the recent Ontario Court of Appeal decision in *Galganov v. Russell (Township)*[15] to the effect that where the lawyers client has not waived solicitor client privilege, it is very difficult to presume that the lawyer has proceeded without the instructions of his client in taking the steps that are subject to criticism. Clearly it would be unfair to award costs against a lawyer personally when he

or she was following the client's instruction but where that position could not be asserted without breaching solicitor client privilege.

38 An argument could be made that, in respecting solicitor client privilege, lawyers are able to avoid liability which would otherwise attach to them. However, in this case, I am satisfied that privilege has not been waived and that there is insufficient evidence available to conclude that the steps taken by counsel in prosecuting the second action were without the client's instruction.

39 As a result, costs are awarded on a solicitor-client basis, with the adjustment that has been noted and will be payable by the plaintiff to the Scotia defendants.

Order accordingly.

Footnotes

* A corrigendum issued by the Court on February 13, 2013 has been incorporated herein.

1 SO 2002, c 24

2 [2003] 3 S.C.R. 77 (S.C.C.) at para. 53

3 [1996] O.J. No. 3210 (Ont. Gen. Div.) at para. 25

4 (1925), [1926] A.C. 155 (Australia P.C.), at pp. 165-66,

5 R.S.O. 1990, c.C.43

6 R.R.O. 1990, Reg.. 194

7 *Ibid.*

8 *Standard Life Assurance Co. v. Elliott*, [2007] O.J. No. 2031 (Ont. S.C.J.)

9 *Benquesus v. Proskauer, Rose, LLP* [2005 CarswellOnt 2464 (Ont. S.C.J.)], 2005 CanLII 21097 at para. 17

10 *DiBattista v. Wawanesa Mutual Insurance Co.* [2005 CarswellOnt 6604 (Ont. S.C.J.)], 2005 CanLII 41985

11 *Supra*, note 6

12 [1993] 4 S.C.R. 3 (S.C.C.) at para. 254

13 [2009] O.J. No. 2409 (Ont. Div. Ct.) at para. 21

14 *Supra*, note 12

15 [2012] O.J. No. 2679 (Ont. C.A.) at paras. 28, 29 and 43

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TAB
8

Para. 142

2015 ONSC 6269
Ontario Superior Court of Justice

Best v. Lancaster

2015 CarswellOnt 15687, 2015 ONSC 6269, 125 W.C.B. (2d) 650, 259 A.C.W.S. (3d) 72

Donald Best, Plaintiff and Gerald Lancaster, Rex Ranking, Sebastien Jean Kwidzinski, Lorne Stephen Silver, Colin David Pendrith, Paul Barker Schabas, Andrew John Roman, Ma'Anit Tzipora Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock and Blackwell LLP, Blake, Cassels & Graydon LLP, Miller Thomson LLP, Kingsland Estates Limited, Richard Ivan Cox, Eric Iain Stewart Deane, Marcus Andrew Hatch, Philip St. Eval Atkinson, Pricewaterhousecoopers East Caribbean (Formerly 'Pricewaterhouse Coopers'), Ontario Provincial Police, Peel Regional Police Service a.k.a. Peel Regional Police, Durham Regional Police Service, Marty Kearns, Jeffery R. Vibert, George Dmytruk, Laurie Rushbrook, James (Jim) Arthur Van Allen, Behavioural Science Solutions Group Inc., Tamara Jean Williamson, Investigative Solutions Network Inc., Toronto Police Association, Jane Doe #1, Jane Doe #2, Jane Doe #3, Jane Doe #4, Jane Doe #5, John Doe #1, John Doe #2, John Doe #3, John Doe #4, John Doe #5, Defendants

Healey J.

Heard: June 15, 2015; June 16, 2015; June 17, 2015; June 18, 2015
Judgment: October 9, 2015
Docket: CV-14-815-00

Counsel: Paul Slansky, for Plaintiff
Peter Wardle, Adrienne Lipsey, for Defendants, Gerald Lancaster, Rex Ranking, Sebastien Jean Kwidzinksi, Lorne Stephen Silver, Colin David Pendrith, Paul Barker Schabas, Andrew John Roman, Ma'anit Tzipora Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock & Blackwell LLP, Blake, Cassels & Graydon LLP and Miller Thomson LLP
Mark Polley, Jessica Prince, for Defendants, Pricewaterhouse Coopers East Caribbean (formerly PricewaterhouseCoopers), Kingsland Estates Limited, Philip St. Eval Atkinson, Richard Ivan Cox and Marcus Andrew Hatch

Jeffrey Claydon, Dominic Polla, for Defendants, Ontario Provincial Police, Marty Kearns, Jeffery R. Vibert, John Doe #3 and Jane Doe #3
Mike Cremasco, for Defendant, Peel Regional Police Service a.k.a. Peel Regional Police
Jennifer Hunter, Shannon Gaudet, for Defendants, Durham Regional Police Service and George Dmytruk
Philip Wright, for Defendants, James (Jim) Arthur Van Allen, Behavioural Science Solutions Group Inc. and Tamara Jean Williamson
Paul-Erik Veel, for Defendant, Toronto Police Association
Norman Groot, for Investigative Solutions Inc. (by written submissions on costs only)

Subject: Civil Practice and Procedure; Public; Torts
Related Abridgment Classifications
Civil practice and procedure
XVI Disposition without trial
XVI.3 Stay or dismissal of action
XVI.3.c Grounds
XVI.3.c.iii Action frivolous, vexatious or abuse of process
XVI.3.c.iii.B Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.G Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.f Costs on solicitor and own client basis
Headnote
Civil practice and procedure --- Disposition without trial — Stay or dismissal of action — Grounds — Action frivolous, vexatious or abuse of process — Miscellaneous
Plaintiff's company's action in Ontario against defendants, mostly resident in Caribbean, was stayed for lack of jurisdiction — Costs were sought personally against plaintiff — Plaintiff was found to be deliberately avoiding personal service of material for costs motion and did not attend ordered cross-examinations — Plaintiff was found to be in contempt of court, which was upheld on appeal, and costs were ordered against him that eventually totalled $375,375.40 — Plaintiff brought action against defendants, including some of initial defendants and various lawyers, for various torts — Multiple defendants brought motions to dismiss action as frivolous, vexatious and abuse of process — Motions granted — Action was attack on results of prior litigation in which plaintiff personally and through his company were wholly unsuccessful, and involved patently false assertion that he did not know costs

were being sought against him personally — Action was abuse of process because it was collateral attack on and attempt to re-litigate findings and rulings made in first action, in which all avenues were exhausted by plaintiff — All issues were dealt with, with finality, in prior proceedings, either before motion judge or in appeal process — Pleading was also abuse of process because of its scandalous and vexatious content — Plaintiff made inflammatory allegations as to defendants' persecution of him, involving actual and threatened physical violence against him and his family and role of lawyers in conspiring to cause such injuries — There were sufficient grounds to dismiss claim in its entirety as abuse of process.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — General principles

Plaintiff's company's action in Ontario against defendants, mostly resident in Caribbean, was stayed for lack of jurisdiction — Costs were sought personally against plaintiff — Plaintiff was found to be deliberately avoiding personal service of material for costs motion and did not attend ordered cross-examinations — Plaintiff was found to be in contempt of court, which was upheld on appeal, and costs were ordered against him that eventually totalled $375,375.40 — Plaintiff brought action against defendants, including some of initial defendants and various lawyers, for various torts — Multiple defendants brought motions to dismiss action as frivolous, vexatious and abuse of process — Motions granted — Defendants were awarded costs totaling $363,209.06 — Action was abuse of process as it was attempt to re-litigate already determined issues and it involved unproven and scandalous allegations — This was case in which court should show its condemnation for plaintiff's litigation conduct — Defendants were entirely complex in proceeding where plaintiff claimed $20 million in damages — Proceeding was factually and legally complex — Motions were extremely important to defendants as claim openly challenged their professional integrity or alleged they worked in concert to cause deliberate harm to plaintiff — Defendants collectively scheduled motions as expeditiously as possible and tailored arguments to minimize overlap while plaintiff filed volumes of irrelevant material — Entire action was improper, but plaintiff also took additional steps to improperly note defendants in default — In view of costs orders from prior action, plaintiff should have understood that motions would attract very high costs award if he lost.

Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and own client basis

Plaintiff's company's action in Ontario against defendants, mostly resident in Caribbean, was stayed for lack of jurisdiction — Costs were sought personally against plaintiff — Plaintiff was found to be deliberately avoiding personal service of material for costs motion and did not attend ordered cross-examinations — Plaintiff was found to be in contempt of court, which was upheld on appeal, and costs were ordered against him — Plaintiff brought action against defendants, including some of initial defendants and various lawyers, for various torts — Multiple defendants brought motions to dismiss action as frivolous, vexatious and abuse of process — Motions granted — Defendants who were named in both actions would be

awarded $84,000 on full indemnity basis — Plaintiff refused to agreed to reasonable request by defendants named in both actions to allow their jurisdiction motion to await outcome of dismissal motions, which would have left them with minimal costs — Plaintiff's conduct of litigation and its effect on these defendants, who were still owed more than $375,000 in costs from prior action, was so outrageous, reprehensible and blameworthy that it shocked conscience of court and required deterrence with costs on highest scale — Those defendants would be entitled to their full costs and disbursements for entire action.

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Hunt v. T & N plc (1990), 4 C.C.L.T. (2d) 1, 43 C.P.C. (2d) 105, 117 N.R. 321, 4 C.O.H.S.C. 173 (headnote only), (sub nom. *Hunt v. Carey Canada Inc.*) [1990] 6 W.W.R. 385, 49 B.C.L.R. (2d) 273, (sub nom. *Hunt v. Carey Canada Inc.*) 74 D.L.R. (4th) 321, [1990] 2 S.C.R. 959, 1990 CarswellBC 759, 1990 CarswellBC 216 (S.C.C.) — referred to

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Jones v. Tsige (2012), 2012 ONCA 32, 2012 CarswellOnt 274, 108 O.R. (3d) 241, 89 C.C.L.T. (3d) 221, 6 R.F.L. (7th) 247, 2012 C.L.L.C. 210-012, 287 O.A.C. 56, 346 D.L.R. (4th) 34, 96 B.L.R. (4th) 1, 251 C.R.R. (2d) 124 (Ont. C.A.) — followed

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McNabb v. Ontario (Attorney General) (2000), 2000 CarswellOnt 3059, 50 O.R. (3d) 402 (Ont. S.C.J.) — referred to

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Nelles v. Ontario (1989), 69 O.R. (2d) 448 (note), [1989] 2 S.C.R. 170, 60 D.L.R. (4th) 609, 98 N.R. 321, 35 O.A.C. 161, 41 Admin. L.R. 1, 49 C.C.L.T. 217, 37 C.P.C. (2d) 1, 71 C.R. (3d) 358, 42 C.R.R. 1, 1989 CarswellOnt 963, 1989 CarswellOnt 415, 69 O.R. (2d) 448 (S.C.C.) — followed

Nelson Barbados Group Inc. v. Cox (2013), 2013 ONSC 8025, 2013 CarswellOnt 18814 (Ont. S.C.J.) — considered

Nelson Barbados Group Ltd. v. Cox (2009), 2009 CarswellOnt 2466, 75 C.P.C. (6th) 58 (Ont. S.C.J.) — referred to

Nelson Barbados Group Ltd. v. Cox (2010), 2010 ONSC 569, 2010 CarswellOnt 341 (Ont. S.C.J.) — considered

Normart Management Ltd. v. West Hill Redevelopment Co. (1998), 155 D.L.R. (4th) 627, 37 O.R. (3d) 97, 1998 CarswellOnt 251, 17 C.P.C. (4th) 170, 113 O.A.C. 375, 41 C.C.L.T. (2d) 282 (Ont. C.A.) — considered

Odhavji Estate v. Woodhouse (2003), 2003 SCC 69, 2003 CarswellOnt 4851, 2003 CarswellOnt 4852, 19 C.C.L.T. (3d) 163, 233 D.L.R. (4th) 193, 312 N.R. 305, 180 O.A.C. 201, [2003] 3 S.C.R. 263, 11 Admin. L.R. (4th) 45, 70 O.R. (3d) 253 (note), [2004] R.R.A. 1, 2003 CSC 69, 70 O.R. (3d) 253 (S.C.C.) — followed

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Penner v. Niagara Regional Police Services Board (2013), 2013 SCC 19, 2013 CarswellOnt 3743, 2013 CarswellOnt 3744, 32 C.P.C. (7th) 223, 49 Admin. L.R. (5th) 1, 356 D.L.R. (4th) 595, 442 N.R. 140, 304 O.A.C. 106, [2013] 2 S.C.R. 125, *(sub nom. Penner v. Niagara (Police Services Board))* 118 O.R. (3d) 800 (note) (S.C.C.) — referred to

Perth Insurance Co. v. Osler Rehabilitation Centre Inc. (2013), 2013 ONSC 7033, 2013 CarswellOnt 16612 (Ont. S.C.J.) — referred to

Prinzo v. Baycrest Centre for Geriatric Care (2002), 2002 CarswellOnt 2263, 2002 C.L.L.C. 210-027, 17 C.C.E.L. (3d) 207, 215 D.L.R. (4th) 31, 161 O.A.C. 302, 60 O.R. (3d) 474 (Ont. C.A.) — followed

R. v. Scott (1990), 116 N.R. 361, 1 C.R.R. (2d) 82, 43 O.A.C. 277, 2 C.R. (4th) 153, 61 C.C.C. (3d) 300, [1990] 3 S.C.R. 979, 1990 CarswellOnt 65, 1990 CarswellOnt 1012 (S.C.C.) — referred to

Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality) (1990), 12 O.R. (3d) 750, 1990 CarswellOnt 701 (Ont. H.C.) — referred to

Romanic v. Johnson (2013), 2013 ONCA 23, 2013 CarswellOnt 528 (Ont. C.A.) — referred to

Rousseau v. Scotia Mortgage Corp. (2013), 2013 CarswellOnt 1043, 2013 ONSC 677, 19 C.C.L.I. (5th) 288 (Ont. S.C.J.) — referred to

Said v. University of Ottawa (2014), 2014 ONSC 771, 2014 CarswellOnt 1267 (Ont. S.C.J.) — referred to

Samuel Manu-Tech Inc. v. Redipac Recycling Corp. (1999), 1999 CarswellOnt 2764, 124 O.A.C. 125, 90 O.T.C. 140 (note), 38 C.P.C. (4th) 297 (Ont. C.A.) — considered

Schreiber v. Mulroney (2007), 2007 CarswellOnt 5267 (Ont. S.C.J.) — considered

Senechal v. Muskoka (District Municipality) (2003), 2003 CarswellOnt 854, 37 M.P.L.R. (3d) 131, 37 M.V.R. (4th) 122 (Ont. S.C.J.) — followed

Sheridan v. Ontario (2014), 2014 ONSC 4970, 2014 CarswellOnt 11946 (Ont. S.C.J.) — referred to

Sheridan v. Ontario (2015), 2015 ONCA 303, 2015 CarswellOnt 6475 (Ont. C.A.) — referred to

Shier v. Fiume (1991), 6 O.R. (3d) 759, 1991 CarswellOnt 1068 (Ont. Gen. Div.) — referred to
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St. Elizabeth Home Society v. Hamilton (City) (2010), 2010 ONCA 280, 2010 CarswellOnt 2197, 69 M.P.L.R. (4th) 189, 319 D.L.R. (4th) 74, 266 O.A.C. 136 (Ont. C.A.) — followed
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Sun Life Trust Co. v. Bond City Financing Ltd. (1997), 36 O.R. (3d) 758, 105 O.A.C. 255, 1997 CarswellOnt 4914, 51 O.T.C. 160 (Ont. Div. Ct.) — referred to
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Toronto (City) v. C.U.P.E., Local 79 (2003), 2003 SCC 63, 2003 CarswellOnt 4328, 2003 CarswellOnt 4329, 2003 C.L.L.C. 220-071, 232 D.L.R. (4th) 385, 311 N.R. 201, 120 L.A.C. (4th) 225, 179 O.A.C. 291, 17 C.R. (6th) 276, [2003] 3 S.C.R. 77, 9 Admin. L.R. (4th) 161, 31 C.C.E.L. (3d) 216 (S.C.C.) — referred to
Tran v. University of Western Ontario (2014), 2014 ONSC 617, 2014 CarswellOnt 1111 (Ont. S.C.J.) — followed
Tran v. University of Western Ontario (2015), 2015 ONCA 295, 2015 CarswellOnt 6198 (Ont. C.A.) — referred to
Ward v. Vancouver (City) (2010), 2010 SCC 27, 2010 CarswellBC 1947, 2010 CarswellBC 1948, 75 C.C.L.T. (3d) 1, [2010] 9 W.W.R. 195, 321 D.L.R. (4th) 1, 7 B.C.L.R. (5th) 203, 76 C.R. (6th) 207, 404 N.R. 1, 290 B.C.A.C. 222, 491 W.A.C. 222, (sub nom. *Vancouver (City) v. Ward*) 213 C.R.R. (2d) 166, (sub nom. *Vancouver (City) v. Ward*) [2010] 2 S.C.R. 28 (S.C.C.) — referred to
Web Offset Publications Ltd. v. Vickery (1999), 1999 CarswellOnt 2270, 43 O.R. (3d) 802, 123 O.A.C. 235 (Ont. C.A.) — referred to
Web Offset Publications Ltd. v. Vickery (2000), 2000 CarswellOnt 1808, 2000 CarswellOnt 1809, 256 N.R. 200 (note), 136 O.A.C. 199 (note), 43 O.R. (3d) 802 (note) (S.C.C.) — referred to
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Wellington v. Ontario (2011), 2011 CarswellOnt 10440, 2011 CarswellOnt 10441, 428 N.R. 394 (note), 291 O.A.C. 399 (note) (S.C.C.) — referred to
WestJet Airlines Ltd. v. Air Canada (2005), 2005 CarswellOnt 2101 (Ont. S.C.J.) — referred to
Whittaker v. Great-West Life Assurance Co. (2008), 2008 CarswellOnt 1706, 63 C.C.L.I. (4th) 100 (Ont. S.C.J.) — referred to

Wilson v. Toronto Police Service (2001), 2001 CarswellOnt 2226, [2001] O.T.C. 483 (Ont. S.C.J.) — referred to

Wilson v. Toronto Police Service (2002), 2002 CarswellOnt 335, 156 O.A.C. 374, [2002] O.T.C. 416 (Ont. C.A.) — referred to

Young v. Young (1993), [1993] 8 W.W.R. 513, 108 D.L.R. (4th) 193, 18 C.R.R. (2d) 41, [1993] 4 S.C.R. 3, 84 B.C.L.R. (2d) 1, 160 N.R. 1, 49 R.F.L. (3d) 117, 34 B.C.A.C. 161, 56 W.A.C. 161, [1993] R.D.F. 703, 1993 CarswellBC 264, 1993 CarswellBC 1269 (S.C.C.) — followed

Zareian v. Durham Regional Police Services Board (2006), 2006 CarswellOnt 1932 (Ont. S.C.J.) — referred to

Zesta Engineering Ltd. v. Cloutier (2002), 2002 CarswellOnt 4020, 21 C.C.E.L. (3d) 161 (Ont. C.A.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

s. 7 — considered

s. 8 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 131 — considered

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. F.31

Generally — referred to

Limitations Act, 2002, S.O. 2002, c. 24, Sched. B

s. 4 — considered

s. 5(1)(a) — considered

Police Services Act, R.S.O. 1990, c. P.15

Generally — referred to

s. 49 — considered

Private Security and Investigative Services Act, 2005, S.O. 2005, c. 34

Generally — referred to

Rules considered:

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

Generally — referred to

R. 21.01(1)(a) — considered

R. 21.01(1)(b) — considered

R. 21.01(2)(b) — considered

R. 21.01(3)(d) — considered

R. 25 — considered

R. 25.11 — considered

R. 25.11(b) — considered

R. 57.01 — considered

R. 57.01(1) — considered

MOTIONS by defendants to dismiss plaintiff's action as frivolous, vexatious and abuse of process.

***Healey J.*:**

Nature of the Action and Motions

1 This is an action brought by Donald Best ("Best") against 39 defendants, by which he seeks damages in the aggregate amount of $20M, injunctive relief to protect his safety and identity and an accounting of funds paid by two of the defendants to their lawyers in a prior proceeding, together with costs. The prior proceeding is referred to in these Reasons as the "Nelson Barbados Action". The action that is the subject matter of these Reasons, being Court File No.: CV-14-815-00, is referred to as the "Second Action".

2 The 39 defendants may be grouped into categories and are defined as follows in these Reasons:

(i) The "Caribbean defendants" are Kingsland Estates Limited, Richard Cox, Eric Deane, Marcus Hatch, Philip Atkinson and PricewaterhouseCoopers East Caribbean;

(ii) The "lawyer defendants" are Gerald Ranking, Sebastien Kwidzinski, Lorne Silver, Colin Pendrith, Paul Schabas, Andrew Roman, Ma'anit Zemel, Fasken Martineau Dumoulin LLP, Cassels Brock & Blackwell LLP, Blake Cassels & Graydon, LLP and Miller Thomson LLP;

(iii) The "OPP defendants" are Ontario Provincial Police, Marty Kearns and Jeffery Vibert;

(iv) The "Peel Regional Police defendant" is Peel Regional Police Service ("PRPS");

(v) The "Durham Regional Police defendants" are Durham Regional Police Service ("DRPS"), George Dmytruk and Laurie Rushbrook;

(vi) The Toronto Police Association defendant ("TPA");

(vii) The "private investigator defendants" are James (Jim) Van Allen, Behavioural Science Solutions Group Inc. and Tamara Williamson.

3 The causes of action set out in the statement of claim in the Second Action, with an inconsistent level of clarity and specificity throughout, are: abuse of process, negligent investigation (also referenced as negligent regulation/performance of statutory duty) and false imprisonment, all claimed by way of both the common law and the *Canadian Charter of Rights and Freedoms*. Further causes of action are: intentional and/or negligent infliction of harm and/or mental suffering (also referenced as intentional, reckless and/or negligent endangerment); misfeasance and/or misfeasance of public office and/or abuse of authority; malicious prosecution; conspiracy to injure the plaintiff (also referenced as conspiracy to do an unlawful act and/or causing loss by unlawful means); breach of common-law privacy rights; breach of ss. 7 and 8 of the *Charter*; and breach of fiduciary duty.

4 It is a truism in advocacy that a pleading sets the tone for the entire action, usually being the first document read by the presiding judge. In James Carthy, Derry Millar & Jeffrey Cowan, *Ontario Annual Practice* (Aurora: Canada Law Book, 2014), at p. 1006, the editors include these apt comments in the advocacy notes prefacing Rule 25 of the *Rules of Civil Procedure*, R.R.O. 1990, O. Reg. 194:

> It is worth repeating, for emphasis, the advocacy value of a carefully crafted pleading. It travels with you to motions, trial and appeal and is the written spokesperson for the virtue of your client's position. If clear, lucid and a complete formulation of the claim or defence, it becomes much easier for a judge to accept evidence and argument in support. If vague, muddy and evasive, the reader assumes the search is ongoing for a foundation for the claim or defence and will be skeptical of formulations scratched out of the evidence or presented for the first time in argument.

5 The claim that initiated the Second Action is 90 pages in length, and contains 234 paragraphs. Best also sought leave of this court to amend the claim to add five new defendants and to amend the names of two others. There are numerous paragraphs of the claim that could serve to exemplify its overall tone and substance, but some are particularly illustrative. Under the heading "Particulars of the Claim", at para. 32, is the following:

> The lawyers, law firms and clients knew about this dissemination and publishing of confidential information and, in fact, were actively involved in the dissemination and publication. They did so knowing and intending that would likely endanger the life of the Plaintiff and the life and/or safety of his family. They conspired with Van Allen and the police to injure him in this manner. Even after the Plaintiff begged them to stop distributing to the public his and his family members' private information including Identity Information, the lawyers, law firms and clients distributed and published even more of this confidential information, which they continue to do to this day. The lawyers, law firms, clients and police later conspired to cover up this unlawful activity and the unlawful nature of Van Allen's "private" investigation services while he was a police officer. They did so flagrantly and outrageously. They did so knowing that this was unlawful and criminal. They did so intentionally for the improper and collateral purposes of encouraging the Plaintiff to leave Canada or as a means to pressure him and others in respect of litigation and potential litigation in other jurisdictions. As officers of the Court, the lawyers and law firms were acting in an official state capacity. Van Allen, as a serving police officer and the police were state agents.

6 Under the heading "Negligent Investigation and/or s. 7 of the *Charter*", at para. 201, is the following:

> The secret investigation itself, that was premised on the Plaintiff being convicted, before he had been found guilty, was itself a negligent investigation. If the court itself was involved (not Justice Shaughnessy who denied knowledge of it, but Court administration), this suggested a possible institutional bias. If initiated by the lawyers, law firms and/or clients, this suggested that the police were involved in the civil contempt proceeding, which would be extraordinary and suggested bias or corruption by the police. If initiated by Van Allen defendants, this suggested further abuse of power by a serving police officer as a private investigator on behalf of private interests. One way or the other, the secret investigation was illegal and corrupt. The fact that a police and Court police investigation is premised on a person being found guilty before he is found guilty is offensive. The fact that it is being done in secret suggests that there is something to hide. Such an investigation is inherently negligent. As is clear from *Hill* (SCC) and *Taylor* (OCA), the duty of care in relation to criminal investigations inherently creates a duty of care because of the targeting of the suspect. The DRPS owed a duty to the Plaintiff having targeted him. The conduct of the secret investigation with the presumption of conviction creates an unreasonable risk of substantial harm and does not meet the standard of care. This is similar to *R. v. Beaudry*, [2007] S.C.J. No. 5..

7 In his submissions on costs at the conclusion of the motions, Best's counsel submitted that, in terms of degree, this claim could not be said to fall at the extreme end of vexatious or

abuse of the court's process. This court completely disagrees with that submission. This claim, both in form and substance, is the most vexatious and abusive to ever come before me. The allegations are scandalous, oppressive and shocking, very clearly aimed at undermining key public institutions such as the courts, judges and local and provincial police services, as well as individuals whose professional reputations are intended to be impugned by the allegations made, including lawyers, police officers and a private investigator. The claims are a torturous yarn spun from the most flimsy of material; the evidence presented by Best to purportedly justify these allegations is either non-existent, disturbingly convoluted, irrelevant or, in many instances, the allegations are simply incapable of proof.

8 For example, in one of many affidavits relied on by Best, he presented the following evidence:

> Defendants also published on the Internet calls for criminals I had previously arrested or investigated to hunt me and my family down, and to stalk us and my company's witnesses. Defendants and their co-conspirators also made public threats to shoot me, my lawyer and others, and other threats to murder and rape some of my company's witnesses and to burn down their business. Defendants and their co-conspirators published on the Internet my photo and what they said were the names of my children, ex-wife and other family members. This is all in the context of the history of actual violent criminal acts against witnesses in Barbados; including arson, home invasion, abduction at gunpoint, beatings, sabotage of the vehicles, killing of family dogs, threats to lose employment unless witnesses stop testifying and the loss of employment at the University of the West Indies when the witness bravely testified notwithstanding the threats.

9 A reading of all of the affidavits filed by Best for use on this motion, together with attached exhibits, confirms that he has placed no credible, corroborative evidence before the court to support the outrageous facts alleged in the foregoing paragraph. This makes the related allegations set out in the statement of claim all the more vexatious and shocking. Unfortunately, this is not an isolated example of the type of evidence advanced by Best to attempt to support the allegations made in his claim. Best's affidavit material is replete with alleged facts that are equally spurious and lacking in any substantive proof.

10 The motions before this court were brought by 21 of the 39 defendants, each seeking an order dismissing the action as being frivolous, vexatious and an abuse of process pursuant to rule 21.01(3)(d) and rule 25.11 of the *Rules of Civil Procedure*; or, in the alternative, striking the claim as disclosing no reasonable cause of action pursuant to rule 21.01(1)(b), without leave to amend.

11 The motions were argued over three days, following which this court released the following endorsement, with minor variations on some of the moving parties' motion records:

> For further Reasons to be released at a later date, this Court orders that the action is dismissed as being vexatious and an abuse of process pursuant to Rule 21.01(3)(d) and Rule 25.11. In the event that such ruling is found to be in error, the alternative relief sought by the moving party/parties is also granted, such that this Court orders that the Statement of Claim is struck on the ground that it discloses no reasonable cause of action, pursuant to Rule 21.01(1)(b), without leave to amend.
>
> The Claim is a transparent attempt to re-litigate the findings and rulings of the Superior Court, Court of Appeal and Supreme Court of Canada in action 07-0141, without basis in law, and is vexatious for the same reason and others to be addressed in my full Reasons. The Claim further offends generally the law of pleadings, and because it is plain and obvious that the causes of action as pled have no chance of success, and that in the circumstances of this case, an opportunity to cure these defects will not result in a Statement of Claim recognized at law as being viable.

12 As stated in that endorsement, this court has found that the claim was an attack on the results of prior litigation in the Nelson Barbados Action. In that action Best was, both personally and through the corporate plaintiff, Nelson Barbados Group Inc. ("Nelson Barbados"), wholly unsuccessful. The defendants in this action are those individuals upon whom he unjustifiably places blame for the fact that he was found in contempt by order of Shaughnessy J. on January 15, 2010, and ultimately served a period of incarceration. The history of that litigation is set out in the following section.

History of The Nelson Barbados Action (Court File 07-0141)

13 In 2007, Nelson Barbados commenced the Nelson Barbados Action in Ontario against 62 defendants, the majority of who reside in Barbados. Best was the principal of Nelson Barbados. In May 2009, the Caribbean defendants brought an application for a stay. Shaughnessy J. ordered that the Nelson Barbados Action be permanently stayed in Ontario.

14 In the concluding paragraphs of his Reasons for Judgment on Motion dated May 4, 2009, Shaughnessy J. noted that Mr. Ranking, who represented PricewaterhouseCoopers East Caribbean, had advised the court that his client and the other represented defendants would be seeking an award of costs on a substantial indemnity basis as against the principal of Nelson Barbados and personally against Nelson Barbados' lawyer, who at that time was Mr. McKenzie. In his Reasons, Shaughnessy J. directed counsel to contact the trial coordinator at Whitby to arrange a date to speak to the issue of costs: *Nelson Barbados Group Ltd. v. Cox* (2009), 75 C.P.C. (6th) 58, [2009] O.J. No. 1845 (Ont. S.C.J.), at paras. 121-122.

15 As Best was still represented by counsel at the time of the release of those Reasons, it can be properly assumed that he was informed of the court's ruling by Mr. McKenzie, and provided with a copy of the Reasons. It is clear from Best's affidavit evidence that, by at least August 2009, Mr. McKenzie had made Best aware that he would be seeking an order removing his firm as solicitors of record because the defendants were seeking costs against him personally. Mr. McKenzie was later removed as counsel of record, but not until September 15, 2009. Yet Best asks this court to accept that despite the Reasons of Shaughnessy J. and his communications with Mr. McKenzie between May and November 2009, he never became aware of the intention of the defendants to seek costs against him personally. I reject that submission; it is patently false given that Best had counsel at the relevant time and had been informed of the reason that Mr. McKenzie was getting off the record.

16 Nevertheless in his current claim, at para. 23, Best alleges that he was not aware that costs were being sought against him personally prior to November 2, 2009. It was a premise underlying his present counsel's submissions to this court, which is that some of the alleged unfairness experienced by Best resulted from a lack of awareness that costs were being sought against him personally. In his affidavit sworn April 23, 2015, after detailing various forms of persecution (such as being targeted and beaten on the street, having "thugs" hired in Auckland to hunt him and his family down, and having the family automobile "shot up with 9mm bullets while parked beside the family home", resulting in Best having to flee to other countries such as Singapore), all arising from steps allegedly taken by unspecified defendants, Best theorizes about the motives underlying the costs hearing. At para. 13, he alleges:

> Then while this horrendous situation was happening, and having created this criminal attack against my family and me, in a matter of a few weeks over the 2009 Christmas season, some of the defendants rushed through a private prosecution of me for Contempt of Court in the civil case costs hearing, that I was unaware of until after the conviction. The lawyers, law offices and their clients knew that I was half way around the world to protect my family, was unrepresented by counsel, not served of many crucial legal documents, not notified of the hearing and that their Campaign was the reason that I had left Canada and was seeking safety for my family. The defendants also knew that they had fabricated false evidence against me and placed this before the court.

17 The key element which seems to elude Best is that the defendants were, as permitted by law, seeking to be compensated for costs incurred by them arising from Nelson Barbados' decision to commence an action in the wrong forum, a decision for which Best, as the operating mind of the corporation, was responsible. In his Reasons, at para. 30, Shaughnessy J. noted that the Corporate Profile Report listed "Donald Best" as the president of Nelson Barbados, but that little else was known of the company. He noted that Nelson Barbados and

Best had refused or failed to provide evidence that would identify shareholders, directors, officers and business activities. He further noted that the defendants' concern was that the plaintiff had been incorporated in Ontario for the primary purpose of assisting with the attack on jurisdiction. At para. 54 of his Reasons, Shaughnessy J. found that Nelson Barbados, through its counsel, had made a deliberate choice not to provide details that would demonstrate its connection to Ontario. He remarked that what little was known or disclosed was that the plaintiff had a head office and business address which was the same as Mr. McKenzie's in Orillia, Ontario. Shaughnessy J. further noted that the transcript of the cross-examination of Nelson Barbados' representative revealed that Mr. McKenzie, by repeated interjections and improper refusals, prevented defence counsel from obtaining information directly relevant to the status of Nelson Barbados, its business and its interest in the action. These facts help to understand at least some of the bases upon which Mr. Ranking's client and other defendants sought to have costs paid by both Best and his lawyer.

18 It is clear from the record that service of any documents on Best was problematic, as he refused to provide any contact information other than the address of a post office box located in Kingston, Ontario. On September 15, 2009, Eberhard J. made an order that Nelson Barbados could be served with documents in the action by sending such documents by ordinary mail to 427 Princess Street, Suite 200, Kingston, Ontario, service deemed to be effective ten days after mailing.

19 On November 2, 2009, Shaughnessy J. made an order relating to the costs motion, which included:

> i) that service of all motion material relating to the costs motion upon Best was validated and the service of all such materials was effective four days after such materials were served upon Nelson Barbados by virtue of having been mailed to 427 Princess Street, Suite 200, Kingston, Ontario;
>
> ii) that service of any and all further materials (including motions, court orders or notices of examination) upon Best will be effective four days after mailing or couriering same to him at the above Princess Street address; and
>
> iii) that Best was to appear at an examination on November 17, 2009, at Victory Verbatim in Toronto, and to deliver various documents to Mr. Ranking at least one week prior to the examination.

20 Filed with the court for use at the November 2, 2009, appearance was an affidavit of James (Jim) Van Allen sworn October 21, 2009 (the "Van Allen affidavit"), which sets out his attempts to locate Best to serve him with a Summons to Witness in order to have his evidence available at the hearing of the costs motion. This affidavit became the genesis of some of Best's claims made in the Second Action, encompassing allegations that Van Allen committed

actionable wrongs by acting as a private investigator while he was a police officer, using police resources directly or indirectly during the course of an investigation of Best, conducting an unlawful secret investigation, swearing a misleading affidavit, distributing Best's personal and private information to the public, redaction of invoices to conceal unlawful use of police resources and colluding and conspiring to cover up these facts, among others. It is alleged that the lawyers and law firms were part of a conspiracy that involved obtaining and using the Van Allen affidavit.

21 Best was not present in court on November 2, 2009, nor did he send a representative. Still, he knew of the hearing date and knew that its purpose was to address the issue of costs. He acknowledged such awareness in a letter written directly to Shaughnessy J. on October 30, 2009, in which he stated "Nelson Barbados Group Ltd. therefore respectfully asks the court to immediately proceed with the costs hearing that is peremptorily scheduled for November 2, 3 and 4, 2009".

22 According to Best, it was on November 16, 2009, that he first learned that he had been ordered to attend an examination the next day, as a result of a telephone call that he made to the trial coordinator at Whitby. However, when and how he may have learned of the requirement of the examination is of no relevance given that there was an order recognizing and validating service on him, made at a court attendance at which he chose to have no representation or agent present for Nelson Barbados or himself.

23 Best did not attend the examination. Instead, he telephoned Victory Verbatim Reporting, and spoke with Mr. Ranking and Mr. Silver. Best deposed that he recorded that call, and subjected the recording to forensic audio analysis. Accepting for the purpose of these motions that the transcription of this recording is accurate, as Best asks the court to do, it is clear that Mr. Ranking and Mr. Silver made offers to accommodate Best's attendance later that day or on another day, and also that Mr. Ranking's office had couriered motion records pertaining to the costs hearing, and the draft order of November 2, 2009, to Best on November 6, 2009. Best asserted that he did not have a copy of the November 2 order. It is clear from the transcript that Best refused to state whether he had checked the contents of the Kingston post office box, that he refused to provide a date on which he would produce himself for cross-examination as ordered by the court and he refused to give counsel any information about his location. Best was insistent on having the cross-examination conducted over the telephone. Counsel warned Best several times that they would proceed with having him found in contempt due to his noncompliance with the order if he did not attend in person. Following their conversation with Best, the lawyers went on the record at the examiner's office to summarize the contents of the call, referenced in the claim as the lawyers' "Statement for the Record". It is clear from that record that there was some confusion in the lawyers' minds about whether Best had acknowledged receiving the order of November 2, but there

is a clear statement from one, Ms. Rubin, who recorded her belief that Best had stated that he had not received it.

24 Best was served with another notice of examination, to occur on November 25, 2009, and again did not attend.

25 There are allegations in the claim that on the next court attendance, which occurred on December 2, 2009, that Mr. Ranking and Mr. Silver misled the court about whether Best had received the order. This allegation is one of several used to justify the Second Action. In his claim Best alleges, at para. 46:

> The lawyers misled Shaughnessy, J. with respect to the facts and law regarding the adequacy of service, knowledge and notice. Contrary to the law they falsely urged the Court to act upon substituted service. They falsely asserted prior knowledge of the November 2, 2009 order in the "Statement for the Record". They relied upon misleading and/or false evidence and/or opinions in the Van Allen affidavit suggesting that the Plaintiff was attempting to evade service. They unreasonably asserted that notice the day before (when the person claimed to be outside of the country) was adequate (in respect of November 17 and November 25, 2009). The contempt order made on January 15, 2010 was a product of the misleading of the court by the lawyers, law firms and clients and the Van Allen defendants, with the police and the TPA.

26 Best did not attend on December 2, 2009, even though that date was set by the order of November 2, 2009, and counsel clearly told Best of their intention to go back to Shaughnessy J. to deal with Best's noncompliance. On December 2, Shaughnessy J. made an endorsement permitting substituted service of the motion for contempt, after making a specific finding that Best was deliberately avoiding personal service and that there were no other steps that could be taken by the defendants to locate Best to effect personal service of the contempt motion. Shaughnessy J. scheduled the contempt hearing for January 15, 2010.

27 In his Reasons on Motion for Contempt, *Nelson Barbados Group Ltd. v. Cox*, 2010 ONSC 569, [2010] O.J. No. 278 (Ont. S.C.J.), Shaughnessy J. reviewed the history of the costs proceeding and the attempts to serve Best, and concluded, at para. 16, that he was satisfied based on all the material filed, including Best's correspondence to the court and the trial coordinator, that he had actual knowledge of the proceedings and the orders of the court. Best was found to be in contempt of the orders of November 2, 2009, and December 2, 2009. He was ordered to pay a fine of $7,500 and to serve a three month sentence of incarceration. It was further ordered that Best could apply to purge his contempt by appearing before Shaughnessy J. on or before February 22, 2010, and answering questions and making productions as detailed in those orders.

28 For the next couple of years, Best resided outside of Canada, but in the latter part of 2012 he retained counsel to obtain a stay of his warrant of committal in order that he could return to Canada and move to set aside the findings of contempt. Best's application was heard on May 3, 2013, and Shaughnessy J. found that Best remained in contempt of court.

29 In his application Best claimed that:

> (i) Certain of the lawyer defendants had made false, fabricated and perjured affidavits related to the Nelson Barbados Action, and engaged in obstruction of justice, fabrication of evidence, conspiracy and fraud upon the court;
>
> (ii) Those frauds were such that Best's contempt conviction was based on 'false evidence';
>
> (iii) Best had no notice of the contempt proceeding;
>
> (iv) Best feared for his safety, and the safety of his family, in part on the basis of blog posts disclosing his personal information;
>
> (v) PricewaterhouseCoopers East Caribbean was not a legal entity;
>
> (vi) There was a cover up or conspiracy devised to prevent a full hearing of the contempt proceeding; and
>
> (vii) There was an "undocumented, secret, private or 'on the side' ... Court police investigation involving Durham Regional Police and others".

30 Each of these same allegations is repeated in the Second Claim. Shaughnessy J. rejected all of Best's allegations. Shaughnessy J.'s perception of Best's conduct in the litigation was the subject of comment several times in his Reasons arising from the May 3, 2013 hearing (*Nelson Barbados Group Inc. v. Cox*, 2013 ONSC 8025, 2013 CarswellOnt 18814 (Ont. S.C.J.), at pp. 53-54, 56-57), as follows:

> Today Mr. Best remains in contempt. Notwithstanding that Mr. Best is well aware of his obligations as prescribed by my orders, he has done everything in his power to avoid compliance with the same. ...Mr. Best is engaged in a self-serving and obstructionist campaign to vilify and impugn the reputation and integrity of counsel, their clients and this court, all in an attempt to avoid compliance with my orders.
>
> . . . . .
>
> Mr. Best's affidavits are replete with irrelevant and baseless allegations of misconduct, deceit, fraud and illegality by Mr. Ranking, Mr. Silver, Mr. Andrew Roman and their respective law firms. Again, this is the case, notwithstanding that Mr. Best has been told

> repeatedly by me that these allegations are irrelevant, and as I stated previously, Mr. Best has persisted in his campaign of baseless allegations during his cross-examinations on affidavits and his "Answers to Advertisements, Undertakings and Refusals", and as well as his factum and his submissions to this court. I find that Mr. Best has shown a continued and complete disregard for the court's instructions, as well as a continued contempt for the court's process.

31 Best appealed Shaughnessy J.'s decision to the Court of Appeal for Ontario. Best made a motion before a single judge of the Court of Appeal for an order that Mr. Ranking and Mr. Silver be removed as counsel and be prevented from arguing the appeal, based on the allegations of misconduct that Best had made in the application to set aside or purge his contempt. Feldman J.A. dismissed the motion to remove counsel, noting that the motion judge rejected Best's allegations that counsel deliberately misled him regarding the facts surrounding Best's failure to attend for examination as ordered, and had made it clear that his findings were based on the appellant's own letters, recorded words and actions. Feldman J.A. ordered costs of $72,000 payable by Best for the motion in order to express the court's condemnation of Best's tactic of making "serious allegations of deliberate misconduct against two counsel for the respondents [Mr. Silver and Mr. Ranking] both in writing and in open court in the face of a finding to the contrary": *Best v. Cox*, 2013 ONCA 695, 2013 CarswellOnt 18839 (Ont. C.A.), at para. 10.

32 Best appealed Feldman J.A.'s decision to a three-judge panel of the Court of Appeal. He sought to introduce fresh evidence at that appeal, which was the Van Allen affidavit and Best's allegations of misconduct in relation thereto. The appeal was unsuccessful. In the court's ruling of March 4, 2014, *Best v. Cox*, 2014 ONCA 167, 2014 CarswellOnt 6936 (Ont. C.A.), at paras. 11-13, leave to appeal to SCC refused, 35785 (September 4, 2014) [2014 CarswellOnt 12140 (S.C.C.)], the court ruled that the fresh evidence would not be admitted, for these reasons:

> [11] We would not admit the fresh evidence. It suffers from an overwhelming problem: it is utterly irrelevant to Feldman J.A.'s decision which was explicitly anchored in recognition that Shaughnessy J. was the case management judge for several years; accordingly, said Feldman J.A., "[c]onsiderable deference is owed to his findings."
>
> [12] The entire thrust of the fresh evidence is to attack Mr. Van Allen's affidavit in support of the respondents' attempt to obtain substitute service for the appellant because his whereabouts were difficult to ascertain. On this point, two crucial observations must be made. First, Shaughnessy J. did not rely on substituted service or the Van Allen affidavit in his contempt reasons which form the subject matter of the appeal. Second, the appellant himself confirmed, in an affidavit and in cross-examination on his affidavits, that he had obscured his residential address. In an affidavit, the appellant

> deposed that "I have used unlisted phone numbers and post box offices to conceal my home address." In cross-examination, he said: "Sir, I have had and have used various addresses that are not my residence address since '76, '78, somewhere around there."
>
> [13] In short, the proposed fresh evidence is irrelevant to the appeal and, therefore, would have been irrelevant to the disposition of the motion before Feldman J.A.

33 By March 31, 2014, cost orders made against Best in the Court of Appeal totalled $192,000, which he had been ordered to pay by April 1, 2014, failing which his appeal of the contempt finding and sentence would be dismissed by the Registrar. Best sought a stay. In dismissing the application for a stay, MacPherson J.A. stated:

> [7] In my view, there is no serious issue to be tried on the proposed appeal. The core of the motions and the appeal heard by this court from November 2013 to March 2014 has been allegations of misconduct (including criminal behavior) against opposing counsel that this court has found to be completely devoid of merit. (I note that these allegations were made by the moving party as represented by previous counsel, not his counsel today.)
>
> [8] Moreover, the proposed appeal does not raise an issue of public importance. Although the appellant attempts to dress up his leave application with the language of access to justice, protection of rights in civil contempt and, most vividly, the return of debtors' prison, the reality is that the subject matter of the proposed appeal is simply the non-payment of costs orders relating to motions and an appeal in meritless proceedings impugning the integrity of counsel. This is not an issue of national importance.

34 In my view, this latter comment also applies to the claim in the Second Action. It stridently attempts to apply recognized causes of action and legal principles, developed in the law to redress legitimate needs, to a set of baseless allegations devoid of merit.

35 Best's application to the Supreme Court of Canada for leave to appeal from the March 4, 2014 judgment of the Court of Appeal was dismissed with costs on a solicitor-client basis. Accordingly, the Nelson Barbados action ran the full gamut of review available, and reached its inevitable, final disposition, with all due process being offered to Best along its course.

36 That there can be no doubt that the Second Action seeks to review and challenge the rulings made in the contempt proceeding is confirmed by paras. 49 and 50 of the claim, which read:

> [49] In fact, had the true facts been known to the Court, there were no reasonable grounds to allege contempt, let alone constitute proof beyond a reasonable doubt. The prosecution initiated against the Plaintiff by the lawyers, law firms and clients should have been (and hopefully will be) concluded favorably for the Plaintiff. Even if it is not,

> the Plaintiff asserts that where this did not occur as a result of fraud by the lawyers, law firms and clients, precluding an appeal on the merits for administrative reasons, malicious prosecution and false imprisonment should still be available. There was no honest belief in guilt and there was a further improper purpose of seeking to pressure discovery and otherwise pressure the termination of litigation in other jurisdictions involving other persons and entities, not the plaintiff or NBGL [Nelson Barbados Group Ltd.].
>
> [50] The actions, and inactions in the face of duties to act, of the lawyers, law firms, clients and other defendants resulted in the contempt order and resulting warrant of committal. The execution of the warrant resulted in the wrongful imprisonment of the Plaintiff in May 2013 after he returned to Canada to challenge the contempt finding, until bail pending appeal was granted in June 2013. The Plaintiff was again wrongfully imprisoned in April 2014 when his appeal was dismissed for procedural reasons (inability to pay costs) triggered by continuation of the intentional abuse of process and lying to the Court of Appeal on and before February 27, 2014.

37 Direct criticism of Shaughnessy J.'s review and assessment of the evidence, and of his findings, are found throughout the Claim. A glaring example is found at para. 45 of the claim, in which Best seeks to attack service of the notice of contempt hearing:

> There was no personal service of any order prior to any obligation arising and no evidence of knowledge of such an obligation until, in respect of November 17 and 25, 2009, the day prior to the obligation arising and otherwise, no knowledge of any obligation until after the deadline. The Supreme Court of Canada, in *Bhatnager*, [1990] S.C.J. No. 62 has made it clear that service that is not personal service may, in some circumstances be adequate for the conduct of civil litigation, but is legally inadequate to found civil contempt. Personal service or knowledge is a precondition for a finding of civil contempt.

38 As several defence counsel submitted during argument, Best is necessarily asking that the entire proceedings before Shaughnessy J., and the higher courts thereafter, be reviewed by way of inquiry into whether the presiding judges "got it right". This court agrees; the Second Action is premised upon allegations that the presiding judges were led into error, or made errors of law and/or fact, in the Nelson Barbados Action, as a result of the concerted efforts of the defendants individually and collectively.

History of the Second Action

39 This action was commenced on July 14, 2014, within months of the administrative dismissal of Best's appeal in the Nelson Barbados Action.

40 Three of the 39 defendants in the Second Action were also defendants in the Nelson Barbados Action. These are three of the five Caribbean defendants. The other two Caribbean defendants appear to be related to or involved with the other three, as all five are alleged to be clients of the lawyer defendants and are alleged to be part of the civil wrongs committed against Best by the Caribbean defendants as a group.

41 All of the defendants, except for Mr. Deane, filed a defence but not before some of them were noted in default. This court received evidence during the costs arguments at the conclusion of these motions that leaves no doubt that the Caribbean defendants were noted in default even when Best's counsel knew that they were represented and had received communications asking that the Caribbean defendants not be noted in default. Best then opposed the setting aside of the noting in default until the final moment, but not before several time-consuming and costly interlocutory steps had been taken by Best. The Caribbean defendants were awarded by the motion judge in their favour in the amount of $45,235.13.

42 The Caribbean defendants have not brought a motion to dismiss or strike the claim, but instead have a motion before this court to have the action stayed for lack of jurisdiction, on the same grounds on which the Nelson Barbados Action was permanently stayed. It was agreed by plaintiff's counsel, but only at the outset of the hearing, that this jurisdictional motion would not be argued until after the disposition of the motions to dismiss. As a result of this court's disposition of these latter motions, by which the Second Action is dismissed in its entirety, the jurisdictional motion is moot other than the costs incurred by the Caribbean defendants.

43 As earlier stated, Best also had a motion before the court to amend his claim and a motion for an interim injunction. As a result of the dismissal of his claim without leave to amend, those motions, as well as the motion for default judgment against Mr. Deane, were dismissed on June 18, 2015.

44 It is undisputed that at the time of commencing this action, and still today, Best has unpaid costs orders arising from the Nelson Barbados Action in the aggregate amount of $375,375.40. This entire amount is owed to the Caribbean defendants as a result of an agreement reached in the Nelson Barbados Action.

The Law and Analysis

A. Dismissal on the Grounds of being Frivolous, Vexatious or otherwise an Abuse of Process

45 The authority of the court to have an action dismissed on the ground that it is frivolous or vexatious or is otherwise an abuse of the process of the court is found in rule 21.01(3)(d). Evidence is permitted on a motion under this rule.

46 The applicable principles to be taken into account when assessing whether a proceeding amounts to an abuse of process may be summarized as follows:

1. The doctrine of abuse of process concentrates on the integrity of the adjudicative process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77 (S.C.C.), at para. 51. The doctrine engages the inherent power of the court to prevent the misuse of its procedure, in a way that will be manifestly unfair to a party to the litigation before it, or would in some other way bring the administration of justice into disrepute: *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (Ont. C.A.), 2000 CanLII 8514, at para. 55, Goudge J.A. dissenting, aff'd [2002] 3 S.C.R. 307 (S.C.C.).

2. Policy grounds behind the doctrine of the abuse of process are essentially the same as those supporting issue estoppel, and include the need that there be an end to litigation, that no one should be twice vexed by the same cause, to preserve the courts and litigants resources, to uphold the integrity of the legal system in order to avoid inconsistent results and to protect the principle of finality: *C.U.P.E.*, at para. 38; and *Demeter v. British Pacific Life Insurance Co.* (1983), 43 O.R. (2d) 33 (Ont. H.C.), 1983 CanLII 1838, at para. 53, aff'd (1984), 48 O.R. (2d) 266 (Ont. C.A.).

3. One circumstance in which abuse of process has been applied is where the litigation before the court is found to be in essence an attempt to re-litigate a claim which the court has already determined: *Canam*, at paras. 55-56; *Donmor Industries Ltd. v. Kremlin Canada Inc.* (1991), 6 O.R. (3d) 501 (Ont. Gen. Div.), 1991 CanLII 7360, at paras. 3-4; *Currie v. Halton Regional Police Services Board*, 2003 CanLII 7815, (2003), 233 D.L.R. (4th) 657 (Ont. C.A.), at para 17; and *Angle v. Minister of National Revenue* (1974), [1975] 2 S.C.R. 248 (S.C.C.), 1974 CanLII 168, at pp. 265-267, Laskin J. dissenting.

4. Abuse of process may be established where the proceedings are oppressive or vexatious, and violate the fundamental principles of justice underlying the public interest in a fair and just trial process and the proper administration of justice: *C.U.P.E.*, at para. 35, citing *R. v. Scott*, [1990] 3 S.C.R. 979 (S.C.C.), at para 70.

5. An implicit attack on the correctness of the factual basis of a decision is a "collateral attack" and an abuse of the court's processes: *C.U.P.E.*, at para. 34. The rule against collateral attack attempts to prevent a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route: *British Columbia (Workers' Compensation Board) v. British Columbia (Human Rights Tribunal)*, 2011 SCC 52, [2011] 3 S.C.R. 422 (S.C.C.), at para. 28.

6. Abuse of process is used to bar proceedings that are inconsistent with the objectives of public policy: *Canam*, at para. 31.

7. Collateral attacks and re-litigation are not appropriate methods of redress since they inordinately tax the adjudicative process while doing nothing to ensure a more trustworthy result: *C.U.P.E.*, at para. 54.

8. *Res judicata*, including its two branches of issue estoppel and action estoppel, and collateral attacks, may be viewed as particular applications of a broader doctrine of abuse of process, but the three doctrines are not always interchangeable: *C.U.P.E.*, at paras. 22-23.

9. There may be instances where re-litigation will enhance, rather than impeach, the integrity of the judicial system, for example: (1) when the first proceeding is tainted by fraud or dishonesty; (2) when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or (3) when fairness dictates that the original results should not be binding in the new context: *C.U.P.E.*, at para. 52, citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460 (S.C.C.), at para. 80.

10. Unfairness in the prior proceedings or unfairness in preventing re-litigation can be the basis to refuse to apply abuse of process: *Penner v. Niagara Regional Police Services Board*, 2013 SCC 19, [2013] 2 S.C.R. 125 (S.C.C.), at para. 39.

11. A party is expected to raise all appropriate issues and is not permitted multiple opportunities to obtain a favorable judicial determination: *Penner*, at para. 42.

12. The principle of *res judicata* applies not only where the remedy sought and the grounds therefore are the same in the second action as in the first, but also where the subject matter of the two actions is the same, and the litigant seeks to raise in the second action matters of fact or law directly related to the subject matter which could have been, but were not, raised in the first action: *Chevron Canada Resources Ltd. v. R.* (1998), [1999] 1 F.C. 349 (Fed. C.A.), 1988 CanLII 9090, at para. 36, citing *Thomas v. Trinidad & Tobago (Attorney General)* (1990), 115 N.R. 313 (Trinidad & Tobago P.C.), at p. 316.

47 Frivolous and vexatious actions referenced in rule 21.01(3)(d) were discussed by the Court of Appeal in *Currie*. In that case, at para. 14, reference was had to the definition of "frivolous" in *Black's Law Dictionary*, 7th ed. (St. Paul, MN: West Publishing Co., 1999), at p. 677: "Lacking a legal basis or legal merit; not serious; not reasonably purposeful".

48 The fact that Best asserts that the Nelson Barbados Action was unfair and tainted with fraud does not make it so, nor does his assertion that Shaughnessy J. and the judges of the

Court of Appeal were misled in their evaluation of the evidence. The Reasons of Shaughnessy J. of May 3, 2013, leaves no doubt that his assessment was that it was Best, not the defendants, who had a persistent strategy in the litigation to mislead and deceive the court, and to obstruct its processes, as explicitly referenced in *Nelson Barbados Group Inc. v. Cox*, at pp. 28-29, 32, 33-35, 49-50, 51-52, 53, 55, 56-57.

49 Just as he has asserted in the Second Action, Best asserted during the contempt proceeding that there had been a cover-up or conspiracy in order to prevent a full hearing into the evidence pertaining to that proceeding, which was addressed at p. 36 of the Reasons of Shaughnessy J. of May 3, 2013. In terms of the issue of service of the order of November 2, 2009, and the representations made to the court by Mr. Ranking and Mr. Silver in respect of it, Shaughnessy J. deals fully with those issues, at p. 54 of his Judgment: "Further, and in any event, this court was never misled concerning Mr. Best's possession of the November 2, 2009 order." Additionally, Best's allegations in his claim that PricewaterhouseCoopers is not a legal entity, and that the court was "misled into refusing to decide" whether it was a legal entity, is another example of Best inviting this court to reach a different result than that already reached. That allegation was raised in the course of the contempt proceeding and dealt with summarily by Shaughnessy J. in his Reasons of May 3, 2013, at p. 36. Further, the "secret investigation" referenced in the current claim was also the subject of comment by Shaughnessy J. in his judgment, at pp. 33-35, which he referred to as "yet a further tactic". Finally, the Van Allen affidavit, to which Best misguidedly attempts to attach much significance in his second claim, is not fresh evidence, as it formed a part of the record before Shaughnessy J., and was the subject of findings in both the Superior Court and the Court of Appeal. Various challenges to the veracity of the Van Allen affidavit were raised by Best during the contempt proceeding.

50 The claim in the Second Action is founded entirely on the previous litigation which dealt with the motion for costs, orders for substituted service and examination of Best, a motion for contempt of court and a finding of contempt, an application to set aside the finding of contempt, an application to remove certain lawyer defendants from appearing on the appeal and the appeals against the 2013 order of Shaughnessy J. There is no new issue raised in the claim that Best did not raise in the prior proceedings, either before Shaughnessy J. or in the appeal process by way of affidavit or oral argument.

51 To summarize, the Second Action is an abuse of process, as defined in the leading cases referenced at para. 46, because it is a collateral attack on and an attempt to re-litigate the findings and rulings made in the Nelson Barbados Action, in which all avenues of appeal were exhausted by the plaintiff. The fact that the appeal was administratively dismissed does not mean that Best was not given a fair forum in which to litigate the costs orders related to Nelson Barbados' former claim. It would be extremely perverse for this court to rationalize a "second kick at the can" on the ground that a litigant's appeal was dismissed for failure to

pay costs orders imposed in the course of a judicial process that was untainted by procedural unfairness, fraud or dishonesty. Best's second claim is unmeritorious because it seeks to re-litigate a cause which has already been decided by a court of competent jurisdiction.

52 As the foregoing suggests, this court finds no merit in the plaintiff's submissions: 1) that privacy violations and the Van Allen investigation were not dealt with, with finality in the prior litigation; 2) that the allegation that PricewaterhouseCoopers was not a legal entity and was not dealt with, with finality; or 3) that the finding of contempt was not subject to a full and fair hearing, or that evidence relative to setting aside such finding was not fully considered. While the plaintiff argues that no court addressed and/or determined the above issues with any certainty of finality, the above review of the history of the prior litigation proves the contrary. Further, a judge is not required to give extensive reasons to the satisfaction of every litigant on arguments raised, particularly when they are spurious or unreasonable. The issues and allegations raised by the plaintiff arising from the Van Allen affidavit, the privacy violations and the legal status of the PricewaterhouseCoopers all fall within such characterization; the courts allotted to these issues the amount of attention they merited. There is no rational reason to apply any of the exceptions to the abuse of process doctrine advanced by Best in argument or through his counsel's factum, or for this court to exercise its discretion to permit re-litigation of any of the issues raised in the second action as permitted by *C.U.P.E.* and *Penner*.

53 The pleading is also an abuse of process because of its scandalous and vexatious content, the majority of it a regurgitation of the allegations made in the Nelson Barbados Action and, with the exception of two paragraphs, all stemming from the contempt hearing arising from that action. The two paragraphs in question, being paras. 31 and 32 of the claim, contain the inflammatory allegations already referenced in these Reasons regarding the personal safety of Best and his family and the role of the lawyers and law firms in conspiring to cause such injury. As commented on by Shaughnessy J. extensively in his Judgment of May 3, 2013, this is a continuation of Best's campaign to vilify and defame the lawyers and law firms, and this time around, Mr. Van Allen and his company, police departments and individual officers.

54 Dismissing the Second Action will meet the policy objectives which underlie *res judicata* and abuse of process: Best will not be permitted to use any more judicial resources to retry the same issues to attempt to get a different result; there will be finality to the issues raised in the contempt proceeding; the integrity of the administration of justice will be upheld by preventing Best from repeatedly challenging adjudicative decisions and continuing to harass and oppress the defendants in the face of unpaid costs orders; and the court will control its own processes by preventing a vexatious pleading from proceeding. On this latter point, part of the reason why this claim is particularly vexatious is that the damages allegedly suffered by Best are claimed to arise, in whole or in part, from his incarceration. A litigant is not entitled to claim damages from harm suffered as a consequence of a court order: *Apotex Inc.*

v. Ontario (Minister of Health & Long-Term Care), 2005 CanLII 32910, (2005), 204 O.A.C. 275 (Ont. C.A.), at para. 28.

55 While in my view there are sufficient grounds to dismiss the claim in its entirety on the basis that it is an abuse of process, for the sake of completeness I will consider the alternate relief sought by the defendants, which is to strike out the claim either under rule 25.11 or rule 21.01(1)(b).

56 Before proceeding however, it is noted that the plaintiff's counsel conceded during argument that the Ontario Provincial Police does not have the legal capacity to be sued and that all claims against this entity should be dismissed: *McNabb v. Ontario (Attorney General)* (2000), 50 O.R. (3d) 402 (Ont. S.C.J.), 2000 CanLII 22413, at para. 30.

B. Applicable Principles for Striking Pleadings

57 The threshold for striking a pleading is high. On a motion to strike a claim the test is whether there is any reasonable prospect of success, the effect being to weed out the hopeless claims and ensuring that those that have some chance of success go to trial: *Green v. Canadian Imperial Bank of Commerce*, 2014 ONCA 90, 118 O.R. (3d) 641 (Ont. C.A.). On a motion under r. 21.01(1)(b), the moving party bears the burden of showing that it is "plain and obvious" and "beyond doubt" that the claim or defence has no chance of success: *Hunt v. T & N plc*, [1990] 2 S.C.R. 959 (S.C.C.), 1990 CanLII 90, at pp. 979-980; and *Dumont v. Canada (Attorney General)*, [1990] 1 S.C.R. 279 (S.C.C.), 1990 CanLII 131, at p. 280. Only if the action is certain to fail because it contains a radical defect should it be struck out: *Hunt*, p. 980. The pleading must be read generously, with allowances for drafting deficiencies: *Falloncrest Financial Corp. v. Ontario* (1995), 27 O.R. (3d) 1 (Ont. C.A.), (*sub nom Nash v. Ontario*) 1995 CanLII 2934, at p. 6; *Tran v. University of Western Ontario*, 2015 ONCA 295, [2015] O.J. No. 2185 (Ont. C.A.), at para. 16.

C. Rules 25.11 and 21.01(1)(b): Striking the Claim

58 Rule 25.11 permits the court to strike out or expunge all or part of a pleading, with or without leave to amend, on the ground that the pleading or other document,

(a) may prejudice or delay the fair trial of the action;

(b) is scandalous, frivolous or vexatious; or

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

59 I find that the claim is also vexatious and an abuse of process because it is inadequate in meeting the purposes of pleadings under the Rules, which are set out in *Balanyk v. University of Toronto*, 1999 CanLII 14918, (1999), 1 C.P.R. (4th) 300 (Ont. S.C.J.), at para. 27; *Cerqueira*

v. Ontario, 2010 ONSC 3954, [2010] O.J. No. 3037 (Ont. S.C.J.), at para. 11; and *Senechal v. Muskoka (District Municipality)* (2003), 37 M.P.L.R. (3d) 131, [2003] O.J. No. 885 (Ont. S.C.J.), at para. 50, as follows:

> (a) to define clearly and precisely the questions and controversy between the litigant;
>
> (b) to give fair notice of the precise case which is required to be met and the precise remedy sought; and
>
> (c) to assist the court in its investigation in the truth of the allegations made.

60 The law is clear that it is improper to plead allegations based on assumptions and speculations, because they are incapable of proof. A pleading must contain a plaintiff's knowledge of the facts and not merely those facts that he believes or wishes may or may not be true. A plaintiff must clearly plead the facts in support of his claim. Mere bald allegations, without supporting facts or with facts incapable of proof, must not be permitted to proceed: *Knight v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, [2011] 3 S.C.R. 45 (S.C.C.), at para. 22; *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385, (2005), 262 D.L.R. (4th) 222 (Ont. C.A.); *Deep v. Ontario*, [2004] O.T.C. 541, [2004] O.J. No. 2734 (Ont. S.C.J.), aff'd [2005] O.J. No. 1294 (Ont. C.A.), at para. 6; *Fitzpatrick v. Durham Regional Police Services Board* (2005), 76 O.R. (3d) 290 (Ont. S.C.J.), 2005 CanLII 63808, at para. 25; *Wilson v. Toronto Police Service*, [2001] O.T.C. 483, [2001] O.J. No. 2434 (Ont. S.C.J.), aff'd 2002 CanLII 4770 [2002 CarswellOnt 335 (Ont. C.A.)], at paras. 1-2; *Hunter v. Bravener* (2002), 55 W.C.B. (2d) 39, [2002] O.J. No. 3100 (Ont. S.C.J.), aff'd (2003), 57 W.C.B. (2d) 449 (Ont. C.A.) [2003 CarswellOnt 1604 (Ont. C.A.)], at paras. 3-5; *Gravelle v. Ontario*, 2012 ONSC 5149, 95 C.C.L.T. (3d) 228 (Ont. S.C.J.), at paras. 122-123; *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.), 1990 CanLII 6761, at para. 19; and *Senechal*, at para. 50.

61 Bare allegations are scandalous and are to be struck out under rule 25.11(b), and allegations of fraud, misrepresentation, negligence and conspiracy must be pleaded with particularity: *Cerqueira*, at para. 11. The opposing party is entitled to have the case against it set out in an intelligible form: *Craik v. Aetna Life Insurance Co. of Canada* (1995), 58 A.C.W.S. (3d) 941, [1995] O.J. No. 3286 (Ont. Gen. Div.), at para. 31, aff'd [1996] O.J. No. 2377 (Ont. C.A.).

62 The claim fails to meet any of these requirements. It is a challenging, if not impossible, task to gain an understanding from it of which causes of action are being asserted against which defendants, which defendants are being referenced from time to time, which allegations are being levelled against which defendants and why and how, all the while casting scandalous aspersions on the defendants amidst irrational and convoluted argument in support of the

allegations made. The allegations are vague and sweeping, with little to no specificity or particulars to enable the defendants to know the case that they must meet.

63 Rule 21.01(1)(b) permits a court to strike out a pleading on the ground that it discloses no reasonable cause of action. As earlier stated, no evidence is admissible under this rule, and the court must take the allegations pleaded as true: *Hunt*, at pp. 989-990.

64 The test for striking out a claim or cause of action was set out in *Imperial Tobacco Canada Ltd.*, at para. 17, where McLachlin C.J. stated:

> The parties agree on the test applicable on a motion to strike for not disclosing a reasonable cause of action under r. 19(24)(a) of the B.C. *Supreme Court Rules*. This Court has reiterated the test on many occasions. A claim will only be struck if it is plain and obvious, assuming the facts pleaded to be true, that the pleading discloses no reasonable cause of action: *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263, at para. 15; *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959, at p. 980. Another way of putting the test is that the claim has no reasonable prospect of success. Where a reasonable prospect of success exists, the matter should be allowed to proceed to trial: see, generally, *Syl Apps Secure Treatment Centre v. B.D.*, 2007 SCC 38, [2007] 3 S.C.R. 83; *Odhavji Estate*; *Hunt*; *Attorney General of Canada v. Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735..

65 Reading the claim as generously as possible and making allowances for some drafting deficiencies, I still find that none of the claims made by Best disclose a reasonable cause of action, even taking as true the facts as pleaded. Each cause of action will be discussed in turn. First, however, I will deal with a legal argument threaded throughout the factum filed by Best for opposing these motions.

66 In his discussion of the applicable law, Best's counsel relies on a line of cases referenced by him as the "joint party liability" cases: *Fullowka v. Royal Oak Ventures Inc.*, 2010 SCC 5, [2010] 1 S.C.R. 132 (S.C.C.); and *Ontario Industrial Loan & Investment Co. v. Lindsey* (1882), 4 O.R. 473, [1883] O.J. No. 263 (Ont. H.C.), and the "common design" liability cases: *Fullowka*; and *Botiuk v. Toronto Free Press Publications Ltd.*, [1995] 3 S.C.R. 3 (S.C.C.), 1995 CanLII 60. His argument, in summary, is that the plaintiff alleges that the defendants have worked in complicity toward the common goal of harming the plaintiff. Accordingly, regardless of the clear confirmation in the law regarding the elements of each cause of action presented by the claim, the argument is that the causes of action are all viable because each party is a tortfeasor working together for this common purpose.

67 In *Fullowka*, at para. 152, the Supreme Court of Canada states: "Inciting another to commit a tort may make the person doing the incenting a joint tortfeasor with the person who actually commits it". At para. 35 of *Ontario Industrial Loan*, the court stated: "All

persons procuring, commanding, aiding or assisting the commission of a wrongful act, are principals in the transaction" (cases omitted). Concerted action liability is a specific form of joint liability, where those participating in the commission of the tort must have acted in furtherance of a common design: *Botiuki*, at para. 74, citing John G. Fleming, *The Law of Torts*, 8th ed. (Law Book Company, 1992), at p. 255.

68 While there can be no argument with these legal principles, they cannot be overlaid on a fact situation to create joint liability unless a tort has been properly pleaded in the first place. Joint liability can have no application to allege tortfeasors where neither the essential elements of the tort in question nor the facts underpinning those elements have been pleaded.

The Claim for Abuse of Process

69 In *Harris v. GlaxoSmithKline Inc.*, 2010 ONCA 872, 272 O.A.C. 214 (Ont. C.A.), at para. 27, the four constituent elements of the tort of abuse of process are set out as follows:

> (1) the plaintiff is a party to a legal process initiated by the defendant;
>
> (2) the legal process was initiated for the predominant purpose of furthering some indirect, collateral and improper objective;
>
> (3) the defendant took or made a definite act or threat in furtherance of the improper purpose; and
>
> (4) some measure of special damage has resulted.

70 In this case, some of the defendants in the Nelson Barbados Action gave instructions to their former counsel to pursue the legitimate objective of recovering their wasted costs after that action was stayed. There was a legal basis for their counsel to pursue the steps that they did in furtherance of that objective. There can be no liability when a defendant employs a regular legal process to its proper conclusion: *WestJet Airlines Ltd. v. Air Canada*, 2005 CarswellOnt 2101, [2005] O.J. No. 2310 (Ont. S.C.J.), at para. 19. Accordingly, it is plain and obvious that this cause of action against the lawyer defendants and their firms cannot succeed, and it cannot succeed against the Caribbean defendants who sought to recover their wasted costs.

71 In all other cases, it is plain and obvious from the claim that this cause of action fails at the first branch of the test; none of the other defendants can be reasonably characterized as "initiating" the costs proceeding or the contempt hearing arising out of it, and they were not parties in the Nelson Barbados Action. As earlier explained, the plaintiff seeks to draw in the defendants in the Second Action as being "co-conspirators" in the legal process initiated by those of the Caribbean defendants who were parties in the Nelson Barbados Action.

Best's counsel cites *Fullowka* as authority for the proposition that liability can attach for encouraging someone to commit a tort. However, the elements of the offence set out in *Harris* are clear and unambiguous, and cannot be circumvented by an argument of the sort raised by Best's counsel.

Negligent Investigation/Negligent Performance of a Statutory Duty

72 The elements of the tort of negligent investigation were established in *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129 (S.C.C.), at paras. 19, 60, 73, 88, 90, 93, as follows:

(a) the defendant owed the plaintiff a duty of care related to an investigation;

(b) the defendant breached the standard of care associated with that duty; and

(c) compensable damages were caused by the breach.

73 Compensable harm only arises in a claim of negligent investigation where the investigation has terminated in the plaintiff's favor, for instance, where there has been a finding of wrongful conviction: *Hill*, at para. 97; and *Romanic v. Johnson*, 2013 ONCA 23, [2013] O.J. No. 229 (Ont. C.A.), at para. 6.

74 Best has not pleaded that any investigations alleged to have been undertaken, secret or otherwise, were terminated in his favor. Likewise, he has not pleaded that the contempt proceeding which allegedly flowed from those investigations terminated in his favor. On this basis alone, this cause of action has no reasonable prospect of success against any of the defendants.

75 Further, a successful action in negligence requires that the plaintiff demonstrate: (1) that the defendant owed him a duty of care; (2) that the defendant's behavior breached the standard of care; (3) that the plaintiff sustained damages; and (4) that the damage was caused, in fact and in law, by the defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, [2008] 2 S.C.R. 114 (S.C.C.), at para. 3.

76 Lawyers do not owe a duty of care to their adversaries in litigation except in very limited circumstances, which do not apply in this case. Best has not pleaded that the present case is one of those exceptional circumstances: *Martel v. Spitz*, 2005 ABCA 63, [2004] A.W.L.D. 536 (Alta. Q.B.), at para. 17, leave to appeal to SCC refused, 30879 (August 18, 2005) [2005 CarswellAlta 1131 (S.C.C.)]; and *Biron v. Aviva Insurance Co.*, 2014 ONCA 558, [2014] O.J. No. 3436 (Ont. C.A.) , at para. 6.

77 With respect to the private investigator defendants, there are no facts pled in the claim setting out what the duty of care is in respect of a private investigator. Best pleads

that a private duty of care to "investigate lawfully" emanates from the legislation set out in the statement of claim: *Criminal Code*, R.S.C. 1985, c. C-46; *Police Services Act*, R.S.O. 1990, c. P.15; *Private Security and Investigative Services Act, 2005*, S.O. 2005, c. 34; *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31; and unspecified "OPP policies", all of which he asserts preclude a serving police officer from acting as or being hired as a private investigator. First, the premise of the argument is inaccurate. The *Police Services Act*, s. 49, deals with secondary employment of police officers and conflicts of interest, with a mechanism in that Act to provide a remedy for any unauthorized breach. That statute does not itself create a duty of care, but rather is a labour relations statute that provides for an internal disciplinary process. Likewise, the *Private Security and Investigative Services Act* does not contain provisions expressly prohibiting a police officer from working as a private investigator.

78 To make such generalized references to a duty of care, without greater specificity, is to create an unfocused action that will prolong the discovery and trial process, and which leaves the defendants without an understanding of the facts that give rise to a duty of care, and how that duty was breached. A claim in negligence must, for these reasons, be particularized: *Basdeo (Litigation Guardian of) v. University Health Network*, [2002] O.T.C. 54, [2002] O.J. No. 263 (Ont. S.C.J.), at paras. 16-17, citing *Region Plaza Inc. v. Hamilton-Wentworth (Regional Municipality)* (1990), 12 O.R. (3d) 750 (Ont. H.C.), at para. 17, Rosenberg J.

79 Further, Best alleges that Van Allen accessed and disseminated "information" as a police officer that could not otherwise have been lawfully obtained. However, the exhibits attached to an affidavit of Mr. Sebastien Kwidzinski filed in the Nelson Barbados Action reveal that all information contained in the Van Allen affidavit was in the public domain other than Best's former address. Nowhere in the claim does Best clarify or particularize how the publishing of his former address was the proximate cause of any damages suffered.

80 In terms of the Toronto Police Association, the claim identifies this defendant as "an incorporated entity which represents active and retired police officers and others which are its members". The claim fails to plead sufficient facts to establish that the TPA was in any way involved in a police investigation.

81 In terms of the Durham Regional Police Service, the core of the allegations, and indeed the only facts pleaded as against the DRPS defendants, relate to two investigations supposedly conducted by one or more of the DRPS defendants. Both investigations are alleged to have contributed to the court's finding that Best was in contempt of court and/or to his subsequent failed attempt to set aside that finding in 2013. These two alleged investigations were a "secret investigation" and an investigation by the professional standards unit of the OPP and the DRPS.

82 As pleaded, the "secret investigation" alleged to have occurred in December 2009 was in relation to and for the purpose of the contempt proceeding and the hearing in January 2010. This proceeding was not terminated in Best's favour. As such, the claim does not disclose a reasonable or tenable cause of action.

83 The law is clear that a police service does not owe a private law duty of care to complainants or victims when it investigates the conduct of its own officers. There is an inherent tension between the public interest in an impartial and competent investigation and a private individual's interest in a desired outcome of that same investigation, which includes seeking a viable civil cause of action against the alleged perpetrators. To impose a private law duty of care would introduce an element seriously at odds with the fundamental role of the special unit created to investigate the conduct of police officers in the public interest: *Wellington v. Ontario*, 2011 ONCA 274, 105 O.R. (3d) 81 (Ont. C.A.), at paras. 43-48, leave to appeal refused, [2011] S.C.C.A. No. 258 (S.C.C.).

84 Therefore, with respect to the second alleged investigation by the professional standards unit, Best was the complainant rather than the subject of the investigation. *Wellington* confirms that there can be no duty owed to Best. Accordingly, Best cannot prove an essential element of the claim.

85 With respect to the OPP officers, Mr. Kearns and Mr. Vibert, the claim does not detail any investigation of Best by these two officers. Even had Best alleged that the two officers participated in such an investigation, on the basis of *Wellington*, at para. 33, such an allegation does not give rise to a relationship of proximity sufficient to ground an action for damages in tort.

86 With respect to the Peel Regional Police Service, the claim again does not detail the specifics of any investigation of Best by this defendant and there is uncertainty whether this defendant is even included in the term "the police" repeatedly referred to by Best in his claim.

87 Where this claim most decidedly fails, however, is with respect to the requirement that compensable damages were caused by the breach. Causation is not addressed in the claim at all. The root of the cause of action is the allegation that Mr. Van Allen used his position as a police officer to obtain Best's former address. All other defendants are alleged to be involved because of their knowledge of Mr. Van Allen's conduct. Best then alleges that this information "helped" persons to locate the plaintiff and his family and threats of harm and violence ensued. Nowhere in the claim does Best set out the particulars of how the former address was or could be used by the identified individuals to harm him. How any alleged damages were caused by this conduct remains uncertain.

88 Accordingly, it is plain and obvious that this cause of action against all of the defendants has no chance of success.

False Imprisonment

89 The essential elements of a cause of action for false imprisonment are set out in *Ernst v. Quinonez*, [2003] O.T.C. 847, [2003] O.J. No. 3781 (Ont. S.C.J.), at para. 93. A party alleging false imprisonment must prove that:

(a) the plaintiff was totally deprived of liberty;

(b) the deprivation was against the plaintiff's will; and

(c) the deprivation was caused by the defendant.

90 There can be no cause of action for false imprisonment once there has been judicial intervention, and if the imprisonment was lawfully justified there is no false imprisonment: *Frazier v. Purdy* (1991), 6 O.R. (3d) 429, [1991] O.J. No. 2154 (Ont. Gen. Div.), at paras 22-23; and *Zareian v. Durham Regional Police Services Board* (2006), 147 A.C.W.S. (3d) 507, [2006] O.J. No. 1296 (Ont. S.C.J.), at paras. 34, 38. The tort requires an intentional and unauthorized confinement of an individual: *Sheridan v. Ontario*, 2014 ONSC 4970, [2014] O.J. No. 4023 (Ont. S.C.J.), at para. 50, aff'd 2015 ONCA 303, [2015] O.J. No. 2281 (Ont. C.A.).

91 Although Best has pled that the lawyer defendants initiated the contempt proceeding, there are no facts pleaded in the claim to suggest that his imprisonment preceded a judicial intervention, and in fact he describes in the claim that he was imprisoned pursuant to Shaughnessy J.'s order.

92 Additionally, the plaintiff must establish that the defendants caused the arrest or detention. Given that it was the plaintiff's conduct which led to the finding of contempt and his incarceration, it is plain and obvious that none of the defendants caused the arrest or detention.

93 There is no cause of action for false imprisonment under these circumstances in relation to any of the defendants.

Malicious Prosecution

94 The Supreme Court of Canada has described the elements of the cause of action for malicious prosecution in *Nelles v. Ontario*, [1989] 2 S.C.R. 170 (S.C.C.), 1989 CanLII 77,

at pp. 192-193, and has since reiterated the test in *Kvello v. Miazga*, 2009 SCC 51, [2009] 3 S.C.R. 339 (S.C.C.), at paras. 78-89, as follows:

> (a) the defendant initiated or continued the impugned prosecution;
>
> (b) the prosecution terminated in the plaintiff's favor;
>
> (c) the defendant initiated or continued the prosecution in the absence of reasonable and probable cause; and
>
> (d) the defendant actuated the prosecution for an improper purpose and did not have an honest belief in guilt.

95 Best has not pled that the contempt proceeding terminated in his favor, and in fact has pled that he was found guilty of contempt and that that judgment was never set aside. Accordingly, it is plain and obvious that this cause of action has no chance of success in relation to any of the defendants.

96 These allegations should also be struck due to the vagueness of Best's allegations as to the "improper purposes" for which the contempt proceeding was allegedly initiated and pursued. In addition to a generalized allegation that there was an improper purpose in wanting to have Best found in contempt and incarcerated, Best makes unsupported and vague allegations that include:

> (i) "seeking to pressure discovery";
>
> (ii) "otherwise pressure the termination of litigation in other jurisdictions involving persons and entities, not the Plaintiff or NBGL";
>
> (iii) "as a means to pressure him and others in respect of litigation and potential litigation in other jurisdictions";
>
> (iv) "encouraging the plaintiff to leave Canada"; and
>
> (v) "to gain advantage in or to prevent the continuation of litigation in other jurisdictions".

97 Clearly these allegations lack the specificity needed to allow the defendants to properly respond. The alluded-to litigation and parties are never identified in the claim. The allegations beg the question of how Best would be entitled to compensation for alleged wrongs done to others. And the notion that the Caribbean defendants and their lawyers would want to drive Best out of the jurisdiction when their intent was to recover costs from him is simply ludicrous.

98 Best's counsel argues in the factum that there was no basis to pursue contempt in the first place, setting out, again, all of the arguments addressed by Shaughnessy J. in his Reasons of May 3, 2013. Again, Best's counsel argues that this is a case where re-litigation should be permitted in accordance with the exceptions discussed in *Canam*, *C.U.P.E.*, and *Penner*. For the reasons already given, this is not a case where any alleged grounds of such exceptions are adequately pled in the claim to give rise to such relief, and the facts of the case do not suggest that re-litigation would be in the interests of justice.

Intentional Infliction of Harm or Mental Suffering

99 The elements of the tort of intentional infliction of mental suffering are set out in *Prinzo v. Baycrest Centre for Geriatric Care* (2002), 60 O.R. (3d) 474 (Ont. C.A.), 2002 CanLII 45005, at para. 48, as follows:

> (1) flagrant or outrageous conduct;
>
> (2) calculated to produce harm; and
>
> (3) resulting in a visible and provable illness.

100 As with other torts requiring intentional conduct, material facts must be pled with sufficient particularity: *Sheridan* (ONSC), at para. 53.

101 Best's allegations that the defendants intentionally undertook steps in the litigation in order to harm him are bald and scandalous and are not supported by material facts. Additionally, the requirement of a visible and provable illness is not described in the claim.

102 Given the failure to plead material facts in support of the essential elements of this tort, it is plain and obvious that it cannot succeed against any of the defendants.

Misfeasance of Public Office

103 The Supreme Court of Canada has set out the elements of the tort of misfeasance in public office in *Odhavji Estate v. Woodhouse*, 2003 SCC 69, [2003] 3 S.C.R. 263 (S.C.C.), at para. 23, and in *St. Elizabeth Home Society v. Hamilton (City)*, 2010 ONCA 280, 319 D.L.R. (4th) 74 (Ont. C.A.), at para. 20, as follows:

> (a) that a public officer, acting in his or her capacity as a public officer, engages in deliberate and unlawful conduct;
>
> (b) the public officer is aware both that the conduct is unlawful and that it is likely to harm the plaintiff;

(c) the public officer's tortious conduct was the legal cause of the plaintiff's injuries; and

(d) the injuries suffered are compensable in law.

104 In *Freeman-Maloy v. York University* (2006), 79 O.R. (3d) 401 (Ont. C.A.), (*sub nom Freeman-Maloy v. Marsden*) 2006 CanLII 9693, at para. 10, leave to appeal refused, [2006] S.C.C.A. No. 201 (S.C.C.), Sharpe J.A. writing for the Court stated that "[t]he tort of misfeasance in a public office is founded on the fundamental rule of law principle that those who hold public office and exercise public functions are subject to the law and must not abuse their powers to the detriment of the ordinary citizen."

105 It is plain and obvious that certain of the defendants are not public officers and were never exercising a public function, including the lawyers, law firms, Van Allen and the other private investigator defendants, the Caribbean defendants and the Toronto Police Association. Further, the claim does not plead any material facts setting out that any of the defendants are in fact government actors fulfilling public functions. Accordingly, this cause of action has no chance of success.

Conspiracy

106 A pleading of conspiracy must be detailed and precise, including in respect of the conduct by each alleged conspirator. As expressed by I.H. Jacob, *Bullen and Leake and Jacob's Precedents of Pleadings*, 12th ed. (London, England: Sweet & Maxwell, 1975), at p. 341 and cited by the Court of Appeal with approval in *Normart Management Ltd. v. West Hill Redevelopment Co.* (1998), 37 O.R. (3d) 97 (Ont. C.A.), 1998 CanLII 2447, at para. 21:

> The statement of claim should describe who the several parties are and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what the purpose or what were the objects of the alleged conspiracy, and it must then proceed to set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy; and lastly, it must allege the injury and damage occasioned to the plaintiff thereby.

107 Similarly, in *Tran v. University of Western Ontario*, 2014 ONSC 617, [2014] O.J. No. 407 (Ont. S.C.J.), at para. 31, rev'd on other grounds 2015 ONCA 295 (Ont. C.A.), the court described that a pleading in conspiracy must make a number of distinct points, including:

(a) describe who the several parties are and their relationship with each other;

(b) allege the agreement between the defendants to conspire;

(c) state precisely what the purpose or what were the objects of the alleged conspiracy; and

(d) set forth, with clarity and precision, the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy, and

(e) describe the injury and damage occasioned to the plaintiff thereby.

108 An allegation of conspiracy will be defective and should be struck unless the specific elements are pleaded in the statement of claim: *Dryden v. Dryden*, 2011 ONSC 7060, 74 E.T.R. (3d) 301 (Ont. S.C.J.), at para. 39.

109 Best has neither pleaded what agreements existed between the defendants nor set out what purpose they had in conspiring. He pleaded bald and spurious allegations concerning an intention to influence proceedings in other jurisdictions, some of which are alleged to not even involve Best or to harm Best personally. Best has not pleaded sufficient precise acts which any of the defendants allegedly undertook in furtherance of conspiracy to ground the cause of action. Where Best has attempted to plead precise acts, for example, that the lawyer defendants committed fraud on the court in relation to the legal entity of PricewaterhouseCoopers, the allegations are vexatious and patently ridiculous.

110 As it is plain and obvious that the pleading does not support this cause of action against any of the defendants, it should be struck.

Breach of Privacy Rights

111 As set out in *Jones v. Tsige*, 2012 ONCA 32, 108 O.R. (3d) 241 (Ont. C.A.), at para. 71, a party alleging breach of common law privacy rights must plead as follows:

(a) the defendant's conduct must be intentional or reckless;

(b) the defendant must have invaded, without lawful justification, the plaintiff's private affairs or concerns; and

(c) a reasonable person would regard the invasion as highly offensive, causing distress, humiliation or anguish.

112 Best pleads that his private information was disclosed in the Van Allen affidavit, prepared in relation to the Nelson Barbados Action. This affidavit and other nonspecified documents were allegedly filed with the court by the lawyer defendants. Best further alleges that certain of the lawyer defendants disseminated his private information on the Internet,

including his date of birth, driver's license information, addresses and employment record. He alleges that this is a breach of the deemed/implied undertaking rule and is therefore unlawful. Best claims that these allegations are "highly offensive" to a reasonable person because his information was accessed without proper purpose and without regard to his safety. He has not pleaded particulars regarding the lawyer defendants' alleged intention to invade his privacy. He has not pled that the former address released by the Toronto Police Association was in fact his former address.

113 The preparation and filing of affidavits and other unspecified material in the Nelson Barbados Action was not without lawful justification, as it was undertaken in the normal course of an action. Further, Best's allegations that the defendants participated in disseminating his personal information on the Internet are bare, scandalous, patently ridiculous and incapable of proof. With respect to this cause of action, Best makes sweeping allegations against all 36 defendants concerning the access and distribution of his private information, without particularizing who accessed what information, when, and who is alleged to have done what with the various categories of information. This approach provides none of the defendants with a reasonable opportunity to prepare a defence other than to deny the allegations, and fails to set out the material facts necessary to support this intentional tort.

114 The only defendant against whom this cause of action has any potential merit is the Toronto Police Association, who allegedly released Best's former address to Mr. Van Allen. However, the facts fail to satisfy the third part of the test set out in *Jones v. Tsige*, in that a reasonable person would not find it highly offensive in the circumstances of this case. Best had concealed any address at which he could be personally served. Accepting for argument's sake that he did so because of his former profession as a police detective, his conversation with Mr. Ranking and Mr. Silver on the morning of his scheduled examination reveals that he would not cooperate in making his whereabouts known, even generally, or cooperate in making himself available to be examined personally, even in the face of a court order. Even in the course of an examination in aid of execution, the defendants would have been entitled pursuant to rule 60.18(2) to examine Best in relation to far more intrusive matters, such as his income, assets and liabilities and any other matter pertinent to the enforcement of the order, including his residential address. Further, the pleading fails to convey how the revelation of a former address specifically caused distress, humiliation and/or anguish.

115 Accordingly, it is plain and obvious that this cause of action has no chance of success and should be struck against all defendants.

Breach of ss. 7 and/or 8 of the Charter

116 Best admitted at the outset of the argument of the motions that this cause of action cannot stand against individual state actors: *Ward v. Vancouver (City)*, 2010 SCC 27, [2010]

2 S.C.R. 28 (S.C.C.). Best had indicated an intention to pursue *Charter* claims had his motion to amend the claim been successful, such that PRPS and DRPS were replaced with their respective Police Service Boards. As the motion to amend has not been granted, these claims have no chance of success.

117 Further, there are no material facts pleaded to engage ss. 7 and 8 of the *Charter*.

Breach of Fiduciary Duty/Negligence in Respect of Fiduciary Duty

118 Best conceded in his factum that this cause of action cannot apply in this case.

Absolute Privilege and Witness Immunity

119 Absolute privilege and witness immunity provides further bases for dismissing the claim against the Van Allen defendants.

120 In *Samuel Manu-Tech Inc. v. Redipac Recycling Corp.*, 1999 CanLII 3776, (1999), 124 O.A.C. 125 (Ont. C.A.), at para. 19, Feldman J.A. speaking for the court, stated that the law on absolute privilege is found in *Halsbury's Laws of England*, vol. 28, 4th ed. Reissue (London, England: Butterworths, 1997), at para. 97:

> Absolute privilege. No action lies, whether against judges, counsel, jury, witnesses or parties, for words spoken in the ordinary course of any proceedings before any court or judicial tribunal recognized by law. The evidence of all witnesses or parties speaking with reference to the matter before the court is privileged, whether oral or written, relevant or irrelevant, malicious or not. The privilege extends to documents properly used and regularly prepared for use in the proceedings. Advocates, judges and juries are covered by this privilege. However, a statement will not be protected if it is not uttered for the purposes of judicial proceedings by someone who has a duty to make statements in the course of the proceedings.

121 It flows from this that the Van Allen affidavit used in the Nelson Barbados Action is a communication captured by absolute privilege. Similarly, as a witness, Mr. Van Allen and the private investigator defendants may not be sued for things said or done in the course of preparing evidence for judicial proceedings: *Elliott v. Insurance Crime Prevention Bureau*, 2005 NSCA 115, 256 D.L.R. (4th) 674 (N.S. C.A.), at paras. 112-114. The principle behind absolute privilege and witness immunity is to ensure candor and cooperation of witnesses and to protect the substance of evidence from collateral attack in subsequent proceedings, such as this action: *Elliott*, at para. 119.

122 On the basis of absolute privilege and witness immunity, it is plain and obvious that the action against the Van Allen defendants cannot succeed.

Limitation defence of the Toronto Police Association

123 The Toronto Police Association also raised the argument that the claim should be struck under rule 21.01(1)(a) on the grounds that it is barred by s. 4 of the *Limitations Act, 2002*, S.O. 2002, c. 24, Schedule B. I accept the arguments put forth by counsel for this defendant and rule that, in the alternative, this is another basis for striking the claim against this particular defendant.

124 The case law supports the proposition that, where it is plain and obvious based on the undisputed facts contained in the pleadings that the limitation period had begun to run at a point in time which ensures that it had expired by the time the claim was filed, an action can be held to be statute-barred and an order striking the claim can be granted: *Beardsley v. Ontario* (2001), 57 O.R. (3d) 1 (Ont. C.A.), 2001 CanLII 8621, at para. 21; *Charlton v. Beamish* (2004), 73 O.R. (3d) 119 (Ont. S.C.J.), 2004 CanLII 35934, at paras. 48-49; and *Whittaker v. Great-West Life Assurance Co.* (2008), 63 C.C.L.I. (4th) 100, [2008] O.J. No. 1194 (Ont. S.C.J.), at paras. 33-48.

125 In this case Best has put before the court all of the material facts in relation to the principle of discoverability by way of his pleading and reply to demand for particulars. A reply to a demand for particulars is not prohibited evidence barred by rule 21.01(2)(b); it is deemed to form part of the statement of claim: *Sinclair v. Markham (Town)*, 2014 ONSC 1550, 27 M.P.L.R. (5th) 32 (Ont. S.C.J.), at para. 14; and *Perth Insurance Co. v. Osler Rehabilitation Centre Inc.*, 2013 ONSC 7033, [2013] O.J. No. 5408 (Ont. S.C.J.), at para. 8.

126 Furthermore, a motion judge is entitled to consider any document specifically referred to and which forms an integral part the statement of claim, as these documents are not evidence but rather are incorporated into the pleading: *Web Offset Publications Ltd. v. Vickery* (1999), 43 O.R. (3d) 802 (Ont. C.A.), 1999 CanLII 4462, at para. 3, leave to appeal refused, (2000), [1999] S.C.C.A. No. 460 (S.C.C.); *D.L.G. & Associates Ltd. v. Minto Properties Inc.*, 2014 ONSC 7287, [2014] O.J. No. 6018 (Ont. S.C.J.), at para. 13; and *Sheridan* (ONCA), at para. 12. It stands to reason that the same principle would apply to documents referred to in a reply to demand for particulars. In this case, the Toronto Police Association relies on a transcript provided by Best of a phone call allegedly held with Mr. Rick Perry, the Legal Director of the Toronto Police Association. This recorded conversation is referenced at para. 7 of Best's reply to demand for particulars.

127 The transcript reveals that as of the date of the conversation on November 24, 2009, Best is aware of the following facts:

1. That an affidavit exists in which a private investigator had deposed that he had contacted the Toronto Police Association, been given Best's name and was given Best's former home address;

2. That Best believed that such conduct would violate the Association's privacy rules;

3. That the release of his past address history was published on the Internet on October 30, and that people were making threats against his family on "the web", and that Best had left the country with his family as a result;

4. That Best had the intention to be "pursuing this";

5. That Best wanted to cross-examine the private investigator to try to determine "who he really spoke to" at the Association to obtain the information, or who accessed their database to find the information; and

6. That Best had suffered damage, which he described in the transcript as follows "... I'll tell you how bad it is. Not even my relatives know how to contact me right now and it's by... If you knew the whole situation, you'd know it was by no means an over reaction. It's ah, they're calling, their calling to ah, this particular thing that I find myself caught up in, they've actually called for the rape of a witness, burning down another witness' business. This is serious stuff so..."

128 The Supreme Court of Canada set out the discoverability principle in *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 (S.C.C.), 1997 CanLII 325, at para. 18:

Once the plaintiff knows that some damage has occurred and has identified the tortfeasor (see *Cartledge v. E. Jopling & Sons Ltd.*, [1963] A.C. 758 (H.L.), at p. 772 *per* Lord Reid, and *July v. Neal* (1986), 57 O.R. (2d) 129 (C.A.)), the cause of action has accrued. Neither the extent of the damage nor the type of damage need be known. To hold otherwise would inject too much uncertainty into cases where the full scope of the damages may not be ascertained for an extended time beyond the general limitation period.

129 The Court of Appeal for Ontario emphasized the difference between "damage" and "damages" in the case of *Hamilton (City) v. Metcalfe & Mansfield Capital Corp.*, 2012 ONCA 156, 347 D.L.R. (4th) 657 (Ont. C.A.), at para. 54. The comments of the court make clear that one does not have to know the full extent of the loss in order to have the limitation period begin to run:

The City's position that damage occurred when the Devonshire notes matured also fails to appreciate the distinction between damage and damages. *Damage* is the loss needed to

> make out the cause of action. Insofar as it relates to a transaction induced by wrongful conduct, as I have explained, damage is the condition of being worse off than before entering into the transaction. *Damages*, on the other hand, is the monetary measure of the extent of that loss. All that the City had to discover to start the limitation period was *damage.*

130 Best argued, at para. 102 of his factum, that the limitation period could not begin to run in 2009 because "there was little damage known to flow from that at the time", and that when the affidavit was distributed abroad between 2009-2012 "he suffered some damage", but that the damage giving rise to the claim did not arise until he was incarcerated on May 3, 2013.

131 First, the opposite is alleged in the claim and the incorporated reply to demand for particulars, which is that the release of the information immediately caused damage, being the catalyst for Best and his family to flee various jurisdictions beginning in late 2009. Second, on the basis of *Metcalfe*, the admission that Best suffered "little" or "some" damage is sufficient. Taken together with the direct knowledge evidenced in the transcript, all of the material facts are available to conclude that Best had discovered all of the necessary elements set out in s. 5(1)(a) of the *Limitations Act, 2002* as of November 24, 2009. This was actual, as opposed to deemed, discovery. He admitted during that telephone call that he knew that injury, loss or damage had occurred, he knew of the act that caused such injury, loss or damage, he knew that the Toronto Police Association, as the source of the information, was the tortfeasor and he knew that a proceeding would be the appropriate means by which to seek a remedy.

132 Accordingly, the limitation period for making the claim against the Toronto Police Association expired on November 24, 2011, and therefore Best was well out of time when this claim was issued in 2014. Best's claim must also be dismissed under rule 21.01(1)(b) on the basis of being statute-barred.

Leave to amend

133 It is rare that a court should deny leave to amend a pleading, except in truly hopeless cases: *Miguna v. Ontario (Attorney General)*, 2005 CanLII 46385, (2005), 262 D.L.R. (4th) 222 (Ont. C.A.), at paras 17-18. As stated in my endorsement, I find that this is one of those exceptional cases in which leave to amend should not be granted, as granting the plaintiff the opportunity to do so will still not result in a statement of claim that is viable at law.

134 This case is similar to that of *Gravelle*, in which Quigley J. denied leave to amend because the "plaintiff has had more than adequate opportunity to fine tune these pleadings to cause them to be more than mere bald accusations with no factual underpinnings to support them" (at para. 126). While the plaintiff has a motion before the court to amend the claim, the proposed amendments do nothing to address the deficiencies noted throughout these Reasons. As Quigley J. noted, at para. 123: "to be accorded this indulgence the plaintiff

must have knowledge of the facts supporting the allegations of intentional misconduct by the defendants at the time of the pleading, and the plaintiff cannot plead speculative allegations that are incapable of proof".

135 The court was provided with Best's responses to two requests for particulars. These responses illustrate what occurs when Best is given the opportunity to remedy what were identified by the defendants as being inadequacies in the claim. By way of example, the Toronto Police Association requested:

> Particulars of the circumstances in which private and/or confidential information relating to the plaintiff was allegedly provided by the TPA, Jane Doe #4, and/or John Doe #4 (as alleged at paragraphs 18, 33, 35, 90, 100, 110, 120, 133, 140, 143, 152, 153, 159, 163, 171, 172, 174, 177, 178, and 188 of the Statement of Claim) to a third-party, including:
>
> > (a) The precise information relating to the Plaintiff alleged to have been provided by the TPA, Jane Doe#4, and/or John Doe #4 to a third-party;
> >
> > (b) The identity of the person(s) to whom such information was allegedly provided; and
> >
> > (c) The date(s) on which such information was allegedly provided.

136 In Best's reply to the TPA's request, he states:

> 1. The affidavit of James Van Allen states, at para. 12, says that he was given information regarding the Plaintiff, Donald Best, a member of the TPA. It is alleged that this information, regarding a former address, and other information, was confidential information which could be used and was used, together with other information, to track down my client and put his physical safety and security of the person interests at risk. Further this risk resulted in further real harm to the plaintiff.

137 This response illustrates, in my view, what can be anticipated by permitting Best to attempt to bolster his claim. His response begs the following questions: What "other information"? How was it used, either alone or together with other information, to track down Best, and when and by whom? Was this "other information" the same information referred to earlier in the same paragraph? Who used this information to put Best at risk, and when? What was the specific threat to his safety and security? How did this risk result in further "real harm"? What connection does this "real harm" have to the information provided in the affidavit, such as the provision of a former address?

138 One can foresee that any attempt to obtain the particulars of any material facts underlying these speculative and bald assertions will only lead to more obfuscation. Best has had an opportunity to come up with the material facts during the contempt hearing, particularly when he was attempting to set aside the finding of contempt and raised the same allegations in his material and argument. In that proceeding he did not put forth the material facts successfully, thus making it even more unlikely that he will be able to put forth the necessary facts to support the causes of action he now pleads. Given that he has been unable to establish the necessary elements of the torts in an already compendious claim, granting leave to amend will ultimately serve no purpose.

Costs

Costs of the Motions to Strike

139 Costs arguments were heard immediately after this court granted the defendants' motions to strike Best's claim.

140 This court made costs awards in favour of the defendants in the following amounts totalling $363,209.06, with reasons to be delivered at a later date:

i. The Caribbean defendants - $84,000 on a full indemnity basis;

ii. The lawyer defendants - $79,134.79 on a substantial indemnity basis;

iii. The OPP defendants - $16,986.50 on a partial indemnity basis;

iv. Peel Regional Police Services - $31,242.67 on a substantial indemnity basis;

v. Durham Regional Police Service defendants - $28,587.53 on a substantial indemnity basis;

vi. The Toronto Police Association - $30,419.30 on a substantial indemnity basis; and

vii. The private investigator defendants - $92,838.27 on a substantial indemnity basis.

141 This court found that the arguments put forth by Best to defend against the motions to strike had "not a scintilla of merit", as stated at the conclusion of the argument of the motions. However, as set out in *Young v. Young*, [1993] 4 S.C.R. 3 (S.C.C.), 1993 CanLII 34, at pp. 134-135, that fact alone is not a basis for awarding solicitor-client costs. It is generally only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties that solicitor-and-client costs may be awarded. The test for awarding costs on a substantial indemnity basis was referenced by Newbould J. in *Schreiber v. Mulroney*,

2007 CanLII 34441, [2007] O.J. No. 3191 (Ont. S.C.J.), at para. 9, citing Mark Orkin, *The Law of Costs*, 2nd ed. (Aurora: Canada Law Book, 1987), at para. 219:

> Costs on a solicitor-and-client scale should not be awarded unless special grounds exist to justify a departure from the usual scale.
>
> As the court said in *Foulis v. Robinson*:
>
> > Generally speaking, an award of costs on a party-and-party scale to the successful party strikes a proper balance as to the burden of costs which should be borne by the winner without putting litigation beyond the reach of the loser. There are, of course, cases in which justice can only be done by a complete indemnification for costs.
>
> An award of costs on the solicitor-and-client scale, it has been said, is ordered only in rare and exceptional cases to marker the court's disapproval of the conduct of a party in the litigation. The principle guiding the decision to award solicitor-and-client costs has been enunciated thus.
>
> > [S]olicitor-and-client costs should not be awarded unless there is some form of reprehensible conduct, either in the circumstances giving rise to the cause of action, or the proceedings, which make such costs desirable as a form of chastisement.
>
> The Supreme Court of Canada has approved the following statement of principle:
>
> > Solicitor-and-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

142 Examples of where a costs award on the higher scale has been warranted are:

1) Where one party to the litigation has behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily run up the costs of the litigation: *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (Ont. S.C.J.), 2007 CanLII 18579, at para. 9, citing *Shier v. Fiume* (1991), 6 O.R. (3d) 759 (Ont. Gen. Div.), 1991 CanLII 7188; *Benquesus v. Proskauer, Rose, LLP*, 2005 CanLII 21097,[2005] O.J. No. 2418 (Ont. S.C.J.); *Donmor Industries Ltd.* ; *Aspiotis v. Coffee Time Donuts Inc.* (1995), 53 A.C.W.S. (3d) 508, [1995] O.J. No. 419 (Ont. Gen. Div.); and *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.), 1991 CanLII 2729.

2) Where unproven allegations of false representation, concealment or misconduct are made that impugn the integrity of a lawyer; *Alie v. Bertrand & Frère Construction Co.* (2000), 11 C.L.R. (3d) 149, [2000] O.J. No. 4860 (Ont. S.C.J.), at para. 26, aff'd (2001), 11 C.L.R. (3d) 12 (Ont. C.A.), at para. 28, leave to appeal refused, (2002), [2001] S.C.C.A.

No. 418 (S.C.C.); and *Sun Life Trust Co. v. Bond City Financing Ltd.* (1997), 36 O.R. (3d) 758 (Ont. Div. Ct.), 1997 CanLII 16221.

3) Where needed to sanction a party's vexatious, contumelious or oppressive conduct of the whole litigation or a step in it: *Abrams v. Abrams*, 2009 CanLII 23375, [2009] O.J. No. 1907 (Ont. Div. Ct.), at para. 15.

4) Where a claim has been dismissed as an abuse of process, in particular where a defendant has been forced to respond to a plaintiff's attempt to relitigate claims: *Said v. University of Ottawa*, 2014 ONSC 771, [2014] O.J. No. 515 (Ont. S.C.J.), at para. 5, citing *Rousseau v. Scotia Mortgage Corp.*, 2013 ONSC 677, 19 C.C.L.I. (5th) 288 (Ont. S.C.J.), at para. 23.

5) Where a plaintiff has made unfounded allegations of improper conduct that were seriously prejudicial to the character and reputation of the defendants: *Said*, at para. 8, citing *Aba-Alkhail v. University of Ottawa*, 2013 ONSC 6070, 14 C.C.E.L. (4th) 133 (Ont. S.C.J.), at paras. 5-7.

6) Where unsubstantiated allegations of dishonesty, illegality and conspiracy are advanced without merit: *Direk v. Ontario (Attorney General)*, 2014 ONSC 1916, [2014] O.J. No. 1403 (Ont. S.C.J.), at para. 4; and *Baryluk v. Campbell* (2009), 66 C.C.L.T. (3d) 160, [2009] O.J. No. 2772 (Ont. S.C.J.), at para. 10. *Marcus v. Cochrane*, 2012 ONSC 2331 (Ont. S.C.J.) at para. 11.

143 Based on the above precedents and the test for awarding solicitor-and-client costs articulated by Orkin in *The Law of Costs*, this case should also attract costs on the higher scale. Best's claim was dismissed as an abuse of process, he was attempting to relitigate issues already determined by the prior proceeding and he made unproven and scandalous allegations of fraud, dishonesty, false representations and other improper conduct against various professional individuals. He attempted to malign the integrity of justice system. These allegations were summarized by Best's counsel, at paras. 60 and 79 of his factum, as follows:

1. Seeking costs for ulterior purposes, such as to intimidate the plaintiff, deter him from litigation and force him to leave the country;

2. Engaging in a campaign to endanger the plaintiff;

3. Seeking documents and conducting an examination or an improper purpose;

4. Disseminating the plaintiff's private information on the Internet, with an intent to harm;

5. Engaging in a conspiracy between lawyers, law firms, clients and police to cover up Van Allen's status as a serving police officer;

6. The dissemination of the plaintiff's information and the cover up of the conspiracy was knowingly criminal or unlawful and done with the intent to pressure the plaintiff;

7. The lawyers, law firms and clients conspired to have Best wrongly found in contempt;

8. The lawyers lied in order to secure examination orders and to "set up" the plaintiff for contempt, in furtherance of their part in the conspiracy;

9. The lawyers lied in court before Shaughnessy J. on December 2, 2009, to further this conspiracy;

10. The lawyers used their positions as officers of the court to mislead the court and perpetrate a fraud to further their conspiracy to have the plaintiff found in contempt;

11. The other lawyers involved - Misters Chabas, Roman, Quidenski and Zemel - failed to correct the falsehoods of Mr. Ranking and Mr. Silver although they had a duty to correct these falsehoods;

12. Mr. Ranking and Mr. Silver mislead the court with respect to the statement for the record as part as a conspiracy to have the plaintiff found in contempt;

13. The purpose of pursuing contempt against the plaintiff was to pressure him to leave Canada and to influence the course of other litigation;

14. The various lies of the defendants culminated in the wrongful imprisonment of the plaintiff;

15. The filing of an affidavit was done to facilitate further dissemination of the plaintiff's private information in order to harm him;

16. The lawyer, Mr. Colin Pendrith, assisted in the continuation of the conspiracy in respect of contempt at the appeal stage;

17. The lawyer defendants and their clients refused to say what questions had not been answered, in perpetuation of pressure through contempt proceedings;

18. The lawyer defendants unreasonably opposed requests for time for the plaintiff to find counsel in order to pursue the conspiracy;

19. The court erred with respect to the timing of the plaintiff's concerns about his safety issues, and the lawyer defendants chose to reinforce this misunderstanding; and

20. There was continued pressure and intimidation of the plaintiff during two days of examination in January 2013.

144 Faced with allegations of this nature, this is one of those cases where the court should react to show its condemnation for this type of litigation conduct, particularly within the context of a proceeding that is an abuse of process.

Application of the Rule 57.01 Factors

The amount claimed and recovered in the proceeding

145 Best claimed damages of more than $20,000,000 against the 39 named defendants.

The result of the proceeding

146 The defendants were entirely successful in having the action dismissed as an abuse of process, and alternatively, having the claim struck as being vexatious and disclosing no cause of action.

The complexity of the proceeding

147 The proceeding was factually and legally complex because of:

(i) the extensive history of the Nelson Barbados Action;

(ii) the 90 page, 234 paragraph claim advancing numerous causes of action which is vague, repetitive and imprecise in its language;

(iii) the nine volumes of affidavit material filed by Best in response to the motions; and

(iv) the 59 page factum filed to refute the defendants' arguments.

148 The plaintiff had also served and filed a motion to amend the claim, and short served an injunction motion even though such motion had not been scheduled in advance. Neither of these had to be dealt with following the disposition of the main motions, but the affected defendants filed responding material to the motion to amend.

The importance of the issues

149 These motions were extremely important to the defendants, as the claim openly challenged the professional integrity of many of them, and for all, made scandalous allegations that they worked in concert to cause deliberate harm to Best.

150 The claim itself, the material filed for these motions and the examples of Best noting various defendants in default and resisting the setting aside of such noting in default, all signal that this action would have been extremely lengthy and costly due to unreasonable steps and positions taken by the plaintiff had it been permitted to continue.

Conduct of any party that shortened and lengthened unnecessarily the duration of the proceeding

151 The defendants collectively scheduled the motions to dismiss/strike as expeditiously as possible and tailored their arguments so that there was minimal overlap among them.

152 As earlier stated, Best filed nine volumes of material, much of which was not referred to during argument, but which had to be reviewed by counsel in advance and which increased the time required to be expended by them to prepare for this hearing.

153 The plaintiff also insisted on proceeding with a motion to amend the statement of claim to add additional defendants rather than waiting to learn the outcome of the defendants' motion to dismiss/motion to strike, the success of which would render the amending motion moot. The plaintiff's proposed amendments sought to add two chiefs of police yet failed to plead any material facts regarding either individual's personal involvement. The affected defendants were required to incur costs preparing responding materials to oppose the plaintiff's amending motion.

154 Even though the plaintiff made concessions that the PRPS, DRPS and OPP are not suable entities with respect to his *Charter* claims, and he conceded that the tort of fiduciary duty could not be pursued in this case, these concessions made little impact on the time expended in argument.

Whether any step in the proceeding was improper, vexatious or unnecessary

155 The entire action was improper and thus, dismissed as an abuse of process.

156 However, the plaintiff noted in default not only the Caribbean defendants, but many of the other defendants.

157 With respect to two of the DRPS defendants, Best did so not withstanding that counsel for DRPS had effected service of a notice of intent to defend by fax on Best's counsel on August 18, 2004, within the time requirement prescribed by the *Rules of Civil Procedure*. These defendants were required to move to set aside the noting in default. Although asked for

his consent, the plaintiff refused but did not file responding material. Instead he attended on the motion and requested an adjournment in order to prepare and file materials and conduct cross-examinations. The adjournment was granted with costs left to the motion judge.

158 Best also noted the OPP defendants in default. No evidence was given to the court for the OPP defendants regarding this step. In its costs outline, these defendants simply submit that the noting in default was ultimately set aside on consent, but required significant additional resources.

159 Best also took the same step with the lawyer defendants. He also noted the TPA in default, notwithstanding the delivery of a notice of intent to defend and a covering letter from counsel asking that the TPA not be noted in default without further notice. Best's counsel claimed that he had not received it, and despite being provided with a copy of the affidavit of service and fax confirmation form, refused to consent to an order setting aside the noting in default. Consequently the TPA prepared and served a motion record to set aside the noting of default, only in the face of which did the plaintiff advised that he would consent to the noting in default being set aside.

The amount of costs that the unsuccessful party could reasonably expect to pay in relation to these matters

160 Best personally has now been the recipient of numerous costs orders made in favour of the defendants in the Nelson Barbados Action, and in this action. As recently as April 10, 2015, approximately two months before these motions were argued, McCarthy J. ordered that Best must pay the sum of $45,253.13 to the Caribbean defendants arising from their initially opposed motion to set aside Best's noting in default of those defendants, and from Best's pursuit of a motion to cross-examine two witnesses in relation to the defendants' motion.

161 During the course of the Nelson Barbados Action, the courts imposed significant costs orders on Best, including $192,000 in the Court of Appeal alone. As earlier stated his unpaid costs orders from that proceeding total $375,375.40. Accordingly, there should be ample understanding by him that the motions of this complexity, requiring argument over three days, would attract a very high costs award in the event he was unsuccessful.

The principle of indemnity

162 Each of the moving parties' counsel filed a costs outline setting out the lawyers involved, their hourly rates, time expended on the steps involved in the case and a calculation of disbursements. None of the fees sought to be recovered by the defendants are disproportionate to the complexity of the proceeding to date and the steps required to be

taken to properly defend the unmeritorious action and to bring forward the motions to strike/dismiss.

163 For some defendants, the fees are elevated in part due to communicating with and reporting to insurers.

164 The only defendant seeking partial indemnity costs was the Ontario Provincial Police, on the basis that it is an agent of the Crown.

165 The actual rates charged to their clients in all cases is less than the amount sought by the parties, being 90 percent of the full indemnity rate, other than in the case of lawyer defendants. In that case they have shown that the actual rates charged are less than the maximum rates set out by the costs subcommittee of the Rules Committee, adjusted to inflation in accordance with the Bank of Canada's "inflation calculator", for fixing partial indemnity costs. Accordingly, I find that the rates used to be particularly reasonable, and that no downward adjustment is required from the full indemnity rate.

166 With leave of the court, counsel for Investigative Solutions Network Inc., who was not in attendance at the motions, submitted written material on costs. Although this defendant did not have its own motion to dismiss/strike before the court, the outcome of the other parties' motions was obviously to its benefit. As it also would be entitled to costs of the action caused by the dismissal, the most expeditious and costs effective process available was followed, which allowed that defendant to be permitted to file written argument on costs, on notice to Best's counsel and giving him full opportunity to respond on behalf of the plaintiff.

167 It is clear from the bill of costs filed, with attached dockets, that although costs are sought on a partial indemnity basis only by Investigative Solutions Network Inc., the fees are high because counsel was reporting to an insurer and was working in conjunction with counsel for all defendants, but particularly with counsel for the private investigator defendants, including a review of facta.

168 Best's counsel submits that of the 69.4 hours spent there should be a reduction of approximately 7.5, arguing that it was unnecessary to expend time on the preparation of an affidavit of documents (1 hour) in light of the motion to strike, and that it was not reasonable for counsel to review the facta filed by other parties, having decided not to participate in the motions.

169 I disagree; Investigative Solutions Network Inc. saved costs by not bringing its own motion and making submissions, but it was not unreasonable for counsel to monitor the legal issues addressed in the action and being raised in the motions given his own client's stake in the outcome.

170 Accordingly, this court orders that costs shall be paid by Best to Investigative Solutions Network Inc. fixed in the amount of $21,527.83 on a partial indemnity rate, as requested.

171 Costs are to be determined in accordance with s. 131 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, and the factors set out in rule 57.01(1). Wide discretion in fixing costs therefore remains with the court, bearing in mind the principles enunciated in the leading cases: see *Andersen v. St. Jude Medical Inc.* (2006), 264 D.L.R. (4th) 557, 208 O.A.C. 10 (Ont. Div. Ct.); and *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.), 2004 CanLII 14579.

172 In summary, there is no question that the allegations made by the plaintiff in the proceeding and the fact that this particular proceeding was commenced, is deserving of an award of costs on a substantial indemnity basis in order that court signalled to the plaintiff, not for the first time, that vexatious, abusive, time-wasting and unmeritorious litigation will receive the court's condemnation and costs orders that attempt to indemnify the defendants.

173 Having regard to all the factors set out in rule 57.01 and the applicable legal principles, including what is fair and reasonable to Best in all of the circumstances, justice requires that the defendants moving to dismiss/strike the claim be awarded the costs set out at para. 140 of these Reasons.

Costs of the Caribbean defendants' jurisdiction motion

174 Counsel for the Caribbean defendants asks that costs of their jurisdictional motion be quantified but that the issue of potential for joint and several liability on the part of both the plaintiff and his counsel for payment of same be left for another day.

175 Costs were awarded to these clients on a full indemnity basis, as this is one of those rare cases described in the law, and canvassed fully in *Baryluk*, where the action was described as a scurrilous attack on the administration of justice.

176 The Caribbean defendants are in a unique position in that three of them were also defendants in the Nelson Barbados Action. They have been plagued with Best's frivolous and vexatious litigation for many years. Despite costs awards and admonishment from many courts along the way, Best has continued his campaign against them in this litigation.

177 At the beginning of this action the Caribbean defendants, on noting that there were various motions to dismiss scheduled for the week of June 15, 2015, proposed to await the outcome of those motions before taking any steps, in order to avoid incurring costs. As suggested in their submissions, this would have prevented almost all of the costs that have been spent by the Caribbean defendants, totalling $165,264. Best refused this suggestion. It

was not until the first day of the argument of these motions that Best's counsel conceded that the Caribbean defendants' jurisdictional motion should await the outcome of the motions to dismiss/strike.

178 As with the other defendants, Best noted the Caribbean defendants in default despite being notified by their counsel of their intention to bring a jurisdiction motion, and requesting that they not be noted in default in those circumstances. I will not review in detail the steps that were required to be taken by the Caribbean defendants to set aside that noting in default; suffice it say that the costs order imposed by McCarthy J. in the excess of $45,000 on a substantial indemnity basis was imposed for conduct that he described as "reprehensible" and conduct that "should meet with the strong disapproval of the court".

179 The alternative to the last eight months of litigation for the Caribbean defendants would have been for Best to agree to await the outcome of the dismissal motions. Had he agree to this reasonable suggestion, their costs would be minimal.

180 Claims that amount to a clear abuse of process, as this one does, should not be permitted to be an endless financial drain on a defendant. Where a party initiates baseless litigation such as this, which clearly invites the same stay to be ordered in favour of these clients as did the Nelson Barbados Action, the Caribbean defendants should not have to bear further legal costs. The common thread in cases where full indemnity costs have been awarded is "the strong sentiment that the matter, or the issue at least, should never have been brought before the court in the first place, leading to a reaction that the innocent party should not have to pay a penny toward the costs of the litigation": *Envoy Relocation Services Inc. v. Canada (Attorney General)*, 2013 ONSC 2622, [2013] O.J. No. 1999 (Ont. S.C.J.), at paras. 114, 116.

181 The action against the Caribbean defendants is even more egregious when one considers that in excess of $375,000 in costs orders remain unpaid to these defendants. This is a case where Best's conduct of the litigation and its effect on the Caribbean defendants is so outrageous, reprehensible and blameworthy that it shocks the conscience of the court and requires deterrence with costs on the highest scale.

182 The same considerations, as set out above regarding rule 57.01(1) factors, apply to the Caribbean defendants' costs.

183 As a result, an order was issued by this court that the Caribbean defendants shall have their full costs and disbursements for the entire action, with the exception of the $45,253.13 already awarded by McCarthy J. Conclusively, Best has been ordered to pay the sum of $84,000 to the Caribbean defendants on a full indemnity basis.

Summary on Costs

184 In *Boucher*, Armstrong J.A. held that the fixing of costs involves more than merely a calculation using the hours docketed and the costs grid. Courts fixing costs are required to give further consideration to quantum. At para. 24, Armstrong J.A. directed that "it is also necessary to step back and consider the result produced and question whether, in all the circumstances, the result is fair and reasonable." He reiterated what the Court of Appeal said in *Zesta Engineering Ltd. v. Cloutier*, 2002 CanLII 25577, (2002), 21 C.C.E.L. (3d) 161 (Ont. C.A.), at para. 4:

> In our view, the costs award should reflect more what the court views as a fair and reasonable amount that should be paid by the unsuccessful parties rather than any exact measure of the actual costs to the successful litigant.

185 These authorities require that I step back to assess whether the cost claimed are fair and reasonable in the circumstances. Given all of the factors and considerations outlined above, I am fully satisfied that the costs ordered are fair and reasonable for this protracted and complex proceeding. While the awards are high, they reflect what the defendants have had to spend in order to respond to the tactics facing them, and secure an order that dismisses this meritless proceeding.

Motions granted.

TAB
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2014 ONSC 771
Ontario Superior Court of Justice

Said v. University of Ottawa

2014 CarswellOnt 1267, 2014 ONSC 771, [2014] O.J. No. 515, 237 A.C.W.S. (3d) 336

Ibrahim Said, Plaintiff and University of Ottawa, Jacques Bradwejn, Michael Vassilyadi, Melissa Forbes, Linda Wynne, Defendants

Beaudoin J.

Judgment: February 3, 2014
Docket: CV-12-54679

Proceedings: additional reasons to *Said v. University of Ottawa* (2013), 2013 ONSC 7186, 2013 CarswellOnt 18637 (Ont. S.C.J.)

Counsel: Ibrahim Said, Plaintiff, for himself
Sally Gomery, Karen Jensen, for Defendants

Subject: Civil Practice and Procedure; Public
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.7 Particular orders as to costs
XXIV.7.e Costs on solicitor and client basis
XXIV.7.e.ii Grounds for awarding
XXIV.7.e.ii.A Unfounded allegations
Headnote
Civil practice and procedure --- Costs — Particular orders as to costs — Costs on solicitor and client basis — Grounds for awarding — Unfounded allegations
Plaintiff alleged that defendants engaged in intentional improper conduct — Plaintiff commenced action against defendants for order directing defendant university to promote him to rank of associate professor, for declaration that he did not sexually harass defendant MF, damages totalling $50.6 million and costs on substantial indemnity basis — Judge concluded that action was abuse of process and that it failed to disclose reasonable cause of action against defendants — Parties made submissions regarding costs — Defendants were awarded costs fixed at $61,015.87, inclusive of fees, disbursements and HST — Defendants were entitled to costs on substantial indemnity basis — Plaintiff made inflammatory

allegations in statement of claim and in affidavit — Plaintiff made unfounded allegations of improper conduct that were seriously prejudicial to character and reputation of individual defendants within academic and medical community — Defendants were entirely successful — Defendants were justified in vigorously defending action — Proceedings were factually and legally complex.

Table of Authorities

Cases considered by *Beaudoin J.*:

Aba-Alkhail v. University of Ottawa (2013), 2013 ONSC 6070, 2013 CarswellOnt 13656 (Ont. S.C.J.) — considered

Rousseau v. Scotia Mortgage Corp. (2013), 2013 CarswellOnt 1043, 19 C.C.L.I. (5th) 288, 2013 ONSC 677 (Ont. S.C.J.) — considered

1013952 Ontario Inc. v. Sakinofsky (2010), 2010 CarswellOnt 188, 2010 ONSC 411 (Ont. S.C.J.) — considered

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11

Generally — referred to

Rules considered:

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

R. 57.01(1) — considered

ADDITIONAL REASONS on costs to judgment reported at *Said v. University of Ottawa* (2013), 2013 ONSC 7186, 2013 CarswellOnt 18637 (Ont. S.C.J.), dismissing plaintiff's action as abuse of process.

***Beaudoin J.*:**

Background

1 The Plaintiff brought an action against the University of Ottawa and four individual Defendants for an order directing the University to promote him to the rank of associate professor, a declaration that he did not sexually harass the Defendant Dr. Forbes, damages against the Defendants in the total amount to $50.6 million and costs on a substantial indemnity basis. The Plaintiff alleged that the Defendants had engaged in intentional improper conduct.

2 On November 20, 2013, I concluded that this action was an abuse of process and failed to disclose a reasonable cause of action against any of the Defendants. At the outset, the Defendants also successfully moved to strike the majority of the affidavit that the Plaintiff had filed in response to their motion on the basis that it was scandalous and vexatious and an abuse of the court's process. At paras. 6 and 7 of my decision I noted:

[6] The Said affidavit contains numerous inflammatory facts of a personal nature against individual Defendants. I cite these examples:

(a) Dr. Said describes Dr. Bradwejn as a "tyrannical and oppressive decision-maker" with a "low professional standard". He describes Dr. Wynne as a "hypocrite" and her actions as "ignorant, arrogant and 'evil'".

(b) In a particularly caustic passage, Dr. Said states that Dr. Forbes, who made a sexual harassment complaint against him, "should be congratulated for having the courage to think, imagine, believe, want, wish, dream and desire that Dr. Said would want to have a relationship with her".

[7] Such statements are scandalous and should be struck. The bulk of the Said affidavit contains legal argument. It is replete with references to case law with accompanying legal conclusions. These arguments properly belong in a factum and not in an affidavit.

The Defendants' Position

3 The Defendants now claim substantial indemnity costs in the amount of $61,015.87 inclusive of fees disbursements and HST in connection with their defence of this action and their successful motion to strike the claim. In the alternative, the Defendants claim partial indemnity costs in the amount of $41,209.60. In support of their claim for costs on a substantial indemnity basis, the Defendants rely on the finding that the proceeding was an abuse of process. Moreover, the Defendants cite the Plaintiff's improper conduct in response to the motion and the unfounded allegations of improper conduct by the Defendant as set out in the Statement of Claim. They also rely on the factors set out in Rule 57.01 (1).

The Plaintiff's Position

4 The Plaintiff maintains that the Defendants' cost estimate is extremely overinflated. He argues that counsel generously provided unjustified employment to some law student and that "this can in no way justify the exaggerated amount". He notes that the Divisional Court granted him $15,000 in costs for a full day hearing. He argues that the costs of this half day motion should be no more than 1/6 of the $15,000 which brings the motion costs to a maximum amount of $2,500.

Analysis and Conclusion

5 Our Courts have previously ruled that a defendant may be entitled to substantial indemnity costs of a successful motion to dismiss for an abuse of process, in particular where a defendant has been forced to respond to plaintiff's attempt to re-litigate claims. In *Rousseau*

v. Scotia Mortgage Corp., 2013 ONSC 677, 2013 CarswellOnt 1043 (Ont. S.C.J.), Justice Reid said this at para. 23:

> [23] Substantial indemnity costs when awarded independently of a relevant rule 49 offer contain element of penalty. For example, such a costs award was made where one party to litigation behaved in an abusive manner, brought proceedings wholly devoid of merit, and unnecessarily ran up the costs of the litigation. An award of substantial indemnity costs, or the threat of it, can ideally function as a tool available to the courts to prevent or control frivolous for needless litigation. Making such an award in the proper circumstances enhances access to justice for other litigants.

6 Our courts have also awarded substantial indemnity costs to sanction the reprehensible conduct on the part of a party to the proceedings. In *1013952 Ontario Inc. v. Sakinofsky*, 2010 ONSC 411 (Ont. S.C.J.), the court awarded substantial indemnity costs against the party that had filed an affidavit exceeding 40 pages that was "replete with scandalous allegations about the behavior and personal life" of the other party and which was irrelevant to the claim.

7 In this case, Dr. Said made inflammatory allegations in the Statement of Claim and filed an affidavit containing numerous inflammatory facts of a personal nature to the individual Defendants as noted above.

8 The Plaintiff further made unfounded allegations of improper conduct that were seriously prejudicial to the character and reputation of the Defendants. In a very similar proceeding, *Aba-Alkhail v. University of Ottawa*, 2013 ONSC 6070 (Ont. S.C.J.), Justice Minnema wrote at paras. 5-7:

> **5** As set out in *1175777 Ontario Ltd. v. Magna International Inc.*, [2007] O.J. No 2549 (S.C.J.) at para. 32, affirmed on appeal at 2008 ONCA 406, "[u]nfounded allegations of improper conduct are... capable of attracting substantial indemnity costs, particularly when the allegations are seriously prejudicial to the character or reputation of the individual." The claims made against the individual defendants here included defamation, conspiracy, misfeasance in public office, breach of fiduciary duty, and intimidation, all of which are allegations of improper conduct. The plaintiffs successfully solicited media coverage, compounding the prejudicial effect of these allegations.
>
> **6** Regarding the second reason, as noted in *Rousseau v. Scotia Mortgage Corp.*, 2013 ONSC 677 (S.C.J.), the dismissal of the proceeding as an abuse of process is relevant to the scale of costs issue. Re-litigation of claims is not in the public interest and is to be discouraged.
>
> **7** Given either one of the above factors and certainly given both together, I find that it is appropriate to award costs on a substantial indemnity scale.

9 In this proceeding, the Plaintiff advanced claims against the individual Defendants in intentional interference with economic interests, conspiracy to injure, defamation, intimidation, discriminatory conduct and breach of the *Charter* on the basis that the individual Defendants had engaged in intentional and improper conduct. For example, the Plaintiff alleged in the Statement of Claim that:

> (a) Dr. Wynne's "ignorant, arrogant, selective, and discriminatory conduct demonstrates the evil motive and intent in reckless indifference to the right and professional career of Dr. Said";
>
> (b) Dr. Vassilyadi lied under oath and "took an active part in the plan to injure Dr. Said, destroy his professional reputation, his family life and his professional and economic future";
>
> (c) Dr. Forbes was psychologically weak and she recklessly filed a baseless complaint of sexual harassment against Dr. Said in furtherance of the conspiracy to injure the plaintiff; and
>
> (d) Dr. Bradwejn acted in a "biased, malicious, negligent, and discriminatory manner" in dealing with the allegations of sexual harassment and Plaintiff's application for promotion.

10 The Plaintiff further alleged in the Statement of Claim that the individual Defendants intended to injure him and to prevent him from maintaining his professional career and employment in Canada; intended to destroy his professional and reputation and career because he "happened to belong to a certain race and geographic region"; were "part of an overall corporate culture within the faculty of medicine, University of Ottawa against individuals from the Middle East".

11 These allegations were seriously prejudicial to the character and reputation of the individual Defendants within the academic and medical community.

Application of Rule 57.01(1) Factors

The result of the proceeding:

12 The Defendants were entirely successful on the motion and in dismissing the action.

The amount claimed:

13 The Defendants are required to respond to a claim for damages or $50.6 million and allegations of intentional conduct that openly challenged their professional integrity. The Defendants were justified in vigorously defending the action.

The complexity of the proceedings:

14 The proceedings were factually and legally complex. The Statement of Claim was 45 pages in length and asserted multiple causes of action against five Defendants.

The importance of the issues:

15 The motion raised important issues for both parties. The motion was obviously important for the Plaintiff because the Defendants were challenging his right to proceed with this claim. The motion was important for the Defendant University of Ottawa. Had the claim proceeded, there would have been serious consequences for the administration of the University and other post-secondary institutions. The individual Defendants were faced with a significant personal liability and their professional integrity was openly challenged.

16 Given my finding that this proceeding was an abuse of process and having regard to the inflammatory allegations in the Statement of Claim and in the Responding Affidavit, I conclude that an award of costs on a substantial indemnity basis is appropriate.

17 I have examined the Bill of Costs and cannot take issue with the time devoted to the matter or with the hourly rates charged. I note that the total amount claimed on a substantial indemnity basis is still far below the amount that Justice Minnema awarded in the *Aba-Alkhail* matter where the same counsel successfully brought a very similar motion. I therefore fix the Defendants' costs in the amount of $61,015.87 inclusive of fees, disbursements and HST which amount is payable by the Plaintiff forthwith.

Order accordingly.

TAB
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Paras. 22 - 25

Most Negative Treatment: Check subsequent history and related treatments.

2013 ONSC 5213
Ontario Superior Court of Justice [Commercial List]

Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.

2013 CarswellOnt 11232, 2013 ONSC 5213, [2013] O.J. No. 3702, 231 A.C.W.S. (3d) 55

Stetson Oil & Gas Ltd., Plaintiff and Stifel Nicolaus Canada Inc., Defendant

Newbould J.

Judgment: August 12, 2013
Docket: CV-08-7809-00CL

Proceedings: additional reasons to *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.* (2013), 2013 ONSC 1300, 2013 CarswellOnt 2558, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: William J. Burden, Arthur Hamilton, Lara Jackson, for Plaintiff
Joseph Groia, Kellie Seaman, David Sischy, for Defendant

Subject: Civil Practice and Procedure
Related Abridgment Classifications
Civil practice and procedure
XXIV Costs
XXIV.4 Offers to settle or payment into court
XXIV.4.a Offers to settle
XXIV.4.a.iii Failure to accept offer
XXIV.4.a.iii.A Commencement of the hearing
Headnote
Civil practice and procedure --- Costs — Offers to settle or payment into court — Offers to settle — Failure to accept offer — Commencement of the hearing
Table of Authorities
Cases considered by *Newbould J.*:

Andani Estate v. Peel (Regional Municipality) (1993), 1993 CarswellOnt 1211, (sub nom. *Andani v. Peel (Regional Municipality)*) 66 O.A.C. 137 (Ont. C.A.) — referred to

Apotex Inc. v. Egis Pharmaceuticals (1991), 1991 CarswellOnt 3149, 4 O.R. (3d) 321, 37 C.P.R. (3d) 335 (Ont. S.C.J.) — considered

Bank of America Canada v. Mutual Trust Co. (2002), 287 N.R. 171, 211 D.L.R. (4th) 385, 49 R.P.R. (3d) 1, 159 O.A.C. 1, 2002 SCC 43, 2002 CarswellOnt 1114, 2002 CarswellOnt 1115, [2002] 2 S.C.R. 601 (S.C.C.) — referred to

Boucher v. Public Accountants Council (Ontario) (2004), 48 C.P.C. (5th) 56, 2004 CarswellOnt 2521, 188 O.A.C. 201, 71 O.R. (3d) 291 (Ont. C.A.) — considered

Canadian National Railway v. Royal & SunAlliance Insurance Co. of Canada (2007), 2007 ONCA 531, 2007 CarswellOnt 4449 (Ont. C.A.) — considered

Eastern Power Ltd. v. Ontario Electricity Financial Corp. (2012), 2012 CarswellOnt 6705, 2012 ONCA 366 (Ont. C.A.) — considered

Eccles v. Eccles (2003), 47 R.F.L. (5th) 4, 2003 CarswellOnt 4098 (Ont. C.A.) — considered

First Capital (Canholdings) Corp. v. North American Property Group (2012), 2012 CarswellOnt 2609, 2012 ONSC 1359 (Ont. S.C.J.) — followed

Graham v. Rourke (1990), 1990 CarswellOnt 2676, 40 O.A.C. 301, 75 O.R. (2d) 622, 74 D.L.R. (4th) 1 (Ont. C.A.) — referred to

Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp. (2004), 192 O.A.C. 24, 246 D.L.R. (4th) 595, 49 B.L.R. (3d) 275, 2004 CarswellOnt 4594 (Ont. C.A.) — followed

Law Society of Upper Canada v. Mazzucco (2009), 2009 CarswellOnt 4698, 50 E.T.R. (3d) 203 (Ont. S.C.J.) — considered

Mahar v. Rogers Cablesystems Ltd. (1995), 34 Admin. L.R. (2d) 51, 25 O.R. (3d) 690, 1995 CarswellOnt 1195 (Ont. Gen. Div.) — considered

Murphy v. Alexander (2004), 183 O.A.C. 325, 21 C.C.L.T. (3d) 226, 236 D.L.R. (4th) 302, 2004 CarswellOnt 783 (Ont. C.A.) — referred to

Oakville Storage & Forwarders Ltd. v. Canadian National Railway (1991), (sub nom. *Armak Chemicals Ltd. v. Canadian National Railway*) 5 O.R. (3d) 1, 4 C.P.C. (3d) 280, (sub nom. *Armak Chemicals Ltd. v. Canadian National Railway*) 52 O.A.C. 188, 84 D.L.R. (4th) 326, 1991 CarswellOnt 440 (Ont. C.A.) — referred to

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 127 — considered

s. 128 — considered

s. 128(1) — considered

s. 130 — considered

Rules considered:

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

R. 49 — considered

R. 49.03 — considered

R. 49.13 — considered

R. 57.01 — considered

R. 57.01(1)(0.b) [en. O. Reg. 42/05] — considered

R. 57.01(4) — considered

R. 57.01(4)(c) — considered

R. 57.01(4)(d) — considered

ADDITIONAL REASONS regarding costs to judmgent reported at *Stetson Oil & Gas Ltd. v. Stifel Nicolaus Canada Inc.* (2013), 2013 ONSC 1300, 2013 CarswellOnt 2558 (Ont. S.C.J. [Commercial List]).

***Newbould J.*:**

1 On March 1, 2013, after an eleven day trial, I awarded judgment to the plaintiff for $16,042,669 plus pre-judgment interest and costs. I have now received cost submissions. The plaintiff seeks costs of $2,143,448.21, inclusive of disbursements and taxes. The defendants contend that costs should be limited to $650,000.

Scale of costs

2 The plaintiff seeks costs on a partial indemnity basis to the date of its offer to settle served on December 28, 2012 under rule 49 which was for $8 million, pre-judgment interest and partial indemnity costs to be agreed or assessed, much less than the judgment in its favour. The defendant takes the position that the offer was served too late to be treated as a rule 49 offer because the trial was scheduled to start of January 8, 2013, more than 7 days after the offer, but when taking into account holidays of Saturdays, Sundays and New Year's Day, less than 7 days before.

3 The defendant had served a rule 49 offer for $1 million plus pre-judgment interest and partial indemnity costs on December 12, 2012 and, on the day following the plaintiff's offer of December 28, 2012, counsel for the defendant wrote to counsel for the plaintiff and said that while he had forwarded the offer to the defendant, he very much doubted that the offer would provide the basis for a meaningful discussion.

4 The commencement of the trial was adjourned one day to January 9, 2013, which would have meant that the offer was technically served 7 days before the commencement of trial, but the adjournment on the agreement of the parties was on the basis that the it would not negatively affect the position of the defendant regarding the timing of the plaintiff's offer. served December 28, 2012

5 Thus it is clear that the defendant has had plenty of time to consider the plaintiff's offer, and the objection of the defendant seems quite technical, taken that Mr. Groia made it relatively clear on the day after the offer was served that it was not going to be met with favour from his client.

6 The court may take into account an offer that does not meet the time requirements of rule 49.03. Rule 49.03 and 49.13 state:

> 49.03 An offer to settle may be made at any time, but where the offer to settle is made less than seven days before the hearing commences, the costs consequences referred to in rule 49.10 do not apply.
>
> 49.13 Despite rules 49.03, 49.10 and 49.11, the court, in exercising its discretion with respect to costs, may take into account any offer to settle made in writing, the date the offer was made and the terms of the offer.

7 In *Law Society of Upper Canada v. Mazzucco* (2009), 50 E.T.R. (3d) 203 (Ont. S.C.J.), Brown J. ordered costs on a substantial indemnity basis in circumstances where the offer was not made within the time required by rule 49. He did so on the basis of his discretion under rule 57.01. He stated:

> 20. As to the quantum of the award of costs, in my view it is appropriate to give considerable weight to the Offer to Settle, even if it does not qualify as a formal Rule 49 offer. The offer was a very reasonable one, made by one commercial party to another. In fixing costs courts should give due recognition to reasonable efforts by parties to settle a dispute. In the circumstances of this case, I find that the Financial Institutions are entitled to substantial indemnity costs incurred following the service of their April 20 offer to settle, not as the result of the operation of Rule 49, but in the exercise of my discretion under Rule 57.01.

8 Whether the discretion is one exercised under rule 57.01 or rule 49.13 matters little. In my view the plaintiff is entitled to costs on a substantial indemnity basis from the date of its offer. The offer was made by one sophisticated commercial party to another, who clearly had time to deal with it and chose not to act on it. It was a serious offer to settle made in a reasonable attempt to settle the case.

9 The defendant relies on *Boucher v. Public Accountants Council (Ontario)* (2004), 71 O.R. (3d) 291 (Ont. C.A.) for the proposition that the objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in the particular proceeding, rather than an amount fixed by the actual costs incurred by the successful litigant. I note that *Boucher* involved the assessment of costs on a partial indemnity basis, and one of the problems that Armstrong J.A. had with the bill of costs was that it was too close to costs claimed on a substantial indemnity basis. The case did not purport to deal with what should occur in a case of substantial indemnity costs. The rules committee appears to have agreed with this, because the language of *Boucher* was later adopted in rule 57.01(1)(0.b) dealing with partial indemnity costs. Rule 57.01(4)(c) and (d) expressly provides that nothing in rule 57.01 affects the authority of a court to award costs on a substantial or full indemnity basis, which is a recognition that rule 57.01 deals with partial indemnity costs and that substantial and full indemnity costs are different.

10 Be that as it may, in awarding costs on a substantial indemnity basis, I think it fair to say that those costs should be fixed in an amount that is fair and reasonable for the unsuccessful party to pay on a substantial indemnity basis. The basic principle of substantial indemnity costs cannot however be ignored. In *Eccles v. Eccles* (2003), 47 R.F.L. (5th) 4 (Ont. C.A.) the Court stated "Substantial indemnity is comparable to the former solicitor/client scale of costs." Traditionally, solicitor and client costs were intended to provide complete indemnification for all costs reasonably incurred. See *Apotex Inc. v. Egis Pharmaceuticals* (1991), 4 O.R. (3d) 321 (Ont. S.C.J.) per Henry J. and the authorities referred to by him. I do not think however that complete or full indemnification is permissible under the rubric of substantial indemnity costs since the reference in rule 57.01(4) to both substantial and full indemnity costs indicates a difference between the two. Substantially indemnity costs must be reasonably incurred. Also, substantial indemnity costs are defined in the rules to mean costs awarded that are 1.5 times an award made on a partial indemnity basis, again indicating that such costs are not to provide for complete indemnification.

11 The plaintiff is also claiming substantial indemnity cost for the fees relating to an allegation of the defendant that the plaintiff manipulated trading by creating an artificial trading price for its stock. This allegation was abandoned two days before the start of the trial and formally continued as part of the record until the defendant removed it on the third day of the trial on its motion to amend its defence. The allegation was tantamount to fraudulent conduct and constitutes a ground for substantial indemnity costs for the work involved in defending it.

12 In sum, the plaintiff is entitled to its costs on a substantial indemnity basis from the date of its offer and also on the work prior to that in defence of the manipulative trading allegation. Otherwise, the plaintiff is entitled to its costs on a partial indemnity basis, to be

fixed taking into account the factors in rule 57.01, including what a party in the position of the defendant could reasonably expect to pay if the case were lost.

Quantum of Costs

13 The plaintiff claims fees to the date of the offer to settle at $756,554 on a partial indemnity basis and claims fees after the offer on a substantial indemnity basis for trial preparation and the trial of $1,018,296 [1] , for a total of $1,774,851. With taxes, it comes to $1,951,635.

14 The defendant takes the position that the amount claimed by the plaintiff is grossly excessive. A draft bill of costs for the defendant has been submitted which provides for total fees of $590,779 calculated on the basis of partial indemnity to the offer of December 28, 2012 and substantial indemnity thereafter. That is approximately 33% of the amount claimed by the plaintiff.

15 The difference in the two bills can be explained by a few factors. One is the hourly rates. For example, Mr. Groia, called in 1981, has used actual rates charged between $700 at the outset and $800 for most of his work after July, 2010. These are less than the rate of $880 used throughout by Mr. Burden, called in 1976. Another is that the partial indemnity rates used by the plaintiff are in excess of the scale in the practice note, whereas the defendant used those scale rates. Another is that the plaintiff has used more senior lawyers in general. The lawyers helping Mr. Groia for the most part were called in 2003 and 2009, with much lower rates. The lawyers mainly helping Mr. Burden were called in 1997, 1999, 2004 and 2011. Another is that the hours claimed by the plaintiff total 4573.2, including 1165.2 hours for trial preparation and 1365.9 hours for the trial, which lasted 11 days, whereas the hours claimed by the defendant in its draft bill of costs total 2861.6, including trial preparation of 718.5 and 805.9 hours for the trial. The result of these differences is that the total fees claimed by the plaintiff on a partial indemnity basis to the offer of December 28, 2012 and substantial indemnity thereafter are $1,774,851 and the comparable fees claimed by the defendant are $590,779.

16 The defendant contends that the plaintiff took a "money is no object" approach to the litigation and the amount claimed should be substantially reduced. I realize that it is hard after the fact for a judge to be sanguine as to the amount of work that should have been done by a successful party. Indeed there is authority that in fixing substantial indemnity costs, it is not appropriate to look in hindsight as to the work done. See *Apotex Inc. v. Egis Pharmaceuticals*, *supra*, in which Henry J. stated:

> For the sake of clarity I add a postscript. Whether a service is performed or engaged in contemplation of adversarial proceedings in court is essentially a matter of judgment.

> I have looked for the exercise of judgment, together with prudence, foresight and imagination, in assigning services to the motion in this case as the test of fairness, reasonableness and necessity in applying the guiding principles. It is not appropriate to apply the test of hindsight (20/20 vision) to determine whether a service charged for was an extra service or frill not reasonably necessary to defend the client's position. The time to view the decision to commit services to the project is before the hearing or trial — not on the basis of hindsight which might indicate that as it turned out, the service was unnecessary. In the case at bar, I did not even call on counsel for the defendants yet it was essential that they be fully prepared in case I had done so.

17 I also realize that it is normal that the work to be done by a plaintiff to build a case is far more than the work needed to be done by a defendant to defend the case. This case is no different in that regard. The case was hard fought, as could be expected, and the defendant had to know that the case would be vigorously be pursued by the plaintiff, just as the defence was vigorously put forward.

18 However, I have come to the conclusion that the amount of hours claimed by the plaintiff is excessive and not reasonable, even for a substantial indemnity bill of costs.

19 For example, 1365 hours claimed for an 11 day trial seems excessive. Time for 10 lawyers is claimed. I do not fault the fact that there were three or four gowned lawyers in court for the plaintiff. There were three for the defendant. But I note that substantial time is claimed for five lawyers who never appeared at the trial. No doubt some work was required during the trial by others who did not appear, and the defendant in its draft bill has claimed for two such lawyers. However 244 hours are claimed for Mr. Hamilton and 241.9 for Ms. Jackson, both of whom were at the trial, which means that they spent a great deal of time working in the office during the 11 day trial. Why all of the other lawyers were needed is not apparent.

20 I also have some difficulty with the amount of time spent on trial preparation, some of which is to be charged on a partial indemnity basis and some on a substantial indemnity basis. 1165.2 hours for trial preparation amounts to approximately 106 hours of trial preparation for each of the 11 days of trial. It is hard to comprehend why that much work was required.

21 The plaintiff has calculated its costs by taking the hourly rates charged by the various lawyers and applying 60% to those hours for the partial indemnity period and 90% for the substantial indemnity period. I note that the actual hourly rates charged throughout remained constant. For example, Mr. Burden has used an actual hourly rate of $880 for the period from the commencement of the case to the end of the trial in March, 2013. This is the case for all of the plaintiff's lawyers. As the case commenced in October 2008, I think it highly unlikely that the hourly rates charged were the same throughout. That is not how downtown Toronto law firms have operated, and without evidence to the contrary, some

reduction from these rates must be considered in fixing the costs, particularly for the work done prior to the offer to settle.

22 Regarding the use of the rates recommended in the practice direction of the Costs Subcommittee of the Civil Rules Committee, I have considerable difficulty with the rates in that practice direction. They were the rates contained in the cost grid introduced in January, 2002. When the cost grid was abolished on July 1, 2005, they were continued in the practice direction. These rates are completely outdated and unrealistic for an action fought by two major downtown Toronto law firms.

23 The practice direction is not a binding rule enacted as a regulation. It states that it "may provide some guidance to the profession as these changes are implemented". It is apparent that other courts agree that the rates are not realistic. I agree with R.J. Smith in *First Capital (Canholdings) Corp. v. North American Property Group*, [2012] O.J. No. 885 (Ont. S.C.J.) that the rates should be adjusted to account for inflation, but I would go further.

24 In *Canadian National Railway v. Royal & SunAlliance Insurance Co. of Canada*, 2007 ONCA 531 (Ont. C.A.), the Court of Appeal awarded trial costs on a partial indemnity basis of 65% of the fees charged to the client. In *Eastern Power Ltd. v. Ontario Electricity Financial Corp.*, 2012 ONCA 366 (Ont. C.A.), the Court of Appeal awarded trial costs on a partial indemnity basis at 60% of actual rates charged the client. The trial judge had included a substantial indemnity cost award as a result of an offer at 90% of actual rates charged, and while this was set aside as the offer was not better than the results of the appeal, the Court of Appeal made no suggestion that the 90% figure would not have been appropriate if the costs were awarded on a substantial indemnity basis.

25 I think it appropriate to award costs at 60% of the time charged for partial indemnity costs and 90% for substantial indemnity costs for the work after the offer to settle. The rates charged, however, must be reduced because the rates have been claimed throughout at the 2013 rates.

26 The defendant contends that the costs should be reduced because the issues were of general importance and important to the industry as a whole. I would not exercise my discretion to reduce costs on this ground. This case was not defended out of any concern for the general importance to the industry. It was a straight contest over money. It was not a case such as *Mahar v. Rogers Cablesystems Ltd.* (1995), 25 O.R. (3d) 690 (Ont. Gen. Div.) relied on by the defendant in which the evidence indicated that the action was brought in pursuit of what the applicant perceived to be the public interest rather than for any personal gain.

27 The defendant also contends that because the plaintiff abandoned its claim for specific performance only at the trial, some reduction of costs should be made based on amounts thrown away on defending that claim. I would not make any deduction for that. There is no

evidence as to what work was done that can be said to have been thrown away. The defendant tried to have its defence amended at the trial to plead issues that it wished to call expert evidence on, and there is no evidence that the expert evidence would not have been necessary if the claim for specific performance had not been made originally. The experts were to be called by the defendant on the issue of whether the plaintiff had mitigated its damages to the point that there were no damages, as contended by the defendant. The effect of reducing the cost award because of the withdrawal of the claim for specific performance would amount to making a distributive costs award, which is to be restricted to the rarest of cases, this case not being one of them. See *Oakville Storage & Forwarders Ltd. v. Canadian National Railway* (1991), 5 O.R. (3d) 1 (Ont. C.A.) and *Murphy v. Alexander* (2004), 236 D.L.R. (4th) 302 (Ont. C.A.)

28 Taking into account all of the foregoing, and setting a fee that I think fair and appropriate on a partial and substantial indemnity basis, I set the fees at $1,400,000, inclusive of taxes. Disbursements of $191,813 are allowed, for a total of $1,591,813 to be paid to the plaintiff by the defendant.

Interest

29 The plaintiff has claimed prejudgment interest of $2,426,574.55 using the prescribed prejudgment interest rate of 3.3% per annum for the third quarter of 2008, the quarter prior to the action being commenced. Interest has been claimed from July 31, 2008, the closing date for the engagement letter, to March 1, 2013.

30 The defendant asserts that the interest should run only from January, 2013, arguing that it was only then that the plaintiff elected to seek damages and not pursue its specific performance claim. This argument is in part a repeat performance of an argument made by the defendant during the trial on its unsuccessful motion to amend the defence and at trial. It was argued that if there was a breach of the agreement by the defendant, the date of the assessment of damages arising from the breach must be taken to be the date of trial, because it was only then that the plaintiff elected not to pursue its claim for specific performance. I did not accept that argument. I held that the appropriate measure of damages was the amount per share that Stetson would have received from the defendant had the engagement letter closed on July 31, 2008 less the amount per share received by Stetson from the Canaccord transaction.

31 In any event, under section 128(1) of the *Courts of Justice Act*, interest is to run from the date the cause of action arose, and that was July 31, 2008 when the defendant refused to close the engagement letter. There is no basis to contend that interest should only run from the date of the trial. That would provide the defendant with a windfall because it has had the

use of the money it failed to pay to the plaintiff on July 31, 2008, and as it is a commercial enterprise, one can presume that it has made full use of the money.

32 The defendant also contends that the rate of interest should be 1.3%, the pre-judgment interest rate for the first quarter of 2013, during which the plaintiff elected not to pursue its specific performance claim. For the same reason, this is inappropriate. Alternatively, the defendant argues for the same rate of 1.3% as it is approximately the geometric average of the prescribed prejudgment interest rates for the period 2008-2013. Using this rate would result in prejudgment interest of $967,350.

33 Section 127 of the *CJA* provides for a prejudgment interest rate at the rate in the quarter before the proceeding was commenced. This is a presumptive rate to which a successful plaintiff has a *prima facie* entitlement, and the onus is on a defendant to justify a departure from this rate. See *Andani Estate v. Peel (Regional Municipality)*, [1993] O.J. No. 1604 (Ont. C.A.) and *Graham v. Rourke* (1990), 75 O.R. (2d) 622 (Ont. C.A.). Section 130 of the CJA gives a court discretion to vary the s.128 rate.

34 Interest is to compensate a plaintiff for the loss of use and the time value of money. See *Andani Estate v. Peel (Regional Municipality)*, *supra*, and *Bank of America Canada v. Mutual Trust Co.*, [2002] 2 S.C.R. 601 (S.C.C.). The plaintiff, a commercial enterprise, is out of the use of the money and the preferred shareholders, to whom some of the proceeds of the judgment may be paid, are investors who have invested in the shares of the plaintiff and are out the money. The defendant is a commercial enterprise which has made use of the money. Both sides no doubt make compounded interest on their money. See *Bank of America Canada v. Mutual Trust Co.* The plaintiff has not sought compound interest, but I see no reason to depart from the presumed rate of interest provided for in section 128(1) of the CJA.

35 The possibility that a judge would award pre-judgment interest at the section 128(1) rate was a risk that the defendants chose to run in this case. Pre-judgment interest is intended to encourage early settlements. The comments of Cronk J.A. in *Kinbauri Gold Corp. v. IAMGOLD International African Mining Gold Corp.* (2004), 49 B.L.R. (3d) 275 (Ont. C.A.) are apt.

36 The plaintiff is entitled to prejudgment interest of $2,426,574.55.

Order accordingly.

Footnotes

1 This includes fees of $2,531 for working with a trading expert for the trading manipulation defence.

TAB
11

Para. 5

2018 ONCA 447
Ontario Court of Appeal

The Catalyst Capital Group Inc. v. Moyse

2018 CarswellOnt 7267, 2018 ONCA 447

The Catalyst Capital Group Inc. (Plaintiff / Appellant) and Brandon Moyse and West Face Capital Inc. (Defendants / Respondents)

Doherty J.A., J. MacFarland J.A., and D.M. Paciocco J.A.

Heard: February 20, 2018; February 21, 2018
Judgment: May 11, 2018
Docket: CA C62655

Proceedings: additional reasons to *The Catalyst Capital Group Inc. v. Moyse* (2018), 130 O.R. (3d) 675, 2018 CarswellOnt 4307, 2018 ONCA 283, D.M. Paciocco J.A., Doherty J.A., J. MacFarland J.A. (Ont. C.A.); affirming *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 4367, 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons at *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 5210, 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 5210, 2016 ONSC 6285, 2016 CarswellOnt 16043, 35 C.C.E.L. (4th) 293, Newbould J. (Ont. S.C.J. [Commercial List]); additional reasons to *Catalyst Capital Group Inc. v. Moyse* (2016), [2016] O.J. No. 4367, 35 C.C.E.L. (4th) 242, 2016 ONSC 5271, 2016 CarswellOnt 13362, Newbould J. (Ont. S.C.J. [Commercial List])

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Robert A. Centa, Kristian Borg-Olivier, Denise Cooney, for Respondent, Brandon Moyse
Kent E. Thomson, Matthew Milne-Smith, Andrew Carlson, for Respondent, West Face Capital Inc.

Subject: Civil Practice and Procedure; Intellectual Property; Restitution; Torts

Headnote

Civil practice and procedure --- Costs — Costs of appeals — General principles
Defendants were entirely successful on appeal — Parties made submissions as to costs — Corporate defendants were awarded costs in amount of $200,000 and individual defendant was awarded costs of $100,000 — Defendants were entirely successful on appeal and were

entitled to reasonable costs on partial indemnity basis — Costs claimed for what was one day appeal were high and reflected no expense spared defence of trial judgment — Given history of litigation, both sides would have reasonably expected other side would pursue all legal avenues vigorously and without financial restraint — Nature of appeal also justified significant preparation-related costs — Although legal issues raised were generally not complex or novel, appeal record was large — Given manner in which appeal was advanced, respondents had to prepare to virtually retry crucial factual issues on appeal — Costs thrown away on unnecessary adjournment requested by plaintiff were included in amounts awarded to defendants.

ADDITIONAL REASONS, concerning costs, to judgment reported at *The Catalyst Capital Group Inc. v. Moyse* (2018), 2018 ONCA 283, 2018 CarswellOnt 4307, 130 O.R. (3d) 675 (Ont. C.A.), dismissing plaintiff's appeal.

Per curiam:

1 The respondent, West Face Capital Inc. ("West Face"), seeks costs in the amount of $250,000, inclusive of disbursements and HST. The respondent, Brandon Moyse, seeks costs in the amount of $149,905.18, also inclusive of disbursements and HST.

2 The appellant, Catalyst Capital Group Inc. ("Catalyst"), argues that West Face should have its costs in the amount of $150,000 and that Mr. Moyse should have no costs or, alternatively, costs in an amount well below the amount requested by Mr. Moyse.

3 The respondents were entirely successful on the appeal. They are entitled to reasonable costs on a partial indemnity basis.

4 The costs claimed, for what was basically a one-day appeal, are high. They reflect a full-out, no expense spared defence of the trial judgment. Catalyst did not provide the court with its bill of costs, but we have no doubt that it would reflect the same "leave no stone unturned" approach to the appeal. Given the history of this litigation, both sides would reasonably expect that the other side would pursue all legal avenues vigorously and thoroughly without financial restraint.

5 The nature of the appeal also justifies significant preparation-related costs. Although the legal issues raised were, with one exception, not complex or novel, the appeal record was large. The grounds of appeal were essentially attempts to re-litigate most of the crucial findings of fact. The appellant's written arguments were lengthy and replete with detailed references to the evidence. The respondents were required to engage in a detailed, careful and time-consuming review of the full record. Given the manner in which the appeal was advanced, the respondents had to prepare to virtually retry the crucial factual issues on appeal.

6 The appeal was adjourned at the last moment in September at the request of Catalyst. The adjournment turned out to be unnecessary. There were considerable costs thrown away and those costs should be included in the amounts awarded to the respondents.

7 The respondents brought a motion related to the fresh evidence in November 2017. That motion was never heard on its merits. We would impose no costs in respect of matters relating to that motion.

8 Having regard particularly to the success of the respondents, the nature of the appeal, and the costs thrown away when the appeal was adjourned, we award costs to West Face in the amount of $200,000 and costs to Mr. Moyse in the amount of $100,000. Both are inclusive of disbursements and HST.

Order accordingly.

End of Document

Court File No.: CV-16-1159500CL

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

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT TORONTO

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